

# reconciling

## reconciling conflicting statutes



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Many laws govern fishery management in the U.S., but the Magnuson-Stevens Fishery Conservation and Management Act provides explicit directives on how, when, and where the process occurs, as well as the intended outcome.

Congress enacted a number of other federal statutes that direct the conservation and utilization of marine resources, including the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). Other statutes require procedures to be followed and/or analyses to be conducted. These include the Administrative Procedure Act, the National Environmental Policy Act, the Regulatory Flexibility Act, the Paperwork Reduction Act and the Federal Advisory Committee Act.

While each of these laws has a necessary purpose, a growing number of policy makers believe the manner in which they are individually applied in the process of marine fishery management results in incompatible regulatory requirements, management dilemmas and confusion among stakeholders.

Conflicts among statutes have led to cumbersome and sometimes unnecessarily complex administrative procedures, on occasion resulting in lengthy delays in the approval of regulations. Some claim the interplay between statutes and conflicting mandates has resulted in jurisdictional battles and poor management decisions.

Many fishery managers agree with the 2004 report of the U.S. Commission on Ocean Policy. It asserts 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, speed the development and application of appropriate conservation measures, and ensure healthy sustainable fish resources for the future.

# key concepts and controversies

## Conflicting Statutory Mandates



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Under the Magnuson-Stevens Act, fishery management councils and NOAA Fisheries are required to manage fish populations to prevent overfishing while achieving “optimum yield” on a continuing basis. The Act also requires fishery managers to rebuild overfished stocks, account for the importance of fishery resources to fishing communities, minimize adverse economic impacts on those communities, and protect essential fish habitat.

The councils’ fishery management plans must be consistent with the applicable laws that affect procedures, as well as those that protect endangered species and safeguard marine mammals. While there is broad agreement with the intent of these laws, inevitable questions arise when satisfying the goals of multiple statutes. The exploitation of fishery resources is to be optimized within defined limits, while at the same time extensive recovery efforts are in place for endangered species. Even more problematic is the MMPA mandate that a species or stock must not be permitted to fall below an estimated optimum sustainable population level.

Frequently, NOAA Fisheries and the councils struggle with what takes precedence among these goals, and the courts have further added to the debate by mandating specific actions. The ambiguity associated with the term optimum yield is of particular concern. Some believe that managing fisheries for optimum yield should involve maximizing the amount of fish harvested using traditional single species yield models, while others believe the yield from a fishery should consider broader ecosystem principles, including the value of harvested species as prey for other fish, seabirds and marine mammals.

## Magnuson-Stevens Act and NEPA Compliance

The National Environmental Policy Act requires the councils and NOAA Fisheries Service to thoroughly weigh the environmental consequences of nearly every action they take. This is generally accomplished through an extensive public review process involving the preparation of comprehensive documents that describe and analyze the potential impacts of the action as well any alternatives under consideration.



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## story ideas

Often, frustration surfaces over the parallel nature of the analyses and environmental considerations required by both NEPA and the Magnuson-Stevens Act. Frequently, the Magnuson timeline is shorter and the process more streamlined, while still remaining highly transparent and participatory.

### Unclear Process?

The complex interplay among Magnuson-Stevens, ESA, MMPA, NEPA, the Administrative Procedure Act, Federal Advisory Committee Act, Paperwork Reduction Act and the Regulatory Flexibility Act often obscures the main goals of the regulatory process.

The Administrative Procedure Act specifies rules that federal agencies, including fishery management councils, must follow when engaged in rulemaking or preparing for judicial review of agency actions. This affects activities such as convening meetings, providing information to the public, and dealing with information privacy concerns.

The Federal Advisory Committee Act applies to some committees associated with the council process, but not others. Although the Magnuson-Stevens Act exempts the councils from this statute, some useful interactions with stakeholders or other informal meetings may be precluded from taking place because they run afoul of the requirements of this act.

Added to these statutes is the Regulatory Flexibility Act which requires a clear outline of the impacts of proposed actions on small entities or small businesses, as well as additional separate economic analyses.

As a result, fishery managers and the public are faced with unclear objectives and a confusing laundry list of mandates. The overlap of legal processes, coupled with the outcome of various lawsuits, further complicates an unwieldy process for implementing fishery management changes.

How do the Councils and NOAA Fisheries manage for optimum yield in a fishery that has a potential adverse impact on a protected resource? Is “optimum yield” an economic definition that means maximizing the economic value of fish harvests, or should it include consideration of broader ecosystem principles, such as the value of harvested species as prey for other fish, seabirds and marine mammals?

Only rarely has Congress established a clear hierarchy of laws in the management of marine resources. Should the laws governing conservation and utilization, and the reasoning behind them, be made more clear, coordinated and accessible to U.S. citizens?

NEPA has now become the guiding act for processing and review of fishery management actions. Can NEPA and the Magnuson-Stevens Act be combined and streamlined while still safeguarding public interest and participation?



# information

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reconciling statutes workshop

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## useful websites

**For information on the Magnuson-Stevens Fishery Conservation and Management Act, Endangered Species Act and the Marine Mammal Protection Act:**

<http://www.nmfs.noaa.gov/>

**For information on the National Environmental Policy Act:**

<http://www.whitehouse.gov/ceq/>

**Report of U. S. Commission on Ocean Policy:**

<http://www.oceancommission.gov/documents/welcome.html>