

the Federal Register for publication. The published rule specifies the effective date for the measures contained therein.

v. Phase V—Ongoing Management

While NMFS reviews each Council recommendation on an individual basis, these recommendations are typically pieces of a more complex management regime taking place in an ongoing management continuum that must address continually evolving information and needs.

The activities involved in continuing fishery management include monitoring, evaluation, adjustment, and revision. This phase can include performance measurement or review of the regulatory activity to determine the effectiveness or usefulness of the measure. Exercising foresight on the structuring of FMPs and regulations can improve efficiency of continuing management by identifying research, data, and monitoring needs to respond to changing conditions in the fishery and establishing an adaptable management structure that facilitates rapid response to those changing conditions.

Frameworking: Planning ahead can enhance management responsiveness to the dynamic nature of fisheries. To this end, Councils have employed a variety of adaptive management planning techniques (referred to generally in this document as “frameworking”) to implement regulatory actions more rapidly, as needed and appropriate. Frameworking typically entails establishing in an FMP/amendment or regulations a mechanism for implementing recurrent, routine, or foreseeable actions in an expedited manner. Examples include certain FMP procedures for setting annual specifications and taking various inseason management actions, such as quota adjustments, in-season closures, and trip limit or bag limit adjustments.

Frameworking is not intended to circumvent standard FMP/amendment and rulemaking procedures under the MSA, and must be done consistent with requirements of the MSA, APA, ESA, MMPA, NEPA, and other applicable law. To the extent that statutory requirements can be addressed up front when establishing the framework mechanism, this may result in less analysis and process being needed when individual actions are executed under that mechanism. What analysis and process (including public comment) is required for each individual action will depend on the specific facts and circumstances of that action.

D. Other Applicable Law

1. Overview

Section 303(a)(1)(C) of the MSA requires federal fishery management plans to be consistent with other applicable laws. NMFS must also review Council-recommended FMPs, amendments, and regulations to determine whether they are consistent with other applicable law. These other laws impose additional procedural, substantive, and timing requirements on the decision process. The particular laws that apply to any given action must be assessed on a case-by-case basis. This section provides an overview of the other applicable laws and executive orders that most frequently apply, including but not limited to the:

- Administrative Procedure Act
- Coastal Zone Management Act
- Endangered Species Act
- Executive Orders 12630, 12866, 12898, 13089, 13132, 13158, 13175, 13272
- Information Quality Act
- Marine Mammal Protection Act
- National Environmental Policy Act
- National Marine Sanctuaries Act
- Paperwork Reduction Act
- Regulatory Flexibility Act

Table X on the next page contains a checklist of key considerations for frequently applied laws and executive orders and briefly describes the purpose and key requirements of each. Table Y lists some additional laws and executive orders that may be applicable to the fishery management process. Following the tables, Section D(4) provides a more detailed description of the laws and executive orders.

This section of Appendix 2 highlights key considerations but is not intended to address comprehensively all requirements of the above-referenced statutes and their implementing regulations. The statutes with their regulations and associated case law are controlling in the instance of any discrepancy between them and this document.

2. Table X. Other Applicable Laws and Executive Orders

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
		Procedural	Determinations	Timing		
Administrative Procedure Act	Increasing public involvement during rulemaking; ensuring federal agencies consider relevant factors in decision making	Public notice and comment; delayed effectiveness of final rule; documentation of decision-making process	Whether record shows reasoned decision making; applicability of good cause waiver	Public comment period on proposed rule & 30-day delayed effectiveness for final rule (unless an exception or good cause waiver is applicable). Timing requirements imposed by the MSA rather than the APA, including comment periods, are discussed in section E., <i>infra</i> .	Administrative record; good cause waiver or exception documented in rule	Document Drafting Handbook, OFR; NOAA Guidelines for Preparing an Agency Administrative Record
Coastal Zone Management Act	Preserving and enhancing the resources of the nation's coastal zone	State notifications and concurrence	Whether action would affect a state coastal zone; consistency with enforceable policies of approved coastal zone management programs	Notify states 90 days before final decision; infer concurrence by day 60 if no state response	Letters to states, state concurrence	NOAA Federal Consistency Regulations
Endangered Species Act	Ensuring actions are not likely to jeopardize the continued existence of any listed species nor	Analytical, documentation requirements	Whether action may affect listed species or critical habitat; Whether action is likely to adversely affect listed species or critical habitat; jeopardy to species	If formal consultation, biological opinion must be signed before final decision; biological opinion issued 135 days, unless extended, after initiation of formal	Letter of concurrence (informal consultation) or biological opinion (BO)(formal	Section 7 ESA Consultation Handbook; ESA Section 7 Regulations; Integration of Endangered Species Act

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
	result in the destruction or adverse modification of critical habitat		or destruction/ adverse modification determinations	consultation.	consultation); incidental take statement issued with BO if take is reasonably certain to occur; reasonable and prudent alternatives if necessary to avoid jeopardy; accompanying MMPA permit needed to authorize take of ESA-listed marine mammals	Section 7 with Magnuson-Stevens Act Processes (Policy Directive 01-117, 2015)
Information Quality Act	Ensuring and maximizing quality, objectivity, utility and integrity of information disseminated to the public	Pre-dissemination review	Quality, objectivity, utility and integrity of information disseminated to the public	Review must be completed prior to the agency disseminating information; peer review required for “influential scientific information”	Pre-dissemination Review Form	NOAA Information Quality Guidelines ; NMFS Policy on the Data Quality Act (Policy Directive 04-108, 2012); NMFS Peer Review Guidance (Procedural Directive 04-108-04);

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
						National Standard 2 Guidelines
Marine Mammal Protection Act	Maintaining or returning marine mammals to their optimum sustainable population sizes	Analytical, documentation requirements	Whether action will have adverse impacts on marine mammals; categorizing commercial fisheries based on frequency of incidental mortalities and serious injuries of marine mammals; compliance with any applicable take reduction plans	Potential for adverse impacts on marine mammals resulting from fishery management actions assessed during NEPA process	List of fisheries; marine mammal authorization certificate for Category I or II fisheries; take reduction plans; MMPA section 101(a)(5)(E) permit needed to authorize take of Endangered Species Act-listed marine mammals	MMPA Regulations ; List of Fisheries ; http://www.nmfs.noaa.gov/pr/interactions/lof/ ;
National Environmental Policy Act	Including the consideration of effects on the human environment in decision making	Public review, documentation, analysis of environmental impacts and a range of reasonable alternatives	Whether action may significantly affect the quality of the human environment	30-day comment period on notice of intent to prepare Environmental Impact Statement (EIS); 45-day comment period on draft EIS (DEIS); at least 90 days between publication of the notice of availability of the DEIS and record of decision; 30-day cooling off period between publication of the notice	Categorical Exclusion; Environmental Assessment (EA) and finding of no significant impact; EIS and record of decision	NEPA Compliance for Fishery Management Actions under the MSA (Policy Directive 30-132, 2013); NAO 216-6 ; CEQ Implementing Regulations; CEQ 40 Questions; NMFS

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
				of availability of the final EIS and record of decision		Guidelines for FONSI Preparation (Policy Directive 30-124-1, 2005)
National Marine Sanctuaries Act	Identifying and designating, as sanctuaries, areas of the marine environment of national significance; protecting sanctuary resources	Analytical, documentation requirements; preparation of Council-recommended fishing regulations	Whether action is likely to injure sanctuary resources (or “may affect” Stellwagen sanctuary resources); whether Council-recommended fishing regulations, or determination that no regulations are needed, are consistent with proposed sanctuary designation’s purpose	If proposed action is likely to injure sanctuary resources (or “may affect” Stellwagen Bank), written statement on effects no later than 45 days before the final approval of the action, unless another schedule is agreed to; additional 45 days from receipt of complete information on the proposed action to develop recommendations to protect sanctuary resources.	Written statement regarding effects of action (can be included in contents of EA/EIS); recommendations to protect sanctuary resources	NOAA’s Regulation of Fishing in National Marine Sanctuaries ; Overview of Conducting Consultation Pursuant to Section 304(d) of the National Marine Sanctuaries Act
Paperwork Reduction Act	Minimizing the paperwork burden resulting from the collection of information by or for the Federal	Documentation, public notice and comment, Office of Management and Budget (OMB) review requirements	Whether action contains a collection-of-information requirement; OMB approval	OMB approval of collection-of-information requirements before effective, e.g., before final rule. Approximately 9 month process to prepare for and obtain OMB approval	Form SF83-I	NOAA PRA Guidance ; PRA Regulations ; NMFS Standard Operating Procedures for PRA Submissions ; PRA Review

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
	Government					Checklist
Regulatory Flexibility Act	Informing public and decision makers of economic impacts on small businesses; including the consideration of alternatives that minimize expected significant economic impacts	Economic impact analysis; consideration of significant alternatives; public review requirements; SBA notification requirement	Whether a rule will have a significant economic impact on a substantial number of small entities	If a proposed rule may impose a significant economic impact on a substantial number of small entities, regulatory flexibility analyses prepared at time of proposed and final rules; if certifying that rule will not have a significant economic impact, certification must be included in the proposed and final rule as appropriate	Certification or Initial and Final Regulatory Flexibility Analyses (IRFA/FRFA); publication of IRFA/FRFA summary in proposed and final rules, respectively.	Guidelines for Economic Review of NMFS Regulatory Actions ; Policy on RFA and RIR Review Process (Policy Directive 01-111, 1997); SBA Compliance Guide ; E.O. 13272 (RFA Compliance)
Executive Orders						
E.O. 12866 (Regulatory Planning and Review)	Reforming the regulatory process to increase efficiency and transparency, enhance planning and	Consider whether action is “significant” under E.O.; consider costs, benefits, alternatives; OMB review requirement	Whether action is a “significant regulatory action” e.g., annual effect on the economy of \$100,000,000 or more	10/90/45-day OMB reviews	Listing document and Regulatory Impact Review; If significant, regulatory impact analysis containing analysis of alternatives, costs/benefits	Guidelines for Economic Review of NMFS Regulatory Actions ; Policy on RFA and RIR Review Process (Policy Directive 01-111, 1997);

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
	coordination, and improve regulatory oversight					NMFS E.O. 12866 Listing Procedures (Policy Directive 30-102, 2014); E.O. 13563 (Improving Regulation and Regulatory Review)
E.O. 13132 (Federalism)	Ensuring that the constitutional principles of federalism guide federal agencies during policy development	State consultation, documentation, OMB review requirements (if federalism implications)	Whether action has federalism implications and will result in substantial state compliance costs and is not required by statute, or whether action would result in preemption of state law	If federalism implications, consult with state and local officials early in the process of developing the proposed regulation	Federalism Summary Impact Statement included with rule	E.O. 13132

3. Table Y. Additional Laws and Executive Orders that May be Applicable

Law	Purpose	Resources
Congressional Review Act	To notify Congress of rules prior to the effective date, and to indicate whether the rule is “major,” e.g., likely to have an annual effect on the economy of \$100,000,000. (Notification requirement coordinated with E.O. 12866 submissions)	Congressional Review Act
The Florida Keys National Marine Sanctuary and Protection Act (P.L. 101-605)	Designated the Florida Keys National Marine Sanctuary subsuming the Key Largo and Looe Key national marine sanctuaries that were designated under the NMSA in 1977 and 1981, respectively.	The Florida Keys National Marine Sanctuary and Protection Act
The Hawaiian Islands National Marine Sanctuary and Protection Act (P.L. 102-587)	Designated the Hawaiian Islands Humpback Whale National Marine Sanctuary.	The Hawaiian Islands National Marine Sanctuary and Protection Act
The Oceans Act of 1992 (P.L. 102-587)	Designated the Stellwagen Bank National Marine Sanctuary off the coast of Massachusetts.	The Oceans Act of 1992
The National Marine Sanctuaries Preservation Act of 1996 (P.L. 104-283)	Added Stetson Bank to the Flower Garden Banks National Marine Sanctuary.	The National Marine Sanctuaries Preservation Act of 1996
The National Marine Sanctuaries Amendments Act of 2000 (P.L. 106-513)	Gave the President authority to establish a Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, which he did via E.O. 13178 on December 4, 2000.	The National Marine Sanctuaries Amendments Act of 2000
The Antiquities Act	Gives the President authority to protect natural and cultural objects through designation of a national monument; used to designate the Papahānaumokuākea Marine National Monument (Presidential Proclamation 8031) on June 15, 2006.	The Antiquities Act
Migratory Bird Treaty Act	Promotes the conservation of migratory	Migratory Bird Treaty Act

	birds and their habitats	
Executive Orders		
E.O. 12630 (Takings)	Requires federal agencies to prepare a Takings Implication Assessment for regulatory actions that affect, or may affect, the use of any real or personal property.	E.O. 12630
E.O. 12898 (Environmental Justice)	Focuses federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all communities.	E.O. 12898
E.O. 13089 (Coral Reef Protection)	Directs federal Agencies to expand their coral research, preservation, and restoration efforts to preserve and protect the biodiversity, health, heritage, and social and economic value of U.S. coral reef ecosystems and the marine environment	E.O. 13089
E.O. 13158 (Marine Protected Areas)	Strengthens the management, protection, and conservation of existing marine protected areas (MPAs) and encourages establishing new or expanded MPAs	E.O. 13158
E.O. 13175 (Consultation and Coordination with Indian Tribal Governments)	Ensures regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications	E.O. 13175 ; NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations
E.O. 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds)	Requires some federal agencies to develop and implement a Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service that promotes the conservation of migratory bird populations	E.O. 13186 ; MOU (agreeing, among other things, to ensure to the extent practicable that environmental analyses required by NEPA evaluate the effects of actions on migratory birds and their habitats)

4. Description of Key Other Applicable Laws

This section, like the tables above, highlights key considerations but is not intended to address comprehensively all requirements of the statutes and their implementing regulations. The statutes, regulations, and appropriate case law are controlling in the instance of any discrepancy between them and this document.

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*

The APA applies procedural requirements to federal rulemakings to increase public access to the federal rulemaking process and to give the public adequate notice and opportunity to comment. It also provides for judicial review of final agency actions.

Under the APA, agencies need to provide a reasonable, meaningful opportunity for comment on proposed regulations. *See also* Executive Order 12866 § 6(a)(referring to “meaningful” opportunity for comment, which in most cases should not be less than 60 days). However, this procedural requirement must be read in conjunction with the procedural requirements of the MSA, which specify time periods for public comment on FMPs and amendments (60 days on FMPs and amendments; 15 – 60 days on regulations). In addition, NMFS can waive the APA’s notice and comment requirement as well as the 30-day delay in effectiveness for final rules if good cause exists. For prior notice and comment, the good cause waiver must demonstrate that notice and comment was impracticable, unnecessary, or contrary to the public interest, and an explanation must be published with the rule.

The APA requires that agency decisions be reasonable and based on the facts in the record. To determine whether an agency action was arbitrary and capricious (unreasonable), if challenged in a court of law, a court reviews the agency’s administrative record. The administrative record contains all the information that the decision-maker considers and, in court, it provides the evidence that the agency complied with substantive requirements and procedures and that the final decision was not “arbitrary and capricious.” However, the APA does not require a particular outcome, as long as the final decision is supported by facts in the record. Thus, when dealing with decisions affected by conflicting priorities or scientific uncertainty, it is important to describe the conflicts and document the rationale for the approach selected, including responding to all comments and acknowledging, even highlighting, areas of contention.

Key Requirements/Considerations:

- Record must support decision
- Public comment requirement applies to most rules, unless an exception or good cause waiver is applicable
- 30-day delayed effectiveness applies to most final rules, unless an exception or good cause waiver is applicable

The APA allows courts to set aside agency actions found to be:

- “arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law”
- “contrary to constitutional right”
- “in excess of statutory jurisdiction”
- “without observance of procedure required by law...”

In addition, the APA allows for any person to petition an agency to issue, amend, or repeal a rule.

Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 *et seq.*; 15 C.F.R. Part 930.

The CZMA requires federal activities that affect a state's coastal zone to be consistent, to the maximum extent practicable, with the enforceable policies of that state's approved coastal zone management program. Section 307 of the CZMA, 16 U.S.C. § 1456, also called the "federal consistency" provision, gives states with approved coastal zone management programs a role in federal agency decision making for activities that may affect a state's coastal uses or resources.

Generally, federal consistency requirements apply to federal actions, including rulemakings, within and outside the coastal zone, which have reasonably foreseeable effects on any coastal use (land or water) or natural resource of the coastal zone.

Key Requirements/Considerations:

- A consistency determination must be provided to state agencies at least 90 days before approving the FMP or FMP amendment or publishing the final rule, unless NMFS and the state agency agree to an alternative notification schedule.
- States have 60 days to respond in writing to NMFS' request for concurrence. If no response is received within that time, concurrence is presumed.

Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*; 50 C.F.R. Part 402

The ESA requires federal agencies to ensure the activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their critical habitat.

To protect and recover species listed as threatened or endangered, the ESA: (1) Requires federal agencies to use their authorities to carry out programs for the conservation of listed species; (2) Requires federal agencies, through a consultation process, to ensure that their actions are not likely to result in jeopardy to listed species or destruction/adverse modification of designated critical habitat; and (3) Prohibits the "taking" of any endangered species, as well as any threatened species to which the prohibition of take is applied, unless authorized.

It is compliance with this second requirement, known as ESA section 7 consultation (16 U.S.C. § 1536), which primarily affects the fishery management process. To demonstrate that an action will not result in jeopardy to a listed species or destruction/adverse modification of designated critical habitat, an action agency must engage with NMFS or the U.S. Fish and Wildlife Service (USFWS), depending on the species, through an informal or a formal consultation. Informal consultation is documented by a "letter of concurrence," which concludes that the action is "not likely to adversely affect" listed species and their critical habitat. Formal consultation is documented by a biological opinion, which assesses whether the action is likely to result in

jeopardy or destruction/adverse modification. If the action as proposed is not likely to result in jeopardy or destruction/adverse modification, but take of listed species is reasonable certain to occur, the biological opinion includes an incidental take statement containing reasonable and prudent measures and terms and conditions that minimize take and must be complied with for otherwise prohibited take to be authorized. If the biological opinion concludes that the proposed action will jeopardize a listed species or adversely modify critical habitat, then a reasonable and prudent alternative that would avoid jeopardizing listed species or resulting in destruction/adverse modification of critical habitat is also included. If the reasonable and prudent alternative is also reasonably certain to result in take of listed species, an incidental take statement with reasonable and prudent measures and terms and conditions is also provided. Consultation is not required when an action agency determines an action will have no effect on listed species or their critical habitats.

Key Requirements/Considerations when an action is likely to adversely affect listed species or their designated critical habitat:

- Formal consultation resulting in a biological opinion.

For a formal consultation, requirements are:

- Biological evaluation/assessment must be included in FMP, FMP amendments or other supporting analyses,
- 135-day consultation period, which may be extended (starting from date of initiation of formal consultation).
- Products of formal consultation include:
 - Biological opinion,
 - Incidental take statement,
 - Reasonable and prudent measures,
 - Terms and Conditions
 - Reasonable and prudent alternatives (if the proposed action is likely to result in jeopardy or destruction/adverse modification), Conservation recommendations.

Timing: Formal consultation should be concluded within 90 days of initiation unless the parties mutually agree to an extension. The consulting agency provides a biological opinion containing its official conclusions regarding the effects of the action within 45 days of completing a formal consultation. Putting this into the context of developing fishery management actions under the MSA, it is important to note that, when consulting on a specific action, the consultation timeline of 135 days does not begin until a preferred alternative (i.e., proposed action) has been identified and consultation initiated. Thus, for council-recommended actions, the ESA consultation cannot typically begin prior to the Council selecting its preferred alternative. Bearing in mind the strict MSA timelines and constraints on Secretarial review once a Council-recommended FMP or amendment is transmitted, it is important to coordinate with NMFS or USFWS, as appropriate, as early as possible. In the case of ESA-listed marine mammals, a permit under section 101(a)(5)(E) of the MMPA is also needed before the incidental take statement of a biological

opinion can become effective. Therefore, additional time that may be needed for the MMPA permit should be factored into the process (see Marine Mammal Protection Act description).

Integration of MSA and ESA section 7 processes

NMFS policy for Integration of Endangered Species Act Section 7 with the Magnuson-Stevens Act Processes, PD 01-117, should be considered when working on fishery management actions that may require ESA section 7 consultations as well as when updating ROAs.

Information Quality Act (IQA), 44 U.S.C. § 3516

The IQA (also referred to as the “Data Quality Act”) was enacted in section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554 § 515. The Act requires federal agencies to ensure the information they disseminate to the public is of appropriate quality, objectivity, integrity, and utility. NOAA guidelines implementing the IQA require a pre-dissemination review of the public information products we disseminate in support of fishery management decisions (including statistical information) to ensure and maximize the quality, objectivity, utility and integrity of information NOAA disseminates.

Key Requirements/Considerations:

- Pre-dissemination review,
- Quality, objectivity, utility and integrity of information NOAA disseminates to the public.

The IQA and the associated OMB Information Quality Peer Review Bulletin also require peer review for “influential scientific information” prior to dissemination. Under section 302(g)(1)(E) of the MSA (16 U.S.C. § 1852(g)(1)(E)), NMFS and the Councils may establish a peer review process for scientific information used to advise the Council about the conservation and management of the fishery. That review process can satisfy the requirements of the IQA. The MSA’s National Standard 2 guidelines (50 C.F.R. § 600.315) contain additional information on the use of the best scientific information available and the peer review process under MSA section 302(g)(1)(E).

Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361 *et seq.*

The MMPA declares that marine mammals should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem and should not be permitted to diminish below their optimum sustainable population. To achieve this goal, the MMPA prohibits take of all marine mammals; however the MMPA includes limited exceptions to the moratorium on take, including for commercial fisheries. The MMPA requires that all commercial fisheries be categorized based on the relative frequency of incidental mortalities and serious injuries of marine mammals in the fishery:

Category I designates fisheries with frequent mortalities and serious injuries incidental to commercial fishing;

Category II designates fisheries with occasional mortalities and serious injuries;

Category III designates fisheries with a remote likelihood or no known mortalities or serious injuries.

Owners of a commercial vessel or non-vessel gear engaging in Category I or II fisheries must obtain a marine mammal authorization certificate from NMFS in order to lawfully incidentally take a marine mammal in a commercial fishery. Owners of a commercial vessel or non-vessel gear engaging in Category III fisheries are not authorized to incidentally take a marine mammal in a commercial fishery; however, should a mortality or an injury occur, the owner will not be in violation of the MMPA provided the owner reports the injury as required under MMPA section 118(e) (16 U.S.C. § 1387(e)).

To help achieve the MMPA's goal of maintaining or returning marine mammals to their optimum sustainable population sizes, take reduction plans for strategic marine mammal stocks that interact with Category I and II fisheries may be developed. The immediate goal of take reduction plans is to reduce, within six months of implementation, the incidental mortality or serious injury of marine mammals from commercial fishing to less than the potential biological removal level. The long-term goal is to reduce incidental mortality and serious injury of marine mammals from commercial fishing operations to insignificant levels. Take reduction teams (TRTs), consisting of representatives from the fishing industry, Councils, state and federal resource management agencies, scientific community, and conservation organizations are responsible for recommending take reduction measures to NMFS. NMFS then publishes the proposed take reduction plan, which may include both required and voluntary measures, for public review and comment, and then finalizes the plan. NMFS would then implement any regulatory components of the plan through the federal rulemaking process.

Section 101(a)(5)(E) of the MMPA (16 U.S.C. § 1371) states that NMFS, as delegated by the Secretary of Commerce, shall for a period of up to three years allow the incidental taking of marine mammal species listed under the ESA by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the MSA while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental mortality and serious injury will have a negligible impact on the affected species or stock (commonly referred to as a "negligible impact determination or NID; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock. NMFS Office of Protected Resources issues these MMPA section 101(a)(5)(E) permits.

The potential for adverse impacts on marine mammals resulting from fishery management actions is also assessed during the associated NEPA processes.

Key Requirements/Considerations:

- Marine mammal impacts must be assessed/considered in FMP, FMP amendment or supporting analyses;
- When take of marine mammals also listed under the ESA is anticipated, an MMPA permit and associated NID are required for prohibited take to be authorized by the

incidental take statement included with the biological opinion. The MMPA permit process includes a public comment period (e.g., 30 days).

For commercial fisheries covered by a TRT, NMFS and Councils should strive to maintain communication with the TRT, including having Council representatives participate as members of the relevant TRTs that address their fisheries.

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; 40 C.F.R. §§ 1500 *et seq.* (CEQ regulations)

NEPA requires federal agencies to assess and consider the effects of major federal actions on the quality of the human environment by considering the environmental impacts of proposed actions and reasonable alternatives to those actions. NEPA also requires that the public be provided the opportunity to help identify, review and comment on such effects, particularly in cases where an environmental impact statement (EIS) is being prepared.

Key Requirements/Considerations:

- EIS required for major federal actions that significantly affect the quality of the human environment
 - Analyze environmental impacts; consider alternatives.
 - 30-day minimum public comment period on notice of intent to prepare EIS/conduct scoping (per NAO 216-06).
 - 45-day public comment period on draft EIS (per CEQ regulations).
 - 30-day cooling off period between final EIS and Record of Decision (ROD) (per CEQ regulations).
- Environmental Assessment (EA): When it is not clear if the proposed action will have significant impacts, an EA is prepared. An EA is a concise document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS and aids an agency's compliance with NEPA when no EIS is necessary. If the EA demonstrates that there are no significant impacts, the agency will prepare a Finding of No Significant Impact (FONSI).
 - Where time permits and where the EA would benefit from greater public participation a 30 day public comment period is encouraged prior to issuing a FONSI (per NAO 216-6).
- Categorical Exclusion (CE): If an action falls within the scope of a category of actions the agency has officially determined do not "individually or cumulatively have a significant effect on the human environment," and there are no extraordinary circumstances indicating that the effects of the action may be significant, the action may be excluded from the requirement to prepare an EA or an EIS. The categories of actions determined by NOAA to be categorically excluded, and the application of those CEs, are described in NAO 216-06. If a CE is applied, then a memo to the file should be prepared describing the basis for the decision to apply the CE.

Timing: At the time of the final decision (and in the case of an EIS, at least 30 days after the Final EIS (FEIS) is noticed and at least 90 days after the DEIS is noticed), agencies must have prepared a Record of Decision (ROD), FONSI, or determined that a CE applies. It is important to be aware of the interaction of NEPA and MSA timing requirements. For example, the deadline for the Secretary to approve, disapprove, or partially approve a Council-submitted FMP or Amendment (which is 30 days after the close of the comment period on the FMP or Amendment and often referred to as “Day 95”) should not occur prior to signing the ROD or the FONSI. If it is an FEIS, the ROD may not be signed sooner than 30 days after noticing the availability of the FEIS.

National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1431; 15 C.F.R. Part 922

Under the NMSA, the Secretary is required to provide the appropriate Council with the opportunity to prepare draft regulations for fishing as the Council may deem necessary to implement a proposed sanctuary designation. The Secretary is also required to accept and propose the Council’s draft regulations, or determination that regulations are not necessary, unless the Council’s action fails to fulfill the purposes of the NMSA and the purposes of the proposed designation. Because the designation document includes determinations about appropriate use and restrictions on use of Sanctuary resources, including fishing, early communication among NOAA offices and Councils is important in ensuring the goals of both MSA and NMSA are met in the most effective way.

The NMSA also requires federal agencies to consult under section 304(d) if a proposed action is likely to injure existing sanctuary resources. A written statement assessing the effects on sanctuary resources (can be included in contents of EA/EIS) must be submitted no later than 45 days before the final approval of the action, unless another schedule is agreed to. If a proposed action is likely to destroy or injure a sanctuary resource, or in the case of Gerry E. Studds Stellwagen Bank National Marine Sanctuary, “may affect” sanctuary resources, the NMSA provides an additional 45 days from receipt of complete information on the proposed action for the Secretary to develop recommendations to protect sanctuary resources. If the Secretary’s recommendations are rejected by the action agency or permit applicant, a written statement explaining the reasons for that decision is required.

Key Requirements/Considerations:

- Council-recommended fishing regulations,
- Consultation requirement for actions likely to injure (or may affect) sanctuary resources.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501 *et seq.*

The PRA requires federal agencies to consider and minimize recordkeeping and reporting burdens when collecting information from the public. OMB approval is required to implement new information collection requirements and clearances expire after 3 years. New collection-of-information approval requests should be submitted at least 30 days prior to the publication of a proposed rule containing a collection-of-information requirement. Once OMB receives the request it has 60 days to review, and except for special emergency submissions, OMB is prohibited from acting for the first 30 days in order to give time for public comment. Accordingly, not including the time necessary to prepare documentation for review, the OMB

review process takes from 30-60 days, and 60 days or more if the PRA submission volume is high as is the common.

Key Requirements/Considerations:

- Estimate burden hours, cost and need for action,
- OMB review and approval,
- Public notice and comment opportunity.

Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*

The RFA requires federal agencies to describe and analyze the effects of proposed regulations on small entities. If a proposed rule may impose a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) is prepared at the time of the proposed rule and summary of the IRFA is included in the proposed rule. A final regulatory flexibility analysis (FRFA) is prepared for the final rule and a summary is included in the final rule. The IRFA and FRFA are designed to assess the impacts that various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize adverse impacts. However, the RFA does not require that the alternative with the least impact on small entities be selected. If a proposed rule will not have a significant economic impact on a substantial number of small entities, certification of that conclusion is required and must be included at the appropriate stage of the rule.

Key Requirements/Considerations:

- SBA definitions of small entities
- IRFA/FRFA
 - IRFA for proposed rules that may have a significant economic impact on a substantial number of small entities. Analysis of effects of alternatives required for proposed rules that may or will have a significant economic impact on a substantial number of small entities.
 - Opportunity for public comment on IRFA.
 - FRFA for final rules that may have a significant economic impact on a substantial number of small entities. Final rule to include response to public comments on economic analysis.
- Certification if proposed rule will not have a significant economic impact on a substantial number of small entities. SBA concurrence is required when proposed rule is certified.
- Small entity compliance guide: for each rule, or group of rules, for which the agency is required to prepare an FRFA, a related law, the Small Business Regulatory Enforcement Fairness Act (SBRFA), requires NMFS to provide a “small entity compliance guide” explaining in “plain English” the requirements of the rule. Failure to do so may be considered by any court reviewing the reasonableness or appropriateness of any proposed fines, penalties or damages in an enforcement action.
- Periodic review: For all rules that may have significant economic impact on a substantial number of small entities, the agency must periodically review them and determine whether they are still necessary.

Executive Orders

E.O. 12866 (Regulatory Planning and Review)

This E.O. on Regulatory Planning and Review requires OMB to review proposed regulatory programs that are considered to be significant; e.g., likely to (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Order. *See also* E.O. 13563 (Improving Regulation and Regulatory Review), which supplements and reaffirms principles in E.O. 12866.

Key Requirements/Considerations:

- OMB concurrence with significance determination (which NMFS makes in a "Listing Document"),
- Analysis of costs, benefits and effective alternatives. (NMFS uses the RIR to document these),
- 90-day + OMB review of significant actions.

E.O. 13132 (Federalism)

The E.O. on Federalism requires federal agencies to consult with state and local governments on regulations with federalism implications and to report to OMB on the extent of that consultation, the nature of any state concerns, the need for the regulation, and the extent to which state and local concerns have been met.

Key Requirements/Considerations:

- Consultation requirement for regulations with federalism implications,
- Federalism summary impact statements and certifications required for regulations with federalism implications,
- OMB review.

E.O. 12630 (Takings)

The E.O. on Government Actions and Interference with Constitutionally Protected Property Rights (Takings) requires federal agencies to assess the potential for administrative, regulatory, and legislative policies and actions that affect, or may affect, the use of any real or personal property, to result in a taking.

Key Requirements/Considerations:

- Takings assessment/determination.

E.O. 13272 (RFA Compliance)

The E.O. on Proper Consideration of Small Entities in Agency Rulemaking intends to improve compliance with the Regulatory Flexibility Act by requiring federal agencies to notify SBA of rules that may have a significant economic impact on a substantial number of small entities.

Key Requirements/Considerations:

- SBA notification.

Other laws and executive orders that may be relevant to fisheries management action are described above in Table Y.

E. Rulemaking Details/Types of Rulemakings (planning in phases 1 and 2, implementing in phases 3 and 4)

1. Overview

To implement a fishery management action, NMFS may need to conduct rulemaking. The MSA has four provisions pertaining to rulemaking and requires different types of procedure depending on the provision used. In addition, as explained in Section D(4) above, the APA includes additional requirements for rulemaking in general. When planning to develop an MSA fishery management measure, forethought should be given to the available authorities for implementation as well as the standard procedures required.

1. *Standard Rulemaking/Regulations Deemed Necessary By Councils.* MSA sections 303(c) and 304(b) (16 U.S.C. §§ 1853(c) and 1854(b)) describe the typical scenario for proposed rules prepared to implement an FMP or amendment. As described in section 303(c), a Council submits to NMFS proposed regulations that it “deems necessary or appropriate” for the purposes of implementing an FMP or amendment (FMP Rulemaking) or modifying regulations that implement an FMP or amendment (Regulatory Amendment). Section 304(b) outlines the procedures for NMFS to review and implement such rules.
2. *Emergency Actions and Interim Measures to Reduce Overfishing.* MSA section 305(c) provides authority for temporary rules to address unanticipated emergencies or reduce overfishing (Emergency Rulemaking, Interim Rulemaking) (16 U.S.C. § 1855(c)). If such a rule changes an existing FMP, it is considered an amendment to that FMP during the period that it is in effect, which is limited to 366 days.
3. *Fishery Management Actions Developed by the Secretary.* MSA sections 304(c)(6) and (7). (16 U.S.C. § 1854(c)(6),(7)).
4. *General Rulemaking Authority.* In addition to the above authorities, MSA section 305(d) authorizes the Secretary to promulgate regulations in accordance with the

APA, that are necessary to implement approved FMPs or regulations or to carry out any other provision of the MSA (16 U.S.C. § 1855(d)).

Each of these provisions is designed to address or adapt to different circumstances. As a result, depending on which provision is used, there may be differences in terms of how rulemaking is initiated, the effect and duration of the rules, public participation, or factual determinations required. Table Z summarizes the key differences in these rulemaking authorities and processes. Appendix 2, section C.2.b.v, and Appendix 3, section B.3, describe a planning technique, known as “frameworking,” through which an FMP, amendment, or regulation can prescribe a procedure that is designed to develop and/or implement future management actions more rapidly when needed and appropriate.

2. Table Z. Rulemaking Authorities and Processes.

Rulemaking Process/ Authorities	Effect	Who Initiates	How Initiated	When Used	Duration	Examples	Required MSA Procedure for Rulemaking	APA Public Comment Period	APA Delayed Effectiveness	OALs
1. Standard/ Deemed Rule (MSA 303(c), 304(b))	Implement FMP or Amendment or modify existing regulations for FMP or Amendment	Council	Council public process	When necessary or appropriate for implementing FMP or Amendment, or modifying existing regulations	In effect until modified (or other duration specified in rule)	Measures needed for rebuilding plans, catch share programs, etc.	Sec: 5 days to initiate review of proposed rule; 15 days to determine consistency with FMP or Amendment and law; 15 – 60 days public comment; 30 days for final rule	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (cannot reduce below MSA 15- day minimum)	30-day delay, unless an exception or good cause waiver is applicable	
2. Emergency Rule (MSA 305(c))	Temporary amendment to FMP or Amendment	Council or NMFS	Finding that emergency exists	Address Emergency	180 days with potential 186-day extension	Gulf of Mexico Oil Spill Closures	186-day extension available only if public had opportunity to comment	Yes, unless an exception or good cause waiver is applicable (no MSA minimum)	30-day delay, unless an exception or good cause is applicable	OALs such as NEPA and CZMA have emergency provisions
Interim Measures (MSA 305(c))			Sec. or Council finding need to reduce overfishing	Address Overfishing		Quota Reduction				

Rulemaking Process/ Authorities	Effect	Who Initiates	How Initiated	When Used	Duration	Examples	Required MSA Procedure for Rulemaking	APA Public Comment Period	APA Delayed Effectiveness	OALs
3. Rule for Secretarial Plan or Amendment (MSA 304(c)(6), (7))	Implement Secretarial FMP or Amendment	NMFS	When Secretary determines appropriate (see list of findings in section E.3.c of Appendix 2)	To implement FMPs or amendments developed by the Secretary pursuant to 304(c)(1), 304(e)(5), 304(g))	In effect until modified (or other duration specified in rule)		60 day public comment period (may be shorter for minor rule revisions)	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (cannot reduce below what MSA requires).	30-day delay, unless an exception or good cause waiver is applicable	
4. General Rulemaking authority (305(d))	Implement FMP or Amendment or other MSA provisions/responsibilities	NMFS	NMFS decides that action is needed	To implement FMP or Amendment or carry out other MSA provisions/responsibilities	In effect until modified (or other duration specified in rule)		N/A	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (no MSA minimum).	30-day delay, unless an exception or good cause waiver is applicable	