

Our Fisheries Management Regime – The MSA

I. Introduction

This chapter provides an overview of Federal Fishery management under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). It provides historical context to the MSA, discusses the unique Council-based structure, and reviews the analytical, procedural, substantive, and timing requirements that must be met.

There are several sources of requirements and standards governing our compliance with MSA. They include:

- The Statute (16 USC 1801 et seq.)
- National Standards Guidelines and Definitions: National Marine Fisheries Service (NMFS) has issued guidance on interpreting various provisions of the MSA at 50 CFR part 600. Specific citations are included as appropriate below.
- Policy Directives. These include an interpretive rule on the use of MSA Emergency Rules (62 FR 44421, Aug. 21, 1997, and NMFS Operational Guidelines on the Fishery Management Plan Process, May 1997).
- Guidance by case law.

II. MSA Overview

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary regime for managing fisheries in Federal Waters. The MSA sets up a unique system whereby regional councils made up of fishery constituents develop management recommendations for their fisheries. As long as the measures the councils recommend are consistent with the provisions of the MSA, including the national standards (which we will discuss in more detail in a few minutes), and other applicable law, NMFS must implement them. The agency may not substitute an alternate management strategy of its own.¹

A. History: Historically, there was widespread belief that marine fisheries resources were almost inexhaustible and in no need of regulation. Prior to 1976, there was little federal management of United States fisheries. States had management authority within their territorial waters (in most cases out to three miles), but there was no comprehensive management regime governing U.S. waters beyond territorial waters. The inadequacies of this approach became evident in the 1960s and 1970s, when, fueled by technological advances, foreign fleets began high-volume, intense fishing efforts off the U.S. coasts. Local fishermen began noticing decreasing yields. Stocks were becoming depleted.

In 1976, with the idea in mind that domestic fishermen would manage their harvests more responsibly than foreign fishermen, Congress passed a precursor to what is now the MSA. Known as the Fishery Conservation and Management Act (FCMA), this early fish law's goal was to eliminate foreign fishing in U.S. waters and replace that effort with domestic fishing.

The FCMA set up the basic management structure we have in place today, whereby regional fishery management councils make management recommendations to the Secretary within the parameters of Congressionally defined policies (national standards). However, over the years, the goals of the statute have

¹ Note that there are limited instances where NOAA Fisheries prepares an FMP independent of the councils, e.g., Atlantic HMS, temporary measures to address overfishing, or where the Council fails to act within a reasonable time.

evolved away from the focus on sheer utilization and development in favor of long-term health and sustainability of the resource and its habitat. In 1996, the Sustainable Fisheries Act amended the existing fishery management law shifting its focus away from fish as a resource for extraction to the current focus on fish as a component of a larger ecological system. The SFA changed the name of the law to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and introduced new definitions, national standards, FMP components, and Secretarial responsibilities. It also added requirements pertaining to bycatch, overfishing, essential fish habitat, and fishing communities.

B. Fishery Management Councils: Section 302 of the MSA establishes eight regional fishery management councils and charges them with certain responsibilities relating to fishery management.

The Councils' jurisdictions are:

- The New England Council, consisting of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut with 18 voting members.
- The Mid-Atlantic Council, consisting of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina, with 21 voting members.
- The South Atlantic Council, consisting of the States of North Carolina, South Carolina, Georgia, and Florida and with 13 voting members.
- The Caribbean Council consisting of the Virgin Islands and the Commonwealth of Puerto Rico and with 7 voting members.
- The Gulf Council. The Gulf of Mexico Fishery Management Council consists of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and has 17 voting members.
- The Pacific Council consisting of the States of California, Oregon, Washington, and Idaho and with 14 voting members, including 8 appointed by the Secretary. The North Pacific Council consisting of the States of Alaska, Washington, and Oregon and with 11 voting members.
- The Western Pacific Council, consisting of the State of Hawaii, American Samoa, Guam, and the Northern Mariana Islands and with 13 voting members.



Each Council must reflect the expertise and interest of the constituent States in the ocean area over which such Council is granted authority.

Voting Members include:

- The principal State official with marine fishery management responsibility in each State
- The regional director of the National Marine Fisheries Service
- Additional members appointed by the Secretary based on recommendations from the Governors.

The MSA sets forth qualification criteria for voting members. They must be individuals who, by reason of:

- Their experience, scientific expertise, or training,
- Is knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned.

Committees and Panels

Councils must establish and utilize committees and panels including:

- SSC's: A scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.
- APs: Each Council shall establish such other advisory panels as are necessary or appropriate to assist it in carrying out its functions under this chapter.
- Fishermen's Advisory Committee: The fishing industry advisory committee provides information and recommendations on, and assist in the development of, fishery management plans and amendments to such plans.

Councils are responsible for:

1. Preparing fishery management plans and amendments
2. Preparing comments foreign fishing applications
3. Conducting public hearings to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments
4. Submitting to the Secretary periodic reports
5. Reviewing on a continuing basis, and revising as appropriate, the issues regarding OY, capacity and TALFF
6. Conducting any other activities which are necessary and appropriate

Additional guidance on council appointments and activities is set forth in 50 CFR part 600. Also, each Council has its own unique Statement of Organization Practices and Procedures (SOPP).

C. Management Structure:

1. Fishery Management Plans (FMPs): The underlying management regime for each fishery is a Fishery Management Plan (FMP). The FMPs must be consistent with a series of competing policy objectives contained in the MSA's National Standards. FMPs must also include specific provisions that are required by the Statute (303(a) components). The MSA also lists additional components that may be included in an FMP at a council's discretion (303(b) components).

2. Other applicable law: FMPs must be consistent with other applicable law. The other applicable laws that are most likely to be implicated include: MSA, ESA, MMPA, EFH, RFA, APA, Executive Orders 12866 and 13272 (Economic Impacts), Executive Order 13132 (Federalism), PRA, CZMA, and the DQA. Some fishery management actions may also implicate additional laws, such as Indian Treaty Rights. The laws applicable to a particular fishery management action must be identified on a case-by-case basis.

3. Secretarial Review. Section 304 establishes strict timelines for conducting Secretarial review of Council submissions (FMPs and FMP amendments). When the Council submits an FMP or amendment, the Secretary must "immediately" publish a notice of availability in the *Federal Register* for a 60 day public comment period. A final decision to approve, disapprove, or partially approve the Council's submission must be made within 30 days of the end of the comment period, or that recommendation will be automatically approved.

Regulations. When the Council submits proposed regulations, the Secretary must “immediately” initiate a review them to determine whether they are consistent with the FMP and other applicable law. The review must be completed within 15 days (MSA section 304(b)(1)).

If they are found to be consistent with the FMP and other applicable law, the Secretary must publish them in the Federal Register for a public comment period of 15 to 60 days. The Secretary may not change the substance of what the Council has submitted, but he may make technical changes necessary for clarity. These must be explained (MSA section 304(b)(1)).

If the Secretary finds that the proposed regulations are not consistent with the FMP and applicable law, he must notify the Council in writing and provide recommendations on revisions that would make the proposed regulations consistent. When this happens, the Council may revise the proposed regulations and submit them to the Secretary for reevaluation (MSA section 304(b)(1), (2)).

The MSA requires the Secretary to promulgate final regulations within 30 days after the end of the comment period on the proposed rule. The Secretary must consult with the Council before making any revisions to the proposed regulations, and must publish in the *Federal Register* an explanation of any differences between the proposed and final regulations (MSA section 304(b)(3)).

As other applicable laws are discussed, it will be apparent that the MSA strict timelines must be carefully considered in context of other statutory timelines, such as those imposed by NEPA and the ESA. An overview of the various timelines is included in the appendix to this manual.

Scope of Review. Section 304 also restricts the scope of the Secretary’s review. A council recommendation may be disapproved only if it fails to comply with all applicable law.

D. Additional Procedural Requirements. In addition, there are other provisions of the MSA that pertain to specific types of management actions that also involve procedural requirements. For example, sections 312 and 407, which authorize development of capacity reduction “buyback” programs, and red snapper IFQs, require referendums.

III. Substantive Determinations

Now we will discuss the MSA’s requirements regarding substantive determinations, i.e., requirements that a certain finding can be made or discretion will be constrained. These required findings help to ensure that the fishery management goals of the MSA are being met. The MSA establishes three main types of substantive determinations: (1) That fishery management actions be consistent with the National Standards and other requirements of the MSA, (2) that FMPs and amendments include all mandatory FMP components, and (3) that fishery management actions be consistent with all other applicable law.

A. National Standards

The MSA contains 10 national standards that establish competing policy objectives that must be balanced and addressed in fishery management actions. These standards are at the core of the MSA and must be carefully considered and documented on the record. Some national standards restrict discretion more than others. The National Standards require that FMPs:

1. Achieve optimum yield while preventing overfishing;
2. Be based on the best available scientific information;
3. Manage stocks as a unit to the extent practicable;
4. Ensure any needed allocations are fair and equitable, reasonably calculated to promote conservation, and carried out so that no individual acquires excessive shares;
5. Consider efficiency in the utilization of the resource where practicable, except that no measure may have economic allocation as its sole purpose;
6. Consider and allow for variations and contingencies;

Overview of the Fishery Management Process

7. Where practicable, minimize costs and avoid unnecessary duplication;
8. Consistent with the conservation requirements of the act, consider the importance of fishery resources to fishing communities in order to provide for their sustained participation, and to the extent practicable minimize adverse economic impacts on such communities;
9. To the extent practicable, minimize bycatch and the mortality of unavoidable bycatch;
10. To the extent practicable, promote the safety of human life at sea. (MSA section 301(a)).

Note that NS 1, 2, 4, part of 5, and 6 are phrased as absolute requirements, whereas the remaining National Standards indicate they must be addressed to the extent “practicable.” Thus, while NS 1, 2, 4, 5 and 6 must be adhered to, the Councils have discretion in weighing the various policy priorities set forth in the remaining standards. The key requirement for these standards is that they are discussed on the record and the Council’s rationale for its treatment of them is explained.

1. NS 1 – Achieve OY/prevent overfishing

National Standard 1 reflects a central driving policy of the MSA which is that FMPs achieve optimum yield (OY) while preventing overfishing. It reads:

“Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery...” (MSA section 301(a)(1)).

OY. The MSA defines OY to mean: “the amount of fish which – will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; is prescribed on the basis of the “maximum sustainable yield” (MSY) from the fishery, as reduced by any relevant social, economic, or ecological factor; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery (MSA section 3(28); see also 50 CFR 600.310).

MSY. MSY is not defined in the Statute, but the National Standard Guidelines say that MSY means “the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions” (50 CFR 600.310(c)(1)). The National Standard Guidelines also provide additional information about how Councils should go about specifying MSY.

The Precautionary Approach. NMFS’ NS 1 Guidelines are based on the Precautionary Approach, which means:

1. Target reference points, such as OY, should be set safely below limit reference points, such as the catch level associated with the fishing mortality rate or level defined by the status determination criteria. Because it is a target reference point, OY does not constitute an absolute ceiling, but rather a desired result.
2. A stock or stock complex that is below the size that would produce MSY should be harvested at a lower rate or level of fishing mortality than if the stock or stock complex were above the size that would produce MSY.
3. Criteria used to set target catch levels should be explicitly risk averse, so that greater uncertainty regarding the status or productive capacity of a stock or stock complex corresponds to greater caution in setting target catch levels. Part of the OY may be held as a reserve to allow for factors such as uncertainties in estimates of stock size and domestic annual harvest. If an OY reserve is established, an adequate mechanism should be included in the FMP to permit timely release of the reserve to domestic or foreign fishermen, if necessary.

2. NS 2 – Based on best available science

National Standard 2 requires that FMPs be based on the “best available scientific information.”

Incomplete Information. The fact that scientific information concerning a fishery is incomplete does not prevent the preparation and implementation of an FMP (MSA section 301(a)(2); 50 CFR 600.315).

Conflicting Opinions. If there are conflicting facts or opinions relevant to a particular point, the Council and Secretary may choose among them, but should justify the choice (50 CFR 600.315).

New Information. FMPs must take into account the best scientific information available at the time of preparation. Between the initial drafting of an FMP and its submission for final review, new information often becomes available. This new information should be incorporated into the final FMP where practicable. It is not necessary to start the FMP process over again, unless the information indicates that drastic changes have occurred in the fishery that might require revision of the management objectives or measures, or unless it changes the factual basis for making necessary determinations under the MSA or other applicable law (50 CFR 600.315(b)(2)).

SAFE Report. The SAFE Report (Stock Assessment/Fishery Evaluation) is a regularly updated product that summarizes the most current scientific information on the fishery (50 CFR 600.315(e)).

Case Law Examples:

NMFS has generally succeeded in litigation where incomplete or conflicting data were at issue. The administrative record is of prime importance in such cases:

- In *Blue Water Fisherman’s Ass’n v. Mineta*, 122 F. Supp. 2d 150 (D.D.C., Sept. 25, 2000), the Court held that lack of complete scientific information on stock status (sharks) does not prevent the Secretary from conserving a species based on limited available data, especially when the very nature of the species prevents the collection of more complete scientific information.
- In *A.M.L. Intern., Inc. v. Daley*, 107 F.Supp.2d 90 (D. Mass., July 28, 2000), the Court held that a decision by the Secretary based on conflicting or incomplete scientific evidence is not thereby rendered arbitrary and capricious in relation to National Standard 2.
- In *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411; (D.D.C. 1998), the Court stated that “Inconclusiveness alone... does not preclude the Secretary from acting based on a thorough consideration of available and relevant data... Difficulties with the data and the nature of the scientific method are expected in managing a resource as elusive as a fishery.”
- Also, “The Magnuson Act does not force the Secretary and Councils to sit idly by, powerless to conserve and manage a fishery resource simply because they are somewhat uncertain about the accuracy of relevant information.”
- And, “The Administrative record before the Court evinces a healthy debate (both within NMFS and between NMFS and participating constituencies) which featured noticeably vocal expert opinions both supporting and opposing the means employed by the Secretary... It is the prerogative of [the Secretary] to weigh those opinions and make a policy judgment based on the scientific data.(lost on other grounds).”
- In *North Carolina Fisheries Assoc., Inc., and Georges Seafood, Inc., v. Evans*, 2001 U.S. Dist. LEXIS 19152, (E.D. Va, November 13, 2001), the Court upheld NMFS’ use of a biomass proxy that showed overfishing was occurring even though plaintiffs had offered a new, but not yet vetted, theory showing other results.
- In *Recreational Fishing Alliance v. Evans*, 172_F. Supp.2d_35 (D.D.C.,_Sep_20,_2001), the Court held that NMFS is required only to base its determination on information available at the time of

preparing an FMP or regulations, and that incomplete information does not prevent the preparation and implementation of an FMP.

- In *Ace Lobster Co., Inc. v. Evans*, 165 F. Supp.2d 148 (D.R.I., Sep 12, 2001), the Court held that despite new reports submitted by plaintiffs showing results other than those relied on by the agency, the new reports did not necessarily apply to the current action, and there was evidence that NMFS did rely on relevant information.
- In *North Carolina Fisheries Association v. Gutierrez*, D.D.C., August 17, 2007, U.S. Dist. LEXIS 60047, the Court held, "...even assuming the data was weak..., and the collection methodology was flawed, the Secretary's decision to press forward...was rational. It is well settled...the Secretary can act when the available science is incomplete or imperfect, even where concerns have been raised about the accuracy of the methods or models employed."
- Finally, in *Ocean Conservancy and Oceana v. Gutierrez*, 394 F. Supp. 2d 147, 2005 U.S. Dist. LEXIS 23388, the Court held that NS 2 does not require NMFS to rely exclusively on one study or to implement the most protective strategy. Despite NMFS' decision not to implement an 18/0 circle hook requirement to protect sea turtles after considering the results of an experiment indicating these hooks were the most effective means of reducing turtle takes, the Court stated, "The comprehensive approach adopted by the NMFS...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."

Two notable losses on NS 2 grounds involved judicial scrutiny of the reasonableness of the agency's handling of facts in the record, and NMFS' making a decision based on issues other than the science.

- In one case, *Natural Resources Defense Council, Inc. v. Evans*, 168 F. Supp. 2d 1149 (N.D.Cal., Aug. 20, 2001), NMFS argued that in calculating bycatch mortality rates for the 2001 Pacific groundfish specifications, it was reasonable to extrapolate from a 1987 study, since that was the best available information. The Court found that NMFS had not explained why it was reasonable to use estimates of 16-20% bycatch mortality when the study NMFS was using also cited a possible rate of 52%. In addition, the Court held that it was not reasonable for NMFS to continue to rely on estimates of 16-20% bycatch mortality rates when it was a "virtual certainty" that bycatch mortality had increased over the years. The Court criticized NMFS for failing to account for new evidence and instead relying on "static estimates that are 15 years old." The other notable loss on NS 2 grounds occurred in *Midwater Trawlers Coop. et al v. Commerce*, an unusual and fact-specific case involving tribal treaty rights (2002 U.S.App. LEXIS 3419 (9th Cir) (and lower court opinion at 139 F.Supp.2d 1136)). NMFS was under court-order to set aside an amount of quota for Indian tribes in order to comply with treaty rights. The Court struck down the agency's attempt to strike a "compromise," stating "In sum, the best available politics does not equate to the best available science as required by the Act." However, the Court later accepted the same methodology, concluding, "...although the Fisheries Service's initial adoption of the sliding scale method may have been the result of a compromise, the Fisheries Service has amply demonstrated that it is the method supported by the best available scientific information." (*Midwater Trawlers Cooperative v. Daley*, 9th Cir. Dec. 28 2004, 393 F.3d 994; 2004 U.S. App. LEXIS 26896).

A notable instance of a district judge ruling against the agency on science in NMFS' older cases occurred in *Fishermen's Dock Cooperative v. Brown*, 867 F.Supp. 385, 1994 E.D. Va (1994), which was overruled on appeal. The case related to NMFS' implementation of the 1994 summer flounder commercial quota, which had been developed based on a conservative estimate of the stock's recruitment rate (based on one standard deviation below the geometric mean). The District Court concluded that the geometric mean constituted the best

available scientific information and that to the extent the basis for the quota deviated from the mean, it was invalid. On appeal the Fourth Circuit reversed (*Fishermen's Dock Cooperative v. Brown*, 75 F.3d 164, 169-170, (4th Cir. 1996)).

In *North Carolina Fisheries Association v. Gutierrez* (2007), the Court held that the approval of a Council's Scientific and Statistical Committee was not a prerequisite for NS 2 compliance, stating, "...That the Secretary acted rationally is especially clear in this case, since he sought and received confirmation from the Southeast Regional Science Center that the amendment as modified was still based upon the best scientific information available...Agency officials, and ultimately the Secretary, are the actors charged with deciding whether an amendment...is based upon the best scientific information available at the time of its adoption. This Court's responsibility is only to ensure the decision reached was a rational one. The record in this case reveals extensive scientific study, intense debate among the interested parties and the regulators, and a reasonable effort by the Secretary to produce an amendment both grounded in and responsive to the information at his disposal."

3. NS 3 – Manage stocks as a unit

National Standard 3 requires that: "to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination" (MSA section 301(a)(3)).

Thus, it encourages integrated management of stocks of fish, but allows for discretion. The choice of a management unit depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives (50 CFR 600.320(d)).

To document that an FMP is as comprehensive as practicable, the record should address:

- The range and distribution of stocks, and the patterns of fishing effort and harvest.
- Alternative management units and reasons for selecting a particular one. A less-than-comprehensive management unit may be justified if, for example, complementary management exists.
- Management activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures.
- Management activities of other countries having an impact on the fishery, and how the FMP's management measures are designed to take into account those impacts.

The MSA does not preclude separation of naturally spawning and hatchery-spawned fish into separate stocks. *Oregon Trollers Association v. NMFS*, (9th Cir. Jul 6, 2006) 452 F.3d 1104; 2006 U.S. App. LEXIS 16840; 36 ELR 20133, certiorari denied by *Or. Trollers Ass'n v. Gutierrez*, 2007 U.S. LEXIS 3949 (U.S., Apr. 16, 2007). (See 50 CFR 600.320)

4. NS 4 – Restrictions on Allocations

National Standard 4 provides that: "Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be:

- Fair and equitable to all such fishermen;
- Reasonably calculated to promote conservation; and
- Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." MSA section 301(a)(4).

An FMP may not differentiate among U.S. citizens, nationals, resident aliens, or corporations on the basis of their state of residence. However, conservation and management measures that have different effects on persons in various geographic locations are permissible if they satisfy the other guidelines under Standard 4 (50 CFR 600.325).

An “allocation” or “assignment” of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4. (50 CFR 600.325(C)(1)). An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, and if the measures are fair and equitable, are reasonably calculated to promote conservation, and avoid excessive shares (50 CFR 600.325(C)).

Case Law Examples:

- *National Coalition for Marine Conservation v. Evans*, 2002 U.S. Dist. LEXIS 21614 (D.D.C. Oct. 31, 2002) (Civil Action Nos. 99-1692 (RWR), 00-2086 (RWR), 00-3096 (RWR)). NMFS implemented the HMS FMP in 1999. Key features of the FMP included 4 closed areas to pelagic longlining to prevent overfishing and a ban on live bait to reduce marlin bycatch. Plaintiffs argued that the locations of the closures discriminated against Florida residents; alleged that NMFS had “rescinded” a closure in the Gulf in order to protect Louisiana residents; and alleged that NMFS had failed to consider alternative locations for the permanent closures. The Court found that although the Florida closure may have “incidental allocative effects,” it is not an allocation for the purposes of NS 4. Even if the Florida Closure were an allocation, it was justified by the record. The record showed that the closure furthered a legitimate FMP goal, and would achieve conservation benefits. Plaintiffs failed to show that the closure was unfair, inequitable, or failed to promote conservation under NS 4.
- In *North Carolina Fisheries Association v. Gutierrez* (2007), the Court noted the Secretary acknowledged that certain sectors would be disproportionately affected by new restrictions, but determined it was justified. The Court upheld, “...the Secretary here explicitly acknowledged that certain sectors -- and even certain vessels -- would bear the brunt of the plan [*68] amendment. AR 5620-22, 71 Fed. Reg. at 55,102-55,104. He, nevertheless, determined that the burden borne was justified by the overall benefit of ending overfishing of the four species at issue. AR 5619, 71 Fed. Reg. at 55,101. Plaintiffs have not identified anything “intentionally invidious or inherently unfair in the plan adopted by the Council and the Secretary,” *Sea Watch Int’l*, 762 F. Supp. at 378, and their challenge under National Standard 4 therefore fails (*North Carolina Fisheries Association v. Gutierrez*, D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047, p. 68).
- In *Yakutat, Inc. V. Gutierrez* (2005), the Court concluded there was no evidence that NMFS’ decision to not include 1999 as a qualifying year for the Alaska p. cod LLP violated NS 4. Plaintiffs argued that the FMP qualified two boats that had clearly abandoned the fishing industry, while it excluded their boat, thereby demonstrating the unfairness of the qualifying criteria. The Court found that NMFS and the Council had directly addressed this issue and provided a rationale for the dates they selected. The Court wrote, “The record demonstrates the Secretary’s concern “to conserve and manage the Pacific cod resources” and “stabilize fully utilized Pacific cod resources” being harvested in the BSAI...Controlling precedent requires that a plan not be deemed arbitrary and capricious, ‘even though there may be some discriminatory impact,’ if the regulations ‘are tailored to solve a gear conflict problem and to promote the conservation of’ the fish in question” (*Yakutat, Inc. V. Gutierrez*, 9th Cir. May 18 2005, 407 F.3d 1054; 2005 U.S. App. LEXIS 8873; 35 ELR 20103, pp. 31, 32).

5. NS 5 – Efficiency in Utilization

National Standard 5 provides that: “Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose” (MSA section 301(a)(5)).

This national standard requires consideration of economic factors and distributions, but also requires that such factors be considered in the context of other relevant social, biological, and ecological objectives.

Efficiency in Utilization. An FMP should contain management measures that result in as efficient a fishery as is practicable or desirable. In theory, an efficient fishery would harvest the OY with the minimum use of economic inputs such as labor, capital, interest, and fuel (50 CFR 600.330).

Economic Allocation. This standard prohibits only those measures that distribute fishery resources among fishermen on the basis of economic factors alone, and that have economic allocation as their only purpose. Where conservation and management measures are recommended that would change the economic structure of the industry or the economic conditions under which the industry operates, the need for such measures must be justified in light of the biological, ecological, and social objectives of the FMP, as well as the economic objectives (50 CFR 600.330).

6. NS 6 – FMPs shall take into account variations in fisheries and allow for contingencies

National Standard 6 provides that: “Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches” (MSA section 301(a)(6)).

Variations. In fishery management terms, variations arise from biological, social, and economic occurrences, as well as from fishing practices. Biological uncertainties and lack of knowledge can hamper attempts to estimate stock size and strength, stock location in time and space, environmental/habitat changes, and ecological interactions. Economic uncertainty may involve changes in foreign or domestic market conditions, changes in operating costs, drifts toward overcapitalization, and economic perturbations caused by changed fishing patterns. Changes in fishing practices (i.e., such as the introduction of new gear, rapid increases or decreases in harvest effort, new fishing strategies, and the effects of new management techniques) may also create uncertainties. Social changes could involve increases or decreases in recreational fishing, or the movement of people into or out of fishing activities due to such factors as age or educational opportunities. Every effort should be made to develop FMPs that discuss and take into account these vicissitudes. To the extent practicable, FMPs should provide a suitable buffer in favor of conservation (50 CFR 600.335).

Contingencies. Unpredictable events, such as unexpected resource surges or failures, fishing effort greater than anticipated, disruptive gear conflicts, climatic conditions, or environmental catastrophes, are best handled by establishing a flexible management regime that contains a range of management options through which it is possible to act quickly without amending the FMP or even its regulations (50 CFR 600.335).

7. NS 7 – Minimize costs and avoid unnecessary duplication *where practicable

National Standard 7 provides that: “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” (MSA section 301(a)(7)).

The National Standard Guidelines note that “Not every fishery needs an FMP” (50 CFR 600.340).

Management measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments. Factors such as fuel costs, enforcement costs, or the burdens of collecting data may well suggest a preferred alternative.

The supporting analyses for FMPs should demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance (50 CFR 600.340). Additional criteria for determining whether regulation is appropriate are set forth in the National Standard Guidelines at 50 CFR 600.340(b)(2).

NS 8 – Fishing Communities

National Standard 8 provides that: “Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2) (N.S. 2) in order to:

- Provide for the sustained participation of such communities, and
- To the extent practicable, minimize adverse economic impacts on such communities” (MSA section 301(a)(8)).

The term “fishing community” means a community that is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing, or on directly related fisheries-dependent services and industries (e.g., boatyards, ice suppliers, tackle shops) (MSA section 3(16); and 50 CFR 600.345(b)(3)).

The importance of fishery resources to fishing communities must be considered within the context of the conservation requirements of the MSA. Deliberations regarding the importance of fishery resources to affected fishing communities must not compromise the achievement of conservation requirements and goals of the FMP (50 CFR 600.345(b)(1)).

All other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative. Where the preferred alternative negatively affects the sustained participation of fishing communities, the FMP should discuss the rationale for selecting this alternative over another with a lesser impact on fishing communities (50 CFR 600.345(b)(1)).

The term “sustained participation” means continued access to the fishery within the constraints of the condition of the resource (50 CFR 600.345(b)(4)).

National Standard 8 does not constitute a basis for allocating resources to a specific fishing community or for providing preferential treatment based on residence in a fishing community (50 CFR 600.345(b)(2)).

Case Law Examples: A Balancing Act

As mentioned above, the National Standards embody a series of competing policy goals that must be considered, some of which constrain discretion more than others. The amount of discretion and the required balancing of competing priorities make the administrative record of primary importance in defending against litigation. The following cases demonstrate the weight accorded to NS 1 vis-à-vis NS 8:

- In *NRDC v. Daley*, 209 F.3d 747, 753 (D.C.C. April 25, 2000), a summer flounder case which contained a challenge to NMFS’ balancing of NS 1 and 8, the District Court upheld NMFS’ argument that the MSA required a balancing of the competing goals of NS 1 and 8 as equal priorities: achieving conservation requirements and minimizing economic impacts. The Appellate Court reversed, ruling that NS 1 (conservation) supersedes NS 8 (mitigation of economic impact). Subsequently, NMFS has applied the Appellate Court’s decision and has been upheld in several other jurisdictions.

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- In *Recreational Fishing Alliance v. Evans*, 172 F. Supp. 2d 35 (D.D.C., Sep 20, 2001), the Court held, “while economic effects must be taken into account, such effects were not meant to trump the real purpose of the MSA, which is to preserve and protect US fisheries.”
- In *Ace Lobster Co., Inc. v. Evans*, 165 F.Supp.2d 148 (D.R.I., Sep 12, 2001), the Court held that “Deliberations regarding the importance of fishery resources to affected fishing communities, therefore, must not compromise the achievement of conservation requirements and goals of the FMP.”
- In *A.M.L. Intern., Inc. v. Daley*, 107 F.Supp.2d 90 (D. Mass., July 28, 2000), the Court stated that “A collapsed fishery will not be economically viable for decades, and is a worse economic consequence than the temporary measures (several years of industry shut-down) contained in the FMP... The fact that the implementation of the SDFMP [Spiny Dogfish FMP] will result in a closure of the spiny dogfish directed fishery is, in itself, not a violation of NS-8.” (107 F.Supp. 2d 90, 103).
- More recently, in *North Carolina Fisheries Association v. Gutierrez* (D.D.C. Aug. 17, 2007, 2007 U.S. Dist. LEXIS 60047), the Court held, “Explicit in both the statutory text and implementing regulations is Congress’s intent that conservation efforts remain the Secretary’s priority, and that a focus on the economic consequences of regulations not subordinate this principal goal of the MSA...the Secretary was aware of potentially devastating economic consequences, considered significant alternatives, and ultimately concluded that the benefits of the challenged regulation outweighed the identified harms. Acknowledging as much does not, as plaintiffs protested at the motions hearing, render NS 8 “a useless appendage” or deprive that provision of its “action forcing” quality. Prelim. Tr. at 13. NS 8 has retained its utility, undoubtedly “forcing” the Secretary to undertake the kind of analysis he reasonably did in this case.”

9. NS 9 – Bycatch

National Standard 9 provides that: “Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch” (MSA section 303(a)(9)).

The MSA defines “bycatch” as “fish” that are harvested in a fishery, but that are not sold or kept for personal use (MSA section 3(2)). The MSA defines “fish” as “finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds” (MSA section 3(12)). Thus marine mammals and seabirds are not included in the MSA definition of bycatch.

Bycatch includes the discard of whole fish at sea or elsewhere, including economic discards and regulatory discards, and fishing mortality due to an encounter with fishing gear that does not result in capture of fish (i.e., unobserved fishing mortality). Bycatch does not include retained incidental catch (i.e., any fish that legally are retained in a fishery and kept for personal, tribal, or cultural use, or that enter commerce through sale, barter, or trade) (50 CFR 600.350(C)).

The priority under this standard is first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided must, to the extent practicable, be returned to the sea alive (50 CFR 600.350(d)). Any proposed conservation and management measure that does not give priority to avoiding the capture of bycatch species must be supported by appropriate analyses.

Case law has provided some guidance on practicability:

- In *Legacy Fishing Co. v. Gutierrez* (D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460), plaintiffs argued that the severity of the economic impacts of the Alaska Groundfish Retention Standards rendered the provisions impracticable. The Court found that NS 9 cannot be viewed in a vacuum, but is a component of a larger balancing scheme that NMFS must consider. Finding for NMFS, the Court wrote, “...the agency carefully analyzed the impact of these regulations on the important factors recognized in NS 7 and 8, including all the potential hardships highlighted in plaintiffs’ complaint.

After the benefits were weighed against the costs, as required by statute, the agency determined that the "costs of the GRS program are justified by the groundfish discard and compliance history of the non-AFA trawl C/P sector" (71 Fed. Reg. 17367). The economic impacts on the plaintiffs' vessels are potentially grave, and the Court does not diminish the difficulties that will be faced by the individuals forced to comply with the GRS program. But the record reflects that these difficulties were recognized, analyzed, and considered by the NMFS in striking the statutorily mandated balance. (This case was reversed on other grounds by *Fishing Company of Alaska*, D.C. C. 12/2007).

- In *Ocean Conservancy and Oceana v. Gutierrez* (394 F. Supp. 2d 147; 2005 U.S. Dist. LEXIS 23388), the Court held that NS 9 does not require NMFS to implement the most protective bycatch avoidance measure available. The Court wrote, "...plaintiffs assert that National Standard 9 requires the NMFS to adopt the most protective measure available with regards to minimizing bycatch. *Id.* I disagree....Simply stated; NS 9 is not entitled to greater weight than any of these other standards (*National Coalition for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 137 (D.D.C. 2002)). In this Court's judgment, NMFS' 2004 Final Rule balanced competing interests by reconciling the economic needs of fishermen with the conservation goal of reducing bycatch to the lowest level possible. In doing so, it thoroughly reviewed the relevant scientific data on bycatch and consulted with participants in the fishery to determine whether the proposed regulations would be effective and practical."

10. NS 10 – Safety of Life at sea

National Standard 10 provides that: "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea." (MSA section 301(a)(10)).

This national standard acknowledges that fishing is an inherently dangerous occupation characterized by unforeseeable and unavoidable hazards. The national standard recognizes that regulations may pressure fishermen to fish under conditions they would otherwise avoid. The national standard is not meant to give preference to one method of managing a fishery over another, but rather directs the Councils and the Secretary to identify and avoid regulations that pressure fishermen to take risks, as long as they can meet the other national standards and the legal and practical requirements of conservation and management (50 CFR 600.355(b)). The National Standard Guidelines set forth additional criteria that should be considered in evaluating a measure's compliance with NS 10 (50 CFR 600.355(c)).

Case Law Examples:

- In *Legacy Fishing Co. v. Gutierrez* (D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460), the Court upheld agency action when NMFS responded to Coast Guard concerns about safety by creating mitigation measures. The Coast Guard stated during notice and comment that the ban on haul mixing may create safety problems by forcing fishermen to stack full nets on vessel decks, which could "adversely affect [] a vessel's stability" (A.R. 152) (letter from Coast Guard to NMFS, noting that "sudden load shifts and unnecessarily high deck loads [are] significant contributors to vessel capsizings and sinkings"). The NMFS analyzed this concern and ultimately concluded this safety risk could be avoided by refraining from stacking nets on vessel decks, and suggested several alternatives such as adjusting the timing of haul back activities, short-wiring a haul to the vessel, and modifying vessel layout to expand fish bin capacity (71 Fed. Reg. at 17370-71). The Coast Guard ultimately agreed with the NMFS that the haul mixing ban will not decrease vessel safety, since regulated vessels may choose between a number of safe ways to respond to the ban (71 Fed. Reg. 17370; A.R. 110-a). The agency thoroughly considered the ban's impact on vessel safety, and determined the regulation would "not decrease vessel safety compared to the status quo," and was necessary to

enforce the GRS program. This case was reversed on other grounds by *Fishing Company of Alaska*, D.C. Cir. 12/2007.

B. FMP Components

The MSA delineates 15 specific components that each FMP must include, as well as an additional 12 that are permissible.

1. Mandatory FMP Components

The MSA requires that each FMP include specified components. These mandatory FMP components are set forth in section 303(a) of the MSA as follows. An FMP must:

1. Prevent overfishing, rebuild overfished stocks, and protect, restore, and promote long-term health and sustainability.
2. Contain a description of fishery
3. Specify MSY and OY
4. Specify capacity and domestic harvesting and processing of OY
5. Specify data to be submitted
6. Provide for temporary adjustments
7. EFH
 - a. Describe and identify
 - b. Minimize
 - i. To the extent practicable
 - ii. Adverse impacts from fishing
 - c. Identify other actions to conserve habitat
8. Specify data needed to implement FMP
9. Include "Fishery Impact Statement"
10. Include overfishing definitions
 - a. Specify objective and measurable criteria
 - b. Contain measures to prevent overfishing and rebuild overfished stocks
11. Bycatch
 - a. Standardized reporting methodology
 - b. To the extent practicable, minimize bycatch
 - c. (To the extent practicable), minimize mortality of unavoidable bycatch
12. Catch and Release
 - a. Assess type, amount, and mortality
 - b. To the extent practicable, minimize mortality, ensure extended survival
13. Describe sectors
 - a. Describe commercial, recreational, and charter sectors
 - b. To the extent practicable, quantify landings trends by sector
14. Allocate necessary harvest restrictions equitably among sectors
15. Establish a mechanism for specifying ACLs and AMs

Note that 303(a)(1) – requiring FMPs to prevent overfishing, rebuild overfished stocks, and protect, restore, and promote long-term health and sustainability – echoes the mandates of NS 1, and is a driving policy in the MSA. It is also important to remember that rebuilding measures required by this section of the MSA must also comply with criteria at 304(e) (e.g., a timeline not to exceed 10 years).

Failure to include all mandatory components in a reasonable manner can result in negative results litigation. Examples: (Bycatch (303(a)(11))

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Pacific Marine Conservation Council, Inc. et al., v. Evans, (N.D. Cal., April 12, 2002) (No. C 01-2506 JL) (Order granting Plaintiffs' Motion for Summary Judgment). The Pacific Fishery Management Council submitted, and NMFS approved, amendment 13 to the Pacific Groundfish FMP. NEPA compliance consisted of an EA/FONSI. Amendment 13 was intended to bring the FMP into compliance with the requirements of the SFA. With respect to bycatch in the groundfish fishery, NMFS was on record stating that it lacked adequate data on bycatch in the fishery, that the absence of data hampered its ability to manage the fishery, and that "critical information on the portion of catch that is discarded at sea is available only through the placement of onboard observers." The amendment provided that NMFS "may implement" an observer program, but did not require such a program. At the time of approving Amendment 13, NMFS had an observer program in place, but was on record stating that the limited scope of that program, a lack of funding for expanding it, would not result in reliable data to support new discard estimates. In disapproving Amendment 13's predecessor, Amendment 11, NMFS had stated that to make the FMP compliant with the SFA, a bycatch amendment must include an analysis of "all practicable alternatives to the current year-round trip limit management system that could be expected to result in a reduction of bycatch rates." In developing Amendment 13, the Council considered a range of alternatives for minimizing bycatch, including capacity reduction, marine reserves, vessel incentive program, and discard caps, but implemented only a voluntary increased utilization program. The FMP also listed bycatch reduction measures that might be implemented in the future. Regarding the duty to minimize bycatch to the extent practicable, the Court concluded that NMFS had not sufficiently analyzed the issue. NMFS was required to conduct a thorough analysis of all available alternatives to ensure that it was minimizing bycatch to the extent practicable. The Court ruled that Amendment 13 did not comply with the MSA's requirement that FMPs include a standardized reporting methodology to assess bycatch. The amendment allowed, but did not require, the establishment of an observer program. In concluding that the amendment did not comply with the M-S Act, the Court noted NMFS' own assertions that such a program was critical: "Because Amendment 13 fails to establish a mandatory and adequate observer program – a program that NMFS itself concedes is critical – this Court finds that Amendment 13 is not in accordance with the MSA." The Court also found this action to violate NS 9 because it was not sufficient to describe, and summarily dismiss alternatives as impracticable without sufficiently analyzing them. NMFS' rationale for dismissing some of these alternatives was based on the fact that implementation would require further discussion beyond the scope of the current FMP amendment. NMFS dismissed other alternatives as impracticable without a 100% observer program. The Court found that NMFS had failed to consider these measures on their substantive merits and, therefore, had made unreasonable decisions.

2. Permissible FMP Components

In addition to the required components of an FMP that are specified in 303(a), the MSA authorizes Councils, at their discretion, to include additional components that are listed in 303 (b). If these permissible components are included, then the record must also address any findings or determinations that the MSA sets forth for them. Under this section of the MSA, FMPs *may* include:

1. Permit requirements
2. Time/area management requirements
3. Restrictions on catch, sale, transshipment
4. Gear requirements
5. Incorporation of state measures
6. Limited Access regimes, if taking into account:
 - a. Present participation
 - i. Control dates
 - ii. Staleness factor
 - b. Historical fishing practices
 - c. Economics of the fishery
 - d. Ability of vessels to fish elsewhere
 - e. Social and cultural framework

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- f. Any other relevant considerations
 - 7. Requirements for processors to submit data
 - 8. Requirements to carry observers
 - 9. Assessments of effects of the FMP on anadromous fish
 - 10. Harvest incentives for reduced bycatch
 - 11. Reservation of a portion of ABC for research
 - 12. Conserve target and non-target species and habitats
 - 14. (so in original) Other necessary and appropriate measures.
3. Other Applicable Law

To be approvable under the MSA, a fishery management action must be consistent with both the MSA and other applicable law. Other chapters in this manual address the broad spectrum of requirements under the most relevant other applicable law. In general, the requirements include a variety of documentation, consideration, and procedures that must be completed and complied with before taking a final action under the MSA.

The other applicable laws that are most likely to be implicated include: MSA, ESA, NEPA, EFH, RFA, APA, Executive Orders 12866 and 13272 (Economic Impacts), Executive Order 13132 (Federalism), PRA, CZMA, and DQA. Some fishery management actions may also implicate additional laws, such as Indian Treaty Rights. The laws applicable to a particular fishery management action must be identified on a case-by-case basis.

IV. Other MSA Provisions

In addition to the MSA's basic requirements for developing fishery management measures through the Council process, the MSA also establishes certain special provisions applicable to Essential Fish Habitat (EFH), Highly Migratory Species (HMS), FMPs and amendments produced by the Secretary instead of the councils, and emergency actions:

EFH. In addition to the requirement that FMPs identify and describe EFH and minimize adverse impacts caused by fishing, the MSA also requires federal action agencies that undertake activities that "may adversely affect" EFH to engage in consultation with NMFS. This requirement applies to fishery management actions undertaken by NMFS and the Councils. The process for conducting consultations on EFH is described in a separate chapter (MSA section 305(b)).

HMS. The MSA establishes a centralized management regime for Atlantic highly migratory species that vests primary management responsibility with the Secretary rather than with the Councils and requires the utilization of advisory panels and cooperation with international authorities (MSA 304(g)).

Secretarial FMPs. In certain instances where conservation and management is necessary in a fishery and the Council either fails to develop management measures within a reasonable time, or recommends measures that are disapproved, the Secretary may develop an FMP or amendment on his own. In such a case, the timelines and procedures are different from those that apply to council-developed FMPs (MSA section 304(c)).

MSA Emergency Authority. Finally, the MSA also provides special procedures for allowing rapid, temporary action when an emergency exists in a fishery or when interim measures are needed to address overfishing (MSA section 305(c)). This section allows the Secretary to take action without usual MSA process if an emergency or overfishing exists, or interim measures are necessary to address overfishing. Such actions are limited to 180 days duration with one extension if public comment has been taken, and other applicable law still applies. NMFS has published guidance to help determine whether use of the emergency authority is appropriate (62 FR 44421, Aug. 21, 1997). Excerpts are provided below:

“The Councils and the Secretary must, whenever possible, afford the full scope of public participation in rulemaking. In addition, an emergency rule may delay the review of non-emergency rules, because the emergency rule takes precedence. Clearly, an emergency action should not be a routine event.”

Criteria for determining whether an emergency exists: “For the purpose of section 305(c) of the MSA, the phrase “an emergency exists involving any fishery” is defined as a situation that:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.”

Justification for use of emergency procedures:

“If the time it would take to complete notice-and-comment rulemaking would result in substantial damage or loss to a living marine resource, habitat, fishery, industry participants or communities, or substantial adverse effect to the public health, emergency action might be justified under one or more of the following situations:

- (1) Ecological-(A) to prevent overfishing as defined in an FMP, or as defined by the Secretary in the absence of an FMP, or (B) to prevent other serious damage to the fishery resource or habitat; or
- (2) Economic-to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be foregone; or
- (3) Social-to prevent significant community impacts or conflict between user groups; or
- (4) Public health-to prevent significant adverse effects to health of participants in a fishery or to the consumers of seafood products.”