

**Administrative Records & Responses to  
FOIA Requests:  
Legal & Regulatory Requirements**

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# **NOAA GENERAL COUNSEL**

## **Relationship to Fishery Management Councils**

- NOAA GC Represents Agency
- NOAA GC regional attorneys provide legal guidance at Council Meetings



# Part 1 : Administrative Records

What is a record?

# Litigation

- **Magnuson-Stevens Act**
  - final agency actions can be challenged within 30 days (no later)
  - no injunctions
  - expedited review
- **Other statutes**
  - Administrative Procedure Act
  - National Environmental Policy Act
  - Regulatory Flexibility Act
  - Endangered Species Act



# 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, which gives “Deference” to Agency Decisions
  - And provides for Court review “on the Record”

# What is in the Administrative 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, including summaries of public meetings, public comments, and Council meeting transcripts
- Any Other Materials that Contain Relevant Facts



## Why is the Administrative Record so Important?

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- In most cases, the Court can *only* consider the record
- If you explain yourself, the court offers your decision deference.



# Example : A Tale of Two Records

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- Pacific Dawn v. Bryson (2011) and Pacific Dawn v. Pritzker (2013)
- Two challenges to the same underlying decisions, two different records, two different outcomes

## With a Strong Administrative Record, How Could We Lose?

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- We have to take actions that reasonably comply with the statute.
- Even if we can support them, our actions still must not be arbitrary.



**TO DETERMINE WHETHER AGENCY'S INTERPRETATION COMPLIES WITH THE LAW**

- We first look to whether Congress has spoken directly to the precise question at issue. If so, we implement the statute.
- If the statute is silent on the issue, the agency's interpretation must be based on a permissible construction of the statute and must not be arbitrary or capricious.

# “Arbitrary and Capricious”

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- **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



# So, We Lost Now What?

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- Vacatur: Court orders that the challenged action is “set aside.” This means that the subject FMP or amendment is no longer in place.
- Remand: Court orders agency to fix identified problems, but leaves the challenged action in place in the mean time.
- No injunctions under MSA, but possible for an injunction under ESA if that is coming into play.

## Wrapping Up on Administrative Records

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- 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



Part 2:

# Freedom Of Information Act

What is FOIA?



# FOIA MANDATES

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- All federal agencies are required to disclose records upon receiving a written request for them, except for those parts of records that are protected from disclosure by nine exemptions and three exclusions of the FOIA.
- Councils fall under the agency category.
- This right of access is enforceable in court.
- The federal FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals.

# TIMELINE FOR FOIA REQUESTS

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- Initial response is to be made within 20 working days excluding weekends and legal holidays
- May obtain an extra 10 days due to:
  - Unusual circumstances
  - Obtaining records from, or referring records to, other components or agencies
  - Voluminous records located



## What Must I Do When Asked to Produce Records for a FOIA?

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- Read the request carefully to understand it
- Ask the Regional FOIA Coordinator questions to clarify request
- Respond with only requested records
- Note if you have concerns about releasing documents, but provide **all** responsive documents
- Involve your Executive Director, who is responsible for providing Council records to the Region in response to a FOIA request

# What is a record under FOIA?

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- Any agency records are those created or obtained by NOAA and are, when the request is filed, in NOAA's possession and control
- Includes records in off-site storage
- Agency records can be in any format like print documents, photographs, videos, maps, e-mail and electronic records



# NOAA's Frequently Used FOIA Exemptions

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- Ex. 3 – Information Specifically Exempted by Other Statutes
- Ex. 4 – Trade Secrets, Commercial or Financial Information
- Ex. 5 – Privileged Interagency or Intra-Agency Memoranda or Letters
- Ex. 6 – Personal Information Affecting and Individual's Privacy
- Ex. 7 – Investigatory Records Compiled for Law Enforcement Purposes

# Other considerations

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- Foreseeable Harm Analysis required
  - Agencies must demonstrate that it reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law before withholding information
- Agencies must segregate and release nonexempt information wherever possible.



**Questions?**