

c. Roles and Responsibilities

This section briefly describes the products and roles and responsibilities during each of the main rulemaking phases for fishery management actions. These Phases are described in detail in section C. of this Appendix 2. The Roles and Responsibilities section of the ROAs describe the primary roles of the Councils, Council planning teams, NMFS, the NMFS Science Centers, NOAA General Counsel and NMFS Office of Law Enforcement in developing FMPs and implementing regulations under the MSA. In addition to the MSA, a variety of other applicable laws and executive orders (EOs) have analytical and procedural requirements, including NEPA, the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), the Information Quality Act, EO 12866 and the Administrative Procedure Act (APA). The roles and responsibilities pertaining to these separate analyses may be included in the ROA or may be contained in a separate document. While the ROAs are specific to the Council/Region that developed it, section C. of this Appendix 2 also briefly describes the general roles and responsibilities of Councils and NMFS in complying with applicable laws.

d. Description of Action Plans or Phases for FMP and Rule Development

Either in the above section, or included in a separate section, is a description of how the Councils and NMFS identify necessary tasks and ensure they are appropriately assigned and completed for each phase of the fishery management process. Some ROAs describe how Action Plans are used to provide a path for development and completion of major actions. Other ROAs detail each phase, describe how each phase is completed, and identify who is responsible for products or documents in those phases. No matter the approach, this has the intended effect of informing internal and external stakeholders of how each phase of the process is initiated and completed.

4. Final Regional Operating Agreements

Links to the current signed versions of these ROAs are appended to these OGs. The ROAs, besides including the above sections, also include a diagram for each Council. These diagrams show the structure and function of Council committees, planning bodies, and other Council-created entities. How these Council bodies work may be reviewed in the ROAs, or they may be briefly described within these OGs.

C. Detailed Description of the Council Fishery Management Process under the MSA

1. General Overview of Statutory Roles and Responsibilities

The MSA and OALs set forth specific analytical and procedural requirements that interact with NMFS's and the Councils' decision-making processes under the MSA. The mandates on NMFS, as the federal action agency, are distinct from the requirements pertaining to the activities of the Councils, in their role as advisory bodies. Nothing precludes a Council's development of analyses and documentation to support compliance with the OALs, and in fact this practice is recommended. However, ultimate legal responsibility for most requirements lies with NMFS. It is good practice to have as complete analysis and documentation as possible available during Council deliberations.

a. MSA Role of the Councils

As set forth in sections 302(h), 303, and 304 of the MSA (see also the policy directive entitled “Procedures for Initiating Secretarial Review of FMPs and Amendments (3/01/91) (<http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-01.pdf>), Councils are responsible for:

- Conducting public hearings to allow for public input into the development of FMPs and amendments,
- Reviewing pertinent information,
- Preparing FMPs and amendments for fisheries requiring conservation and management,
- Drafting or deeming regulations to implement the plans or amendments,
- Developing annual catch limits (ACLs),
- Identifying research priorities, and
- Transmitting complete packages containing documentation necessary for NMFS to initiate a review of compliance with all applicable laws including NEPA.

b. MSA Role of NMFS

As set forth in MSA section 304(a) (16 U.S.C. § 1854(a)), NMFS’ role³ with respect to Council-developed FMPs and FMP amendments is to review – and approve, disapprove, or partially approve – those plans and amendments in accordance with specified procedures, including:

- Upon transmittal of the FMP or amendment, immediately:
 - Commence a review to determine whether the plan or amendment is consistent with the MSA and OALs; and
 - Publish the plan or amendment in the *Federal Register* for a 60-day comment period.
- Within 30 days of the end of the comment period, approve, disapprove, or partially approve a plan or amendment. Disapproval must be based on inconsistency with the MSA or other applicable law. Disapproval notices must specify what was inconsistent and how to remedy the situation, if possible (see MSA section 304(a)(3)(A)-(C)).

In addition, as set forth in section 304(b) (16 U.S.C. § 1854(b)), NMFS’ role with respect to Council-recommended proposed regulations is to:

³ MSA Section 304 vests the authority to take action regarding fishery management plans and implementing regulations with the Secretary of Commerce. This authority has been delegated to the Under Secretary of Commerce for Oceans and Atmosphere (NOAA Administrator) who has re-delegated this authority to the Assistant Administrator for Fisheries (AA). Department Organization Order 10-15 § 3.01(aa); NOAA Organization Handbook Transmittal # 61. Among other things, the AA has re-delegated to the Deputy AAs authority for signature of material for publication in the Federal Register and the Code of Federal Regulations. NOAA delegations of authority may be found [here](#).

- Upon transmittal, immediately initiate an evaluation of whether the proposed regulations are consistent with the FMP or amendment, the MSA, and other applicable law.
- Within 15 days of initiating the evaluation, make a determination of consistency, and—
 - if that determination is affirmative, publish the proposed regulations for a public comment period of 15 to 60 days; or
 - if that determination is negative, notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent.
- Consult with the Council before making any revisions to the proposed regulations.
- Promulgate final regulations within 30 days after the end of the comment period and publish in the *Federal Register* an explanation of any differences between the proposed and final regulations.

The MSA, at Section 304(c), (16 U.S.C. § 1854(c)), also authorizes NMFS to prepare an FMP or amendment if:

- (a) the appropriate Council fails to develop and submit to NMFS, after a reasonable period of time, an FMP for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;
- (b) NMFS disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment; or
- (c) NMFS is given authority to prepare such plan or amendment under the MSA.

NMFS may also develop regulations to implement Secretarial plans and amendments. (MSA section 304(c)(6), (7); 16 U.S.C. § 1854(c)(6), (7)).

Additional information about specific tasks and roles performed by NMFS regional and HQ offices can be found in NMFS's Policies on Regulatory Process (PD 30-102) and Fishery Management Actions (PD 01-101).

c. OAL Roles of NMFS and Councils

As described in section D of Appendix 2, the OALs set forth a variety of requirements for analysis, documentation, determinations, and procedures. Because of the close relationship between NMFS's actions and the Council's recommendations, compliance with the OALs will be most effective if NMFS and the Councils coordinate closely. The ROAs explain how these relationships work for each Council/Region pair. Council staff can often be responsible for drafting supporting analyses and documentation; however, it is NMFS's responsibility to ensure the resulting documents fully comply with applicable laws.

2. Detailed Description of the Phases

a. Applicability

This section describes the general process for development of an FMP or FMP amendment. These phases can also apply to Council proposed regulations. However, as described in Phase V below, some FMPs or amendments can be designed in a manner that allows more rapid implementation of regulations in certain circumstances. This approach, called “Frameworking,” would be designed via the process set forth below, but then could allow for more rapid implementation during Phase V if certain criteria are met. See the discussion at Phase V for more information on Frameworking.

b. Phases

i. Phase I–Planning and Scoping. Phase I includes scoping activities such as initial problem description and potential solutions under the MSA. As explained in Appendix 1, part B, Councils conduct a variety of activities considered to be generic “scoping,” such as regular hearings, information gathering, and early review of public input. In addition, scoping activities that are prescribed by NEPA may be conducted during this phase. When NEPA scoping is occurring it should be clearly identified as such.

As part of the scoping process, regulatory analysis and information collection requirements may be examined and preliminary estimates may be made of the costs and benefits of regulations. Concerns of affected States, including potential Coastal Zone Management Act (CZMA) impacts, and Indian tribes are identified and public participation is encouraged. Consideration of potential impacts to protected species pursuant to the ESA (see Policy Directive 01-117) and MMPA (e.g., relationship to take reduction plans) and to essential fish habitat (EFH) per the MSA, as well as consideration of environmental justice issues and social impacts, also begins.

Many Council/Region pairs develop action plans and convene IPTs or FMATs at this point.

ii. Phase II–Document Development. Phase II can include general frontloading activities and communications. It results in the development of draft analytical documents to inform the Council, NMFS, and the public. Under the ROAs, the Councils and NMFS typically agree to use a standardized analytical format within each region. Each regional format typically includes the requirements of MSA, NEPA, and other applicable laws and may include analyses relevant to ESA and MMPA. The Council, NMFS Regional Office, and NOAA General Counsel (GC) collaborate, through their plan teams where applicable, to identify, synthesize, review, and analyze data needed to support fishery management proposals or actions. The plan teams should collaborate, where applicable, with NOAA OLE and the regional NOAA GC to review whether regulations implementing an action are enforceable.

iii. Phase III–Public Review and Council Action to Recommend a Measure. Once the draft documents have been prepared, the Council shares them with the public and considers them publically. Depending on individual Council practices and variations in management issues, the range of activities that take place during Phase III can vary widely, in some cases encompassing

years of iterative drafting, public hearings, public comment, and multiple options papers and whitepapers; in other cases consisting of a single staff-level draft. During Phase III, bearing in mind MSA and other relevant legal authorities, the Councils have broad discretion to explore alternatives and develop recommendations. In many instances, the bulk of Council activity may take place during Phase III. Phase III is also critically important for the frontloading of ESA, as encouraged by PD 01-117, as well as EFH information, and factors pertaining to OALs where relevant.

Phase III concludes when the Council votes to make a management recommendation to NMFS.

iv. Phase IV–Post Council Action to Recommend a Measure. After the Council votes to recommend an action, two things must happen: (a) the package of supporting materials (such as required analyses and proposed regulations, etc.) must be finalized, then transmitted to NMFS;⁴ and then (b), once transmittal occurs, NMFS must review and take final action on the recommendation pursuant to the MSA formal review process.

(A) *Phase IV(a)– Preparation for Transmittal.* While NMFS and the Councils strive to complete as much supporting documentation as possible early in the process, for various reasons, it is not always feasible to finalize all materials prior to a Council’s vote. In the case of ESA section 7 consultations, formal consultation cannot begin until there is a defined action.⁵ Likewise, CZMA consistency letters cannot be completed prior to identification of a proposed action. Thus, after the Council’s vote, NMFS and Council staff conduct additional work to prepare documents for transmittal. Each Council/Region pair has its own working relationship governing who finalizes these documents – these are explained further in the ROAs described in section B of this Appendix. The degree of complexity of a recommended measure could affect the amount of time necessary to finalize a package. For instance, if regulatory text must be completed or revised in order to be “deemed” after the Council has taken final action, a

⁴ The 1997 Operational Guidelines described Phase III as concluding with the Council’s adoption of a recommendation, and Phase IV beginning with transmittal. There was little discussion of activities required to complete the package for “transmittal.” The 2005 Draft Revised Operational Guidelines attempted to address this issue by characterizing Phase III as Council Final Action, and Phase IV as Secretarial Final action, and then discussing the post-vote activities that each party might need to undertake to prepare the package for transmittal. Partially as a result of this approach and partially as a result of the 2005 Draft’s suggested check-point system, the 2005 outlined up to 16 specific steps that could take place within the main 4 phases. This 2015 version recognizes the reality that via frontloading, FMATs, and general cooperative tasking and staffing, there is no real separation of roles during the post-vote preparation process. Rather, the key procedural distinction should be between what happens after the council vote and prior to transmission regardless of which party performs any particular task. In this 2015 document, these activities are sorted into Phases IV(a) (after vote/prior to transmittal) and (b) (after transmittal). We note that some of the ROAs refer to the 16 steps set forth in the 2005 draft. This is not inconsistent with these 2015 OGs. Rather, it is just another way of characterizing the sequence of events. In addition, the specific tasking and scheduling associated with each action is further clarified within an action plan or other planning tool.

⁵ Pursuant to section 7 of the ESA, technical assistance, pre-consultation, and informal consultation can be requested to help develop alternatives that conserve ESA-listed species and designated critical habitat. These activities should take place earlier in the process such as during phases 1 – 3. (See PD 01-117).

significant amount of time could be necessary to complete this task.⁶ Pursuant to PD 01-101-01 (“Procedures for Initiating Secretarial Review of FMPs and Amendments”), the Regional Administrator (RA) determines when the supporting documentation is adequately complete to support an agency decision on the Council’s recommendation, and establishes the transmittal date for the FMP or amendment. The transmit date initiates the statutory review periods and initiates Phase IV(b).

Documentation that is required by OALs should be complete prior to transmission when possible. Failure to complete documentation/procedure required by other laws prior to transmission can affect the Secretary’s ability to make determinations under 304(a) that an FMP or amendment is consistent with applicable laws, and thus can lead to disapproval.

(B) Phase IV(b)–Secretarial Review and Implementation. During Phase IV(b), NMFS reviews and approves, partially approves, or disapproves, the Councils’ recommended FMP or amendment, and conducts rulemakings to implement regulations. This phase is subject to strict timelines and procedures set forth in the MSA (sections 304(a) and (b)), as well as timing and procedural requirements applicable to agency rulemakings pursuant to the APA. In addition, the MSA restricts the Secretary’s discretion to make any changes to Council-submitted recommendations at this point.

NMFS initiates formal public review of a Council’s proposed measures by publishing in the *Federal Register* the Notice of Availability (NOA) of an FMP or FMP amendment and/or the proposed rule to implement the Council’s recommendation. NMFS must publish the NOA for an FMP or FMP amendment “immediately” (i.e., on or before the 5th day after transmittal) for a 60-day comment period. Within 30 days of the close of the comment period (i.e., by “Day 95” after “transmittal”), the agency must approve, partially approve, or disapprove the Council’s recommendation. If NMFS takes no action by Day 95, the FMP or amendment becomes approved under the MSA by operation of law. 16 U.S.C. § 1854(a)(3). NMFS will notify the Council of the official start date of the Secretarial review period. After reviewing public comment received on the NOA and/or proposed rule, the RA makes his/her decision regarding approval/disapproval of the action to the Assistant Administrator for Fisheries (AA), and the AA determines whether to concur.⁷

NMFS may make changes to proposed regulatory text under section 304(b)(3), if it consults with the Council and publishes an explanation of any differences between the proposed and final regulations. The final step for implementing an approved final rule is to send it to the Office of

⁶ Section 303(c) of the MSA (16 U.S.C. § 1853(c)) provides that “[p]roposed regulations which the Council deems necessary or appropriate” to implement an FMP or amendment, or to modify existing FMP/amendment regulations, shall be submitted to the Secretary for review. The process by which Councils document that a proposed regulation has been deemed necessary or appropriate is often referred to as “deeming.” The deeming process can vary depending on the Council/Region pair. In some instances, a Council may take final action, then staff develops regulatory text consistent with the intent of the final action. Additional Information specific to the deeming process for each Council/Region pair is usually described in the SOPPS.

⁷ See note 3 (explaining delegation of MSA authority from the Secretary to the AA). The AA re-delegated to the RAs authority under the MSA to approve, disapprove, or partially approve FMPs/amendments with the concurrence of the AA, and authority to make determinations, approve or disapprove recommendations, and take other actions authorized in regulations implementing FMPs. NOAA Organization Handbook Transmittal # 61.

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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: