

Reconciling Statutes Workshop

Background Information for ‘Managing Our Nation’s Fisheries II’

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Many laws govern the process of fishery management. In the U.S. EEZ, the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the Nation’s principal legislation governing Federal fishery management. Other statutes impact fishery management and conservation. The Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), Federal Advisory Committee Act (FACA), Paperwork Reduction Act (PRA), Regulatory Flexibility Act (RFA), Administrative Procedure Act (APA), and Executive Orders all affect MSA actions. Each of these Federal laws has a purpose, yet how each law is applied in the process of marine fishery management often results in costly, redundant, and slow processing of actions and creation of disenfranchised, confused, and frustrated user groups. From a management perspective, the integration of the statutory requirements under the MSA with the requirements of statutes such as the ESA, MMPA, and NEPA poses a unique challenge (Dunnigan 2004). Some believe that the interplay and conflicting or overlapping mandates of so many laws has led to jurisdictional battles within and among agencies over how marine resources are managed and has fostered poor management decisions (Rufe 2002). NOAA Fisheries has responded to these management inefficiencies in the regulatory process by implementing a regulatory streamlining project (RSP). The Pew Oceans Commission (2003) stated that policies for marine resource use have grown by accretion over the years, often in response to crisis. Reconciling conflicting statutory requirements is a subject of increasing importance to the Councils and regulated communities as the Nation moves forward with implementing a new and more effective regulatory structure for managing our valuable marine fishery resources.

This issue has been broken into four general discussion topics. Each of these topic areas will be discussed by the Panel. Some background material on each issue is provided below. A summary of how each of these issues is addressed in recent past or current legislation or in the two ocean commission reports is provided in Table 1.

Issue 1: Conflicting Statutory Mandates

Implementation of the MSA may conflict, or at least overlap, with NEPA, ESA, and MMPA given their differing values and congressional mandates. Fishery managers often face decisions that require consideration of these laws and a judgment of which takes precedence. In cases of legal or regulatory conflict or overlap managers may be indecisive, thereby delaying the management process, or may make the ‘wrong’ decision, thus subjecting the process to litigation, causing delays and acrimony. Fishery managers often ask “Which law is in charge? The MSA or?”

Of the many Federal, State, Territorial, and local statutes that regulate U.S. commercial fisheries, the principal law is the MSA. The MSA requires the Councils and NOAA Fisheries to manage fish populations under their jurisdiction to provide an optimum yield while preventing overfishing on target or non-target populations. Fishery Management Plans (FMPs) promulgated by Councils must be compliant with the MSA’s ten National Standards and other applicable laws. The ESA has considerable impact on the fishery management process, as it specifies that for endangered or threatened plant or animal species, the Councils and NOAA Fisheries are restricted from taking fishery management actions that may result in jeopardizing the continued existence of that species or may result in the destruction or adverse

modification of its critical habitat. As a consequence, the ESA occasionally may become the fishery management authority.

Another law that significantly affects fishery management is the MMPA. The MMPA makes it unlawful to harass, hunt, capture or kill, or attempt to harass, hunt, capture, or kill any marine mammal unless specially authorized. Any of these actions are considered a “take”. Commercial fisheries have some special exemptions to the MMPA but must comply with other regulations to minimize or document take. The MMPA also mandates that fishery managers must implement a process of take reduction and must act to reduce incidental mortality and serious injury to marine mammals to insignificant levels approaching a zero mortality and serious injury rate, a confusing and poorly understood process.

The MSA requires managing fisheries for optimum yield, rebuilding overfished stocks, creating opportunities for commercial and recreational use of marine fish stocks, minimizing adverse social and economic impacts on fishing communities, and protecting marine habitat and endangered or other protected species. Frequently NOAA Fisheries and the Councils struggle with what takes precedence among these objectives, and the courts have further added to the mix by ordering specific actions.

Discussion items:

- *What legislation, or regulatory change, should be introduced to improve U.S. fishery management so that conflicting statutory mandates do not impede the conservation and management requirements of the MSA? How might this process be made less vulnerable to litigation?*
- *Would the following concept provide some solutions? “Consideration should be given to treating NEPA and the APA in the same way that the MSA treats the FACA. Councils and their committees are exempt from FACA but all provisions of FACA apply under the MCA. In this way the substance of the requirements are met but there is no procedural competition in terms of timelines. This strategy should be considered for NEPA, APA, and MSA.” [Letter from David Benton to Rep. Gilchrest, 2002.]*
- *How do the Councils and NOAA Fisheries manage for optimum yield in a fishery which may have potential adverse impacts on a protected resource?*
- *Is there any credence to the suggestion that some Councils’ inability to comply with all of the other applicable Federal laws results in economic damage to the industry and damage to fish stocks? (cf: Waldeck and Buck 2001)*

Issue 2: MSA Fishery Management and NEPA Compliance

NEPA requires Councils and NOAA Fisheries to thoroughly weigh the environmental consequences of any action they may take and proceed through a scoping and public review process that generally takes one to two years before any management measure can be implemented. The MSA and NEPA have similar goals – to ensure environmental impacts are defined and discussed when considering fishery management measures. NEPA analyses and time lines can be much longer than the analytical and review process required under the MSA, although assessment of impacts under MSA is essentially the same as under NEPA. This duplication of effort and prolonged process often results in delaying needed conservation actions.

The NEPA mandate is essentially a procedural requirement to ensure Federal actions are fully vetted and well considered. NEPA does not mandate particular results but rather prescribes the necessary process (Walsh et al. 2002). To that end, NEPA requires Councils to prepare EISs or EAs for nearly every fishery

management action they consider and eventually approve, principally so that the public is informed about the potential environmental impacts of the proposed action and alternatives to that action. The process requires lengthy periods of time for scoping, analysis, public review, and agency approval, often significantly delaying effectiveness of new regulatory measures. NEPA requirements involve considerable paperwork, much of which is rarely read or even understood by the public. Some are frustrated about the parallel nature of the analyses and environmental considerations required under both NEPA and the MSA, particularly because the MSA time line for such considerations is shorter and the process more streamlined.

NEPA has increasingly been invoked by some litigants to overturn or thwart fishery management decisions. This has drawn NOAA Fisheries and the Councils into costly legal activity. Some question whether NEPA should apply to marine fishery management actions, and it has been suggested that perhaps a Programmatic EIS for the FMPs might be an appropriate umbrella informational document under which fishery management decisions might be approved while ensuring a sufficiently informed public. NEPA has now essentially become the guiding act for processing and reviewing fishery management actions, largely due to the threat of litigation (Madsen 2004).

Discussion items:

- *How might the preparation of FMPs or FMP amendments, or other similar Council actions, be modified to comply with the underlying intent of NEPA yet enable the process to be completed in one year or less?*
- *Has the time come for Congress to clarify application of NEPA to fishery management actions so that MSA and APA supplant its requirements with their own to ensure public knowledge of proposed actions, together with appropriate review and comment?*

Issue 3: An Unclear Process

The complex interplay among the MSA, NEPA, ESA, MMPA, APA, FACA, and PRA often obscures the main goals of the regulatory process. This may lead to unclear objectives and a confusing fishery management process to the public. The overlap of legal process and in many cases litigation further complicates an unwieldy process for implementing fishery management changes, resulting in delays, legal challenge, and confusion.

The APA specifies procedures that Federal agencies, including Fishery Management Councils, must follow when holding meetings, providing information to the public, dealing with information privacy concerns, conducting rulemaking, and providing for congressional and judicial review of agency actions. Some of the requirements in the APA include those embodied in the former Freedom of Information Act and the Privacy Act. Fishery management actions involve considerable requirements for compliance with the APA, particularly the rulemaking process. Part of that process is the need for an administrative record for nearly any action Councils or NOAA Fisheries may take; the “record” involves making sure a decision is supported by an adequate discussion, debate, public comment, and consideration of appropriate alternatives. The overall process involves a lengthy period of time to comply with the various notices, public review, and internal agency reviews, often delaying implementation of new regulations and imposing costs on the fishing industry. This focus on process as opposed to substance often compromises implementation of management programs.

Committees that provide advice to the Federal government, such as special committees that might be appointed to advise regional Councils, may be established only if they serve a necessary nonduplicative function and automatically terminate in two years unless specifically authorized for longer periods of

time. FACA does not apply to the Councils or to their SSCs or APs (MSA Sec. 302(i) and Walsh et al. 2002), but does apply to other committees associated with the Council process. Fishery Management Councils often find it necessary to convene committees to interact with stakeholders or to explore potential solutions to management issues. Council committees formed for such advisory services must have a specific purpose, must be balanced in points of view of the members, must be able to render independent judgment, and must have adequate staffing and funding and have a specified duration.

Council Chairs and Executive Directors annually meet, with NOAA Fisheries fishery management staff attending as well, to discuss areas of common interest and to identify fishery management issues and possible solutions. Unfortunately, FACA provisions disallow collective or consensus comments and suggestions derived from these meetings to be considered by the Secretary.

The RFA requires Federal actions to clearly outline impacts of the action on small entities – small businesses. This requires an additional separate economic analysis of a proposed action that often is attached to an EA or EIS. Additional recordkeeping, notice and public review, economic analysis, rulemaking, and agency and congressional review requirements in the APA, FACA, and RFA add administrative, cost, and staffing burdens to the fishery management process.

Discussion items:

- *Too often it seems that FACA inhibits good decisionmaking because of its constraints on allowing information from certain meetings to be used in the fishery management process. How might FACA be accommodated, say, at Council Chairmen’s meetings, where innovative ideas may develop that could be used by Councils or NOAA Fisheries in addressing fishery management issues?*
- *Should triggers be established, or should default positions be developed, that effectively supersede required RFA actions – e.g. if an action has an economic effect of less than \$5.0 million, no analysis is required?*

Issue 4: The MSA and Management of Marine Mammals and Threatened and Endangered Species

The MMPA requires protection of marine mammals and their habitat, and the ESA requires similar protections for threatened and endangered species, and often a marine mammal may be under the protection of both laws. How these species are treated during the fishery management process is confusing and is obscured by unclear definitions of such terms as “take”, “zero mortality rate goal”, “jeopardy and adverse modification”, “critical habitat”, and the ESA Section 7 consultation process, in which the role of the Councils is unclear.

The ESA is arguably the law with the most “teeth” when it comes to potential differences with the goals of the MSA. Generally, the condition under which fishery management meets the ESA is when a fishery may adversely impact a listed species or its critical habitat. Under terms of the ESA, when a species is listed as threatened or endangered and a fishery management action is proposed that might affect that species, the onus for avoiding any jeopardy to the continued existence of that species and/or for avoiding any destruction or adverse modification of that species’ designated critical habitat falls on the Councils and NOAA Fisheries. The “bar” under which a fishery must operate to avoid jeopardy or adverse modification is set purposely low to be conservative, and fairly austere changes in a fishery, termed Reasonable and Prudent Alternatives (RPAs), may be imposed on a fishery. Because the goal of the ESA is to conserve ecosystems upon which a listed species depends and to aid in the recovery of a listed species, this requires managers to be especially conservative in protecting a species and its critical habitat.

Where the fishery management process encounters the ESA, fishery managers (the "Action Agency") must enter into a Section 7 consultation with the "Consulting Agency", the agency with Federally-mandated responsibility for the ESA listed species likely to be affected by the action. Under the MSA, NOAA Fisheries is both the "action agency" and the "consulting agency" and thus consults with itself, although in practical terms the NMFS Office of Sustainable Fisheries consults with the NMFS Office of Protected Resources. Potential impacts of commercial fisheries include incidental injury or mortality in fishing gear, degradation of marine habitat, and the removal of prey species important to the nutrition of a listed species. Often there is confusion over how specific fishing activities may cause jeopardy or adverse modification. The consultation process can be lengthy and complicated, and may require years of work to complete and often involves the intervention of courts of law and, in turn, the resultant delays in fishery authorizations. The role of Councils in the consultation process is unclear; many consider Councils part of the "Action Agency" but Councils *per se* do not participate directly in the consultation process. The product of such consultations is a Biological Opinion that helps the Action Agency identify any endangered or threatened species that might be adversely impacted by a fishery management action and describes how the proposed action may (or may not) jeopardize the continued existence of a listed species or may (or may not) adversely modify that species' critical habitat. The Biological Opinion may also include RPAs that are recommended so that a fishery action might be authorized while avoiding jeopardy and adverse modification. Sometimes there is disagreement among the scientific community, stakeholders, and NOAA Fisheries over how some RPAs will benefit a listed species, particularly when such measures adversely impact commercial fishermen and fishing communities.

Often, litigation occurs over the Biological Opinion and the proposed RPAs, frequently over their presentation of data that substantiate a determination of jeopardy and adverse modification. The determination of jeopardy and adverse modification is a judgment by the Consulting Agency. While the Consulting Agency's "opinion" may seem subjective to some, the determination is based on the available science and the jeopardy standard as described in regulations. These standards also may be less than clear to stakeholders. Often uncertainty requires the Consulting Agency to be more precautionary, thus occasionally appearing to be subjective and open to interpretation. Some constituents suggest that additional guidelines be developed to assist NOAA Fisheries in determining under what circumstances to invoke jeopardy and/or adverse modification. Some also suggest that perhaps the NEPA scoping process could be used to identify potential concerns early in the process rather than near the end when the Biological Opinion is prepared.

The MMPA recognizes that some species of marine mammals may be in danger of extinction or depletion due to human activities, and thus this statute requires conservation and protection of marine mammals. Fisheries can interact with marine mammals and such interactions can result in injury or death through entanglement with gear, incidental kill or injury in nets and other gear, harassment from vessel noise and activity, and intentional injury or kill to protect gear or target fish. Under the MMPA, fishery management must consider impacts of fishing activities on marine mammals and must identify and mitigate situations where fishing may result in injury or death of a marine mammal. General permits may be granted to allow for the taking of marine mammals incidental to commercial fishing operations when such taking would not disadvantage the affected marine mammal species or stock (Heck and Buck 1993).

The "take" of a marine mammal under the MMPA is defined in a restrictive manner that includes harassment, hunt, capture or kill, or "attempting" to harass, and so forth. While permits may be granted for incidental and non-intentional take, there is a fair amount of discretion and thus confusion in determining what constitutes take and what is required to avoid take. An annual List of Fisheries (LOF) is published which places all commercial fisheries into categories based on their history of interactions with marine mammals; the LOF process is confusing to some and relies on data regarding fishery interactions that may be limited and thus open to subjective interpretation.

Discussion items:

- *How might a change in definition of “take” or “harassment” be crafted for MMPA reauthorization to improve fishery management?*
- *How can more clarity be brought to the definition of “jeopardy” under the ESA?*
- *How might the public be better informed about the process of determining when a fishery management measure is “under the jeopardy bar”?*

Summary

Councils must wade through these issues when making fishery management decisions. Councils are bound by all of these statutes, which must be honored and harmonized to the fullest extent possible (Walsh et al. 2002). But laws governing fishery management do not mesh well, occasionally creating an atmosphere of confusion and distrust among fishery stakeholders, consumers, managers, and the general public. These conflicts have led to cumbersome and some unnecessarily complex administrative procedures resulting in long time delays in authorization of regulations (Madsen 2004). The process often requires litigation to resolve uncertainty and conflict or to mediate opposing and strongly held viewpoints. Only rarely has Congress established a clear hierarchy of laws in the management of marine ecosystems. For example, certain mandates under the ESA take precedence over all other legal mandates (e.g., legal actions that may jeopardize the continued existence of an ESA listed species cannot be authorized by the Federal government). Unfortunately, in some issues case law through litigation has been necessary for establishing Congressional intent in situations that involve mandates that appear to be inconsistent. Legal challenges have become the routine, rather than the exception, often thwarting necessary conservation actions (Madsen 2004). Many believe that laws governing the use of our Nation’s marine resources, and the reasoning behind them, should be clear, coordinated, and accessible to U.S. citizens to facilitate compliance (U.S. Commission on Ocean Policy 2004), speed the development and application of appropriate conservation measures, and ensure healthy sustainable fish resources for the future.

References Cited

Dunnigan, John H. 2004. “Improving Fisheries Regulations: Regulatory Streamlining & Performance Measures in Fisheries Management”. Fishery Management Council Workshop, October 20, 2004. Baltimore, Maryland.

Heck, J. and E.H. Buck. 1993. The Marine Mammal Protection Act: Reauthorization Issues. Congressional Research Service Report for Congress 93-185 ENR, February 1, 1993. 37 p.

Madsen, S. 2004. Testimony of Ms. Stephanie Madsen, Chair, North Pacific Fishery Management Council to the Senate Subcommittee on Oceans, Fisheries, and Coast Guard, September 14, 2004; and Responses to post-hearing questions from Senate Commerce Committee.

Pew Oceans Commission. 2003. America’s Living Oceans. Charting a Course for Sea Change. Summary Report. Recommendations for a New Ocean Policy, May, 2003. 35 p. + CD ROM.

Rufe, R.T. 2002. Written testimony to the U.S. Commission on Ocean Policy from The Ocean Conservancy. Letter to Admiral James D. Watkins, October 28, 2002.

U.S. Commission on Ocean Policy. 2004. Preliminary Report of the U.S. Commission on Ocean Policy. Governor’s Draft, April 2004. 413 p. + Appendices and CD ROM.

Walsh, J.P., A. Rieser, and H. Wilson. 2002. Legal Assessment of the Council's Role under the Magnuson-Stevens Act, the Endangered Species Act, and the National Environmental Policy Act. Report to the North Pacific Fishery Management Council, September, 2002. 44 p.

Testimony of Mr. David Benton, Chairman, North Pacific Fishery Management Council, to the Senate Subcommittee on Oceans and the Fisheries, May 9, 2002.

Letter from Regional Fishery Management Councils to Rep. Wayne T. Gilchrest, dated June 7, 2002, regarding "Recommendations of the Regional Fishery Management Council Chairmen on the Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act).

References: Reconciling Statutes Matrix

H.R.4900 introduced by Rep. James Greenwood, July 22, 2004, to establish a national policy for our oceans, to strengthen the National Oceanic and Atmospheric Administration, to establish a National Ocean Council.

H.R.4706 introduced by Rep. Nick Rahall, June 24, 2004, to amend the Magnuson-Stevens Fishery Conservation and Management Act to provide for stewardship of fishery resources for the American public.

S.2066 introduced by Senator Olympia Snowe, February 11, 2004, to authorize appropriations to the Secretary of Commerce for the Magnuson-Stevens Fishery Conservation and Management Act for fiscal years 2004, 2005, 2006, 2007, and 2008.

H.R.3645 introduced by Rep. Don Young, November 21, 2003, to amend the Magnuson-Stevens Fishery Conservation and Management Act to clarify the definition of 'essential fish habitat'.

Bush Administration Bill and Recommendations for Magnuson-Stevens Act Reauthorization, 2003.

S.482 introduced by Senator Susan Collins, February 27, 2003, to reauthorize and amend the Magnuson-Stevens Fishery Conservation and Management Act.

Draft Senate Bill by Senator John Kerry, July 2002, to amend the Magnuson-Stevens Fishery Conservation and Management Act to improve fishery management and enforcement, and fisheries data collection, research, and assessment.

H.R.4749 introduced by Rep. Wayne Gilchrest, May 16, 2002, to reauthorize the Magnuson-Stevens Fishery Conservation and Management Act.

Table 1. Reconciling Statutes: Issues and Solutions

	U.S. Commission on Ocean Policy (USCOP 2004)	PEW Oceans Commission (POC 2003)	S 2066 Snowe Fishery Conservation & Mgmt Amds Act of 2004	HR 4749 Gilchrest Magnuson-Stevens Act Amds	HR 3645 Young	S 482 Collins Fisheries Science and Mgmt Improvement Act of 2003	-- NMFS Fishery Conservation and Mgmt Act Amds of 2003	S – Kerry Fisheries Mgmt Modernization and Improvement Act of 2002
Issue 1: Conflicting Statutory Mandates – MSA, ESA, MMPA... who's in charge? Does the dog wag the tail?	National Ocean Council's Committee on Ocean Resource Management to coordinate all ocean-related Federal mandates.	Regional Ocean Ecosystem Councils to develop and oversee regional ocean governance plans.						
Issue 2: MSA Fishery Management and NEPA Compliance Overlap – process duplication and delay	National Ocean Council, Regional Ecosystem Assessments to provide common baseline assessment that speeds EIS preparation.		Include cumulative social and economic impact assessment in provisions of National Standard 8.	Add to the FMP and amendment impact assessment process an additional cumulative effects analysis of measures in other existing FMPs.	MSA FMPs and amendments are deemed to be in compliance with NEPA.	1) Include cumulative social and economic impact assessment in provisions of National Standard 8 2) Compliance with MSA Sect 304 constitutes compliance with NEPA.		Develop integrated set of regulations and procedures to govern decision making under MSA and NEPA.

	U.S. Commission on Ocean Policy (USCOP 2004)	PEW Oceans Commission (POC 2003)	S 2066 Snowe Fishery Conservation & Mgmt Amds Act of 2004	HR 4749 Gilchrest Magnuson-Stevens Act Amds	HR 3645 Young	S 482 Collins Fisheries Science and Mgmt Improvement Act of 2003	-- NMFS Fishery Conservation and Mgmt Act Amds of 2003	S – Kerry Fisheries Mgmt Modernization and Improvement Act of 2002
Issue 3: An Unclear and Plodding Process – conflicting statutes, burdensome mandates - how to make the process more deliberative, transparent, streamlined, clear and understandable			1) Amend MSA Sect. 302 to broaden public notice requirements 2) Streamline Secretarial review of FMPs and amendments				1) Amend MSA Section 302 to broaden public notice requirements 2) Streamline Secretarial review of FMPs and amendments	1) Modify Secretarial review process 2) Establish a Litigation Task Force to streamline fishery management legal review and litigation process 3) Develop integrated set of regulations and procedures to govern decision making under MSA and NEPA
Issue 4: The MSA and Management of Marine Mammals and Threatened and Endangered Species – conflicts and confusion over definitions, process, and authorities	1) Amend MMPA to revise definition of harassment 2) Require NMFS and USFWS to implement programmatic permitting for activities that impact marine mammals 3) Amend MMPA to place management of all marine mammals under NOAA 4) National Ocean Council to improve coordination between NMFS and USFWS RE: implementation of the ESA							