

**Building an Administrative Record:
Legal & Regulatory Requirements**
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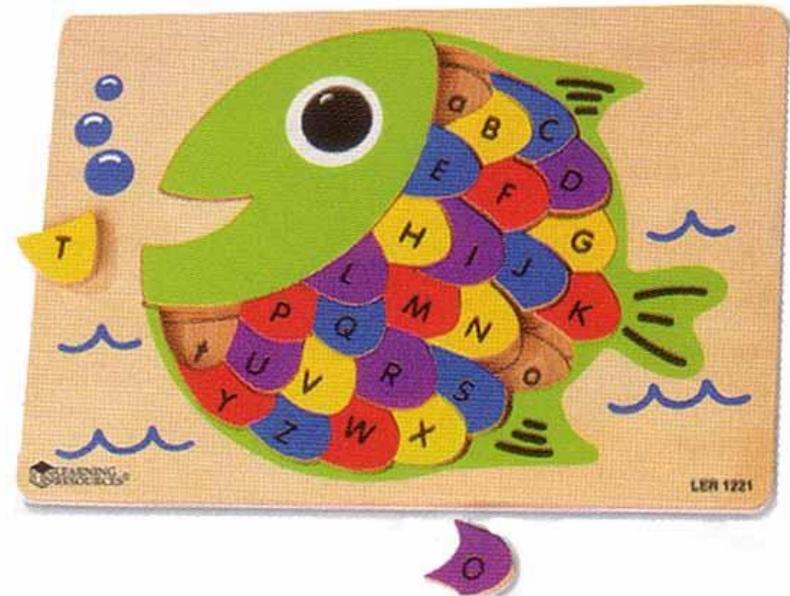
Relationship to Fishery Management Councils

- * Councils May Not Sue or Be Sued
- * NOAA GC Represents Agency
- * NOAA GC regional attorneys provide legal guidance at Council Meetings
- * Fisheries and Protected Resources Section (Silver Spring) advises HQ and provides national coordination



LEGAL REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- * **Magnuson-Stevens Act**
- * National Environmental Policy Act
- * Endangered Species Act
- * Marine Mammal Protection Act
- * Regulatory Flexibility Act
- * EO 12866
- * Administrative Procedure Act
- * Coastal Zone Management Act
- * Information Quality Act
- * National Marine Sanctuaries Act



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
 - * Gives “Deference” to Agency Decisions
 - * Provides for Court review “on the Record”

What is the Administrative Record?

- * It is the paper trail that documents the agency's decision-making process and the basis for the agency's decision
- * Establishes that the agency complied with relevant statutory, regulatory, and agency requirements; and demonstrates that the agency followed a reasoned decision-making process



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 –
 - * Summaries of meetings with public
 - * Public Comment
 - * Transcripts of Council Meetings
- * Any Other Materials that Contain Relevant Facts

Why is the Administrative Record so Important?

- * In most cases, the Court can **only** consider the record
 - * Judicial Review is limited to “the record the agency presents to the reviewing court.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).
- * In other words, we cannot go back after the fact to provide support and a rationale for an action—it must be done at the time the decision is made.

Why is the Administrative Record so Important?

- * When the “court finds that the agency, in view of the administrative record as a whole, has considered the relevant factors and articulated a rational connection between the facts found and the . . . decision,” the agency wins the challenge
 - * *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 982 (10th Cir. 2005)
- * ***In other words: if you explain yourself, the court offers your decision deference.***

Warming up: How a Court Looks at the Record



- * *NRDC v. NMFS* (D.D.C. 2014)
- * Challenge to South Atlantic Fishery Management Council's Regulatory Amendment 11 to the Snapper/Grouper FMP
- * Reg Amend 11 lifted a deepwater closure designed to prevent overfishing of speckled hind and warsaw grouper (pictured) 2 species that are overfished.

Example 1: The Record and Regulatory Amendment 11

- * NMFS and the Council determined that the closure was not effective in preventing overfishing of the stocks because the species did not occur in the closed areas
- * This determination was supported throughout the record
- * In upholding NMFS's decision to lift the closure the Court relied heavily on the record....

Example 1: The Record and Regulatory Amendment 11

The agency clearly has changed its position on this issue, and if Plaintiffs are confused or uncertain about the genesis of the agency's change of heart, this Court does not know why: the NMFS has repeatedly maintained that its new evaluations of the available data demonstrated that the six-stock deep water prohibition was not an effective means of addressing the overfishing problem with respect to speckled hind and warsaw grouper, and ***the administrative record loudly echoes the NMFS's current explanation for its change in position.*** (See, e.g., Final App. to RA 11, 39 AR Doc. 87 at 3050 (concluding that speckled hind and warsaw grouper “rarely cooccurred” with the six stocks included in the deep water prohibition); June 2011 Minutes, AR Doc. 48 at 1740 (Councilmember stating that the deep water prohibition, though “well intentioned[,]” was “too broad of a brush” for the NMFS to take, and noting that he was “not convinced anymore that what [the NMFS] put in place here is meeting [its] purpose and need”); Mar. 2012 Minutes, AR Doc. 108 at 3783-3786 (noting that the exempted fishing permit data found extremely low co-occurrence between blueline tilefish and both the speckled hind and warsaw grouper); RA 11, AR Doc. 86 at 2997 (finding the data sufficient to show that “the probability of catching either [co-occurring] species with speckled hind and warsaw grouper is low”); *id.* at 3005 (noting the Scientific and Statistical Committee's conclusion that “the deepwater closure has little, or limited effect on protecting speckled hind and warsaw grouper”).).

Example 2: A Tale of Two Records

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

A Tale of Two Records

- * **BACKGROUND:**

- * Challenges to the Pacific Council's Trawl Rationalization program
- * This case came from participants in the program who were challenging the way in which quota shares were initially allocated for whiting

- * **ISSUE:**

- * Was there a rational justification for the formula used to allocate shares, or was the allocation arbitrary and capricious?



Source: Brenda Guild Gillespie

A Tale of Two Records

- * **2011 HOLDING:**

- * Even if it was conceptually reasonable for Defendants to have relied on a 2003 control date when promulgating regulations in 2010, the manner in which they did so here was not rational.

- * **Why arbitrary?:**

- * Council used data from after 2003 for some purposes but not others

- * “This appears to be a quintessential case of arbitrariness”

A Tale of Two Records

- * **2011 Holding, Cont.:**

- * Court notes that NMFS “have not cited any portion of the record where they considered whether the IFQ allocations based on history through 2003 and 2004 “reasonably reflected” more recent fishing patterns
- * “The record unequivocally states that the extension of the period to 2004 for harvesters was the result of a compromise arrived at during industry negotiations”

A Tale of Two Records

- * **2011-2013:** Council and NMFS undertake a year long “reconsideration process.” Council considers a range of potential qualifying years including the original set of years.
 - * Following much process, including development of a EA, seven hours of public testimony, and advisory committee reports, Council votes to retain the original qualifying period.
- * **2013:** Reconsidered action is finalized, and then challenged again by Pacific Dawn

A Tale of Two Records

- * **2013 Holding:**

- * *NMFS considered the relevant factors and articulated a rational connection between the facts found and the choices made*

- * **Processors v. Harvesters:**

- * The Court's earlier concerns with the explanation as to why the qualifying period for processors was extended to 2004 were sufficiently addressed during reconsideration

With a Record Like This, How Could We Lose?

1. Chevron two-step process
2. “Arbitrary and Capricious” Standard of Review (APA)
 - > *“Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law”* (5 U.S.C. § 706(2)(a))

1. Chevron “Two Step” Process

- * **WHEN:**

- * Judicial review of an agency’s statutory interpretation

- * **Process:**

Step 1: Has Congress spoken directly to the precise question at issue?

YES → Give effect to Congressional Intent!

NO → Go to Step 2

Step 2: Is the agency’s answer based on a permissible construction of the statute?

From *Chevron, Inc. v. Natural Resources Defense Council* (U.S. Supreme Ct. 1984)

1. Chevron “Two Step” Process: *Pacific Coast Federation of Fishermen’s Associations v. Blank*

* **BACKGROUND:**

- * A different challenge to Pacific Council’s Trawl Rationalization Program
- * Plaintiffs were not trawl sector participants and brought claims challenging the program’s makeup of initial quota recipients

* **ISSUE:**

- * Does 303A(c)(5) require the Council and NMFS to ensure the participation of fishing communities?

1. Chevron “Two Step” Process: *Pacific Coast Federation of Fishermen’s Associations v. Blank*



- * **STEP 1:** Court holds that the clear language of 303A(c)(5) only requires NMFS to consider fishing communities when establishing a limited access privilege program, but does NOT require the agency to develop criteria for allocating fishing privileges to such communities
- * **Because the court found the language to be unambiguous, the inquiry stops at step 1**

1. Chevron “Two Step” Process: *Oceana v. Locke*

- * **BACKGROUND:**

- * Challenge to New England Fishery Management Council’s Groundfish Amendment 16 (ACL amendment)
- * Several claims were raised, but key here was a focus on the monitoring provisions both for Amendment 16 and the Groundfish FMP as a whole

- * **ISSUE:**

- * Does the MSA--sections 303(a)(11) & (a)(15)--require that the Council and NMFS include bycatch reporting as part of the requirement to impose ACLs?

1. Chevron “Two Step” Process: *Oceana v. Locke*

- * **STEP 1:** Court holds that the relationship between 303(a)(11) (standardized bycatch reporting methodology) and 303(a)(15) (ACLs) is ambiguous, so proceeds to...
- * **STEP 2:** Court holds that agency’s interpretation that the two provisions are wholly separate is reasonable

**NORTHEAST
MULTISPECIES
(GROUND FISH)**



2. “Arbitrary and Capricious”

* **WHEN**

- * Agency decisions under the MSA are reviewed pursuant to Section 706(2) of the APA. 16 U.S.C. § 1855(f)(1)(B)
- * 706(2) requires courts to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

* **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

2. Arbitrary and Capricious: *Guindon v. Pritzker*

* **Background:**

- * Participants in the commercial red snapper industry challenged management measures on the recreational sector in the Gulf of Mexico red snapper fishery
- * Argument was that the Rec sector was continually exceeding quotas and therefore existing management measures were inadequate

* **ISSUE:**

- * Was NMFS justified in maintaining the status quo in light of its apparent failure to control mortality?



2. Arbitrary and Capricious: *Guindon v. Pritzker*

- * Administrative discretion is not a license to engage in Einstein's definition of folly---doing the same thing over and over again and expecting a different result. Section 407(d) required NMFs to implement management measures with a fighting chance of resulting in a prohibition on the retention of fish—be that a buffer, a dramatically shortened season, or some other strategy. Failing to do so was arbitrary and capricious.*

So, We Lost Now What?

“If the record before agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation”

Florida Power & Light Co. v. Lorion,
U.S. 729, 744 (1985)

So, We Lost Now What?

- * 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.

Wrapping Up

- * 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