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

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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

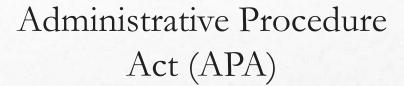
Magnuson-Stevens Act

- 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





- 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?

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

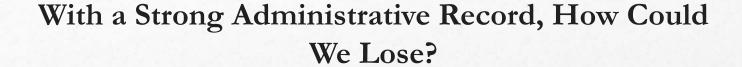




<u>Pacific Dawn v. Bryson</u> (2011) and <u>Pacific Dawn v.</u>
 <u>Pritzker</u> (2013)

• Two challenges to the same underling decisions, two different records, two different outcomes





- 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"

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?

- <u>Vacatur</u>: 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.





- 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?



- 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.





- 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





- 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 <u>all</u> 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?

- 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





- 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

- 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?