

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

NOAA Needs to Continue Streamlining the Rulemaking Process and Improve Transparency and Consistency in Fisheries Management

FINAL REPORT NO. OIG-13-011-I
JANUARY 16, 2013

U.S. Department of Commerce
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UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

January 16, 2013

MEMORANDUM FOR: Dr. Jane Lubchenco
Under Secretary of Commerce for Oceans and Atmosphere

FROM: Todd J. Zinser

SUBJECT: *NOAA Needs to Continue Streamlining the Rulemaking Process and Improve Transparency and Consistency in Fisheries Management*
Final Report No. OIG-13-011-I

Attached is our final report on the controls and processes used by NOAA's Fishery Management Councils (FMCs) for fishery rulemaking. We are conducting this review in phases and expect to generate reports incrementally. In this first phase, we evaluated the role of NOAA and the FMCs in the fishery rulemaking process and the transparency of the rulemaking process prescribed under the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

We found that while NOAA's National Marine Fisheries Service (NMFS) has complied with the MSA requirements we reviewed and has taken action to improve implementation of the MSA, (1) its required financial disclosures for FMC members who vote do little to increase transparency and lack effective review, (2) NMFS has not fully implemented several regulatory streamlining remedies, and (3) rules packages and administrative records supporting fishery management actions are not maintained uniformly at NMFS regional offices.

On December 18, 2012, we received NOAA's response to our report, which accepted all of our recommendations. Where appropriate, we have modified our final report based on this response. The formal NOAA response is included as appendix E. The final report will be posted on OIG's website pursuant to section 8L of the Inspector General Act of 1978, as amended.

In accordance with Department Administrative Order 213-5, please provide us with your action plan within 60 days of the date of this memorandum. We extend our thanks to NOAA for the courtesies shown our staff during our fieldwork. If you have any questions about this report, please contact Ann C. Eilers at (202) 482-2754 or Andrew Katsaros at (202) 482-7859.

Attachment

Report In Brief

JANUARY 16, 2013

Background

The legislation that directs how NOAA manages the nation's fisheries and the principal law that governs the fishery rulemaking process is the Magnuson-Stevens Fishery Conservation and Management Act (MSA). A primary goal of the MSA is to end and prevent overfishing through the use of annual catch limits and accountability measures. Eight regional Fishery Management Councils (FMCs), established by the MSA, work with NOAA and the public to prepare and maintain fishery management plans for fisheries under their authority. Fishery management plans are intended to preserve and repair fisheries while minimizing adverse effects on dependent communities through a formal process that incorporates scientific data, the knowledge of council members and advisory bodies, and public input.

Why We Did This Review

On August 17, 2011, Congressmen Barney Frank and John F. Tierney asked OIG to review controls and processes used by NOAA's FMCs to develop rules for the commercial fishing industry—known as fishery rulemaking. The request was prompted by concerns that NOAA's National Marine Fisheries Service (NMFS) had abandoned its core missions of "development of the commercial fishing industry" and "increasing industry participation." We are conducting this review of rulemaking in several phases and plan to generate additional reports. In this first phase, we evaluated the role of NOAA and the FMCs in the fishery rulemaking process and the transparency of the rulemaking process prescribed under the MSA. Subsequent products will look further into NOAA and the FMCs and the rules they develop.

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OIG-13-011-I

WHAT WE FOUND

FMC voting members' financial disclosures do little to increase transparency and lack effective review. We reviewed 72 publicly available disclosure statement forms for current voting council members and noted more than 20 instances where required information was missing.

NMFS has not fully implemented regulatory streamlining remedies. In 2003, NMFS developed a Regulatory Streamlining Project (RSP) in response to criticisms of the fishery management process from Congress and its constituents (such as fishers). Although NMFS received $2.5 million in its FY 2005 appropriation for the RSP, it has still not been fully implemented.

Maintenance of rules packages and administrative records needs to be consistent. Record-keeping and file organization are not uniform across NMFS regional offices, which make it difficult for NMFS headquarters to provide oversight.

WHAT WE RECOMMEND

We recommend that the Assistant Administrator for NOAA Fisheries:

1. strengthen policy guidance on financial disclosure by FMC voting members, with emphasis on how NOAA intends to handle specific consequences for conflicts or potential conflicts it identifies;
2. strengthen processes for formal reviews of financial interest disclosures, considering the time period that the disclosure covers, how financial interest amounts relate to voting restrictions, and when affiliations with outside organizations should be reported;
3. strengthen criteria for identifying conflicts of interest and processes to follow up on any conflicts that are identified;
4. finalize draft Operational Guidelines and provide them to NMFS regional offices;
5. finalize regional operating agreements between NMFS regional offices and FMCs; and
6. develop uniform procedures for the collection, management, and maintenance of documents supporting decisions and administrative records associated with fishery regulations.

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Introduction

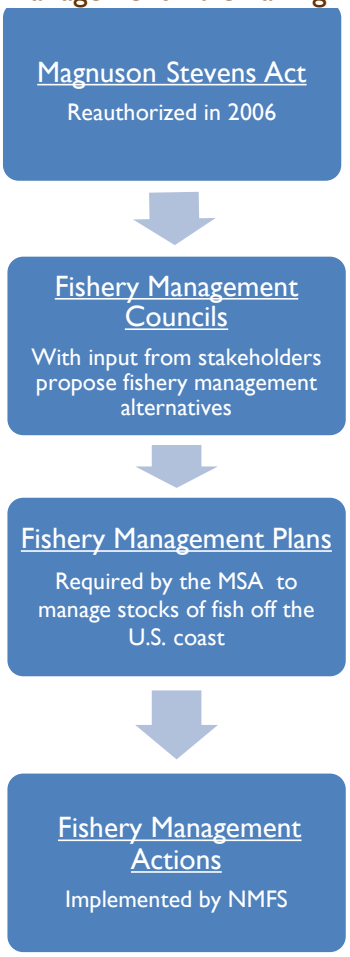
On August 17, 2011, Congressmen Barney Frank and John F. Tierney asked OIG to review controls and processes used by NOAA's Fishery Management Councils (FMCs) to develop rules for the commercial fishing industry—known as fishery rulemaking. The request was prompted by concerns that NOAA's National Marine Fisheries Service (NMFS) had abandoned its core missions of "development of the commercial fishing industry" and "increasing industry participation." [1] FMCs are funded through cooperative agreements with NMFS. See figure 1 for an overview on fishery rulemaking.

We are conducting this review of rulemaking in several phases, and we expect to generate additional reports. In this first phase, we evaluated the role of NOAA and the FMCs in the fishery rulemaking process and the transparency of the rulemaking process prescribed under the Magnuson-Stevens Fishery Conservation and Management Act (MSA).[2] Appendix A includes the objectives, scope, and methodology of this phase of the review.

We found that while NMFS has complied with the MSA requirements we reviewed and has taken actions to improve implementation of the MSA, (1) its required financial disclosures for FMC members who vote do little to increase transparency and lack effective review, (2) NMFS has not fully implemented regulatory streamlining remedies, and (3) rules packages and administrative records supporting fishery management actions are not maintained uniformly at NMFS regional offices.

Subsequent products related to our review of fishery management will look further into NOAA and the FMCs and the rules they develop.

Figure 1. Fishery Management Rulemaking



Source: OIG

MSA and Subsequent Reauthorization

The legislation that directs how NOAA manages the nation's fisheries[3]— and the principal law that governs the fishery rulemaking process—is the MSA. Since it was first enacted in 1976, Congress has amended the MSA several times, and as a result, fisheries management has undergone significant changes in goals and priorities. The requirement to rebuild overfished

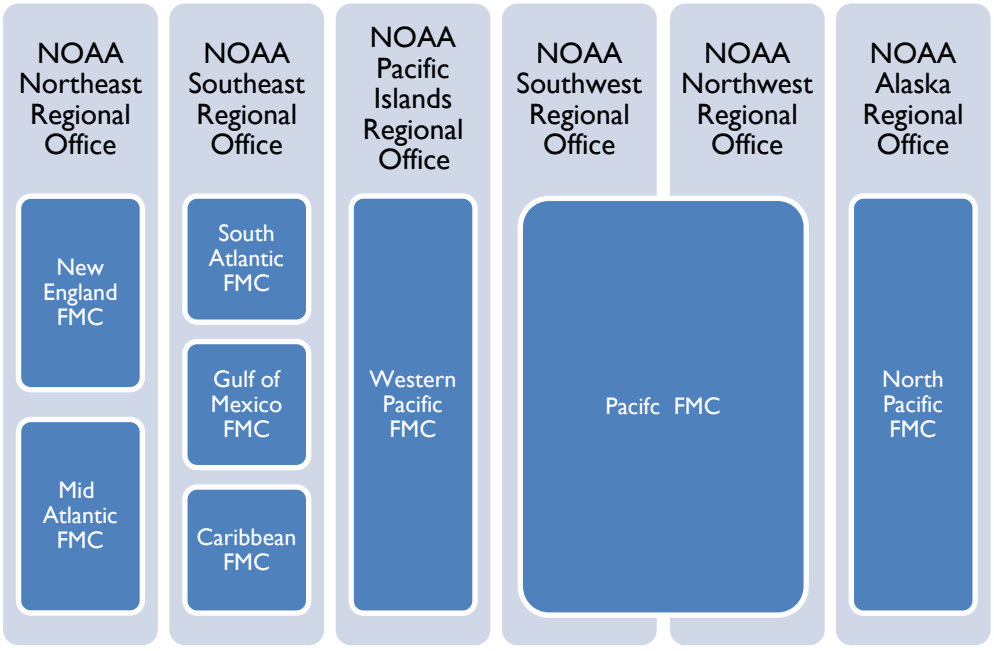
[1] August 17, 2011, letter from Congressmen Barney Frank and John F. Tierney to Department of Commerce Inspector General.
[2] 16 U.S.C. § 1801 *et seq.*
[3] A fishery refers to the activities involved in catching a species of fish (or shellfish) or a group of species that share the same habitat.

fisheries within 10 years, subject to certain exceptions, was added to the MSA in 1996. When the MSA was last reauthorized in 2007,[4] its rebuilding provisions were amended to require an immediate end to overfishing. In addition, new requirements for annual catch limits and accountability measures to address overfishing were added. Appendix B summarizes the goals of the MSA reauthorization and NOAA's implementation of the changes.

Fishery Management Councils

As shown in figure 2, eight regional FMCs established by the MSA and funded through cooperative agreements with NMFS, work with NOAA and the public to prepare and maintain fishery management plans for fisheries under their authority. In fiscal year 2012, base programmatic funding allocated to the eight FMCs totaled $28 million.

Figure 2. NOAA Regional Offices and Associated FMCs



Source: OIG

FMCs develop fishery management plans and management measures for the fisheries in statutorily prescribed areas within the exclusive economic zone (EEZ).[5] They are also responsible for developing operating procedures for committee and advisory group meetings and for developing fishery management plan amendments. NMFS approves, disapproves, or partially approves FMC-developed plans and amendments and implements approved measures.

There are 114 voting members on the eight FMCs, of which 72 were appointed by the Commerce Secretary based on nominations from state governors. Other voting council

[4] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479 (2007).

[5] An EEZ generally extends from 3–200 nautical miles offshore. Coastal states are responsible for managing fisheries within state waters, which extend out to 3 nautical miles for most states but 9 nautical miles for Florida and Texas.

members include representatives from the constituent states and NMFS regional administrators.

Each FMC has an executive director who reports to the council chair or to the head of a council executive committee. While council members include nonfederal, federal, and state officials, [6] FMC staffs are nonfederal employees. Staff size ranges from 9 (at the Caribbean FMC) to 19 (at the Gulf of Mexico FMC). Council staff members provide information for management decisions, inform the public about council activities, coordinate meetings, create fishery management documents, and assist council advisory groups.

Fishery Management Plans

The regulation of U.S. fisheries is based on fishery management plans (FMPs or plans). An FMP is a set of management objectives, and strategies for achieving these objectives within a specific fishery. The FMCs make decisions within the framework outlined in each plan while NMFS uses the plans to issue federal regulations.

FMPs are intended to preserve and repair fisheries while minimizing adverse effects on dependent communities through a formal process that incorporates scientific data, the knowledge of council members and advisory bodies, and public input. Once a plan or amendment is developed by the FMC, it is submitted to the Commerce Secretary[7] who approves, partially approves, or disapproves the plan. Currently, the eight regional FMCs and NMFS manage 46 FMPs.

National Standards

The MSA requires that FMPs are developed and amended using the best scientific information available[8] and within the boundaries of the MSA's 10 national standards, which are listed in table 1.[9] The national standards are statutory principles that must be followed when developing, amending, and implementing FMPs. The public has an opportunity to comment on FMPs as part of the regulation-setting process designed to encourage public involvement and promote transparency. Appendix C summarizes FMP development (and amendment) and regulatory processes.

[6] Council members are from federal and state governments, commercial and recreational fisheries, academia, the conservation community, and Indian tribal governments. Members are appointed to obligatory (state-specific) or at-large (region-specific) seats.

[7] The authority for certain actions—such as review of the FMP/amendment, supporting documentation, publication of proposed regulations, and issuance of the final rule—has been delegated from the Commerce Secretary to NOAA officials.

[8] NMFS's National Standard Guidelines state that "scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature. Successful fishery management depends, in part, on the timely availability, quality, and quantity of scientific information, as well as on the thorough analysis of this information, and the extent to which the information is applied. If there are conflicting facts or opinions relevant to a particular point, a Council may choose among them, but should justify the choice." 50 C.F.R. § 600.315(b)(1).

[9] NOAA regulations summarize the Commerce Secretary's interpretations of the national standards, which are guidelines intended to aid the councils in formulating FMPs. 50 C.F.R. §§ 600.305–.355.

Table I. National Standards of the MSA[a]

Conservation and management measures shall:	
1	Prevent overfishing while achieving optimum yield.
2	Be based upon the best scientific information available.
3	Manage individual stocks as a unit throughout their range, to the extent practicable; interrelated stocks shall be managed as a unit or in close coordination.
4	Not discriminate between residents of different states; any allocation of privileges must be fair and equitable.
5	Where practicable, consider efficiency, except that no such measures shall have economic allocation as its sole purpose.
6	Take into account and allow for variations among and contingencies in fisheries, fishery resources, and catches.
7	Minimize costs and avoid duplications, where practicable.
8	Take into account the importance of fishery resources to fishing communities to provide for the sustained participation of, and minimize adverse impacts to, such communities (consistent with conservation requirements).
9	Minimize bycatch[b] or mortality from bycatch.
10	Promote safety of human life at sea.

Source: NMFS

[a]Listed here are summaries of the National Standards set forth in section 301(a) of the MSA. Additional information and the Commerce Secretary's guidance on the National Standards are set forth in 50 C.F.R. 600.305 *et seq.*

[b]The term *bycatch* means fish that are harvested in a fishery, but not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.

Types of Fishery Management Actions

Table 2 shows fishing regulations and related announcements that NMFS has adopted since 2009 under the MSA rulemaking process. Types of fishery management actions include proposed rules, final rules, in-season actions that implement previously published regulations, emergency rules, and notices to the public of various actions affecting the fisheries. Appendix D describes the different types of fishery management actions.

Table 2. Summary of NOAA Fishing Regulations Under the Magnuson-Stevens Fishery Conservation and Management Act

Type of Fishery Management Action	2011	2010	2009
Proposed rules	75	50	60
Final rules	86	61	62
In-season actions	155	161	162
Emergency rules and interim measures	7	15	3
Notices	82	55	44

Source: OIG with statistics provided by NMFS Office of Sustainable Fisheries

Note: Regulations may take more than 1 year to complete; thus, the numbers in the table only illustrate general levels of regulatory action from year to year.

Findings and Recommendations

I. FMC Voting Members' Financial Disclosures Do Little to Increase Transparency and Lack Effective Review

To meet the financial disclosure requirements stated in the MSA,[10] NOAA asks that the voting council members and council member nominees disclose financial interests on a Statement of Financial Interests form.[11] The MSA does not require FMC staff to submit financial disclosure forms.

We reviewed 72 publicly available disclosure statement forms for current voting council members and noted more than 20 instances where required information was missing (see table 3).[12] The omissions indicate ineffective review, and thus, information disclosed may be inaccurate or incomplete.

Table 3. Information Missing from Statements of Financial Interests

Missing Required Information	Instances Noted
Degree of ownership (e.g., percentage)	3
Start date of financial interest	5
Address of organization	6
Fisheries of interest	2
Relationship to interest (e.g., marketing, guide, or charter)	2
Acknowledgment of no financial interests to disclose	4
Total	22

Source: OIG

Instructions on NOAA's Statement of Financial Interests are, at times, ambiguous. For example, in one area, the instructions explain that conflicts of interests between council-related actions and activities must be reported; another area instructs that if there are "no financial interests to disclose," simply check the appropriate box and fill out the last page (which only requires general information and a signature). This type of instruction allows each council member to judge what information to disclose and how to disclose it. When council members interpret the instructions differently, the standard is blurred, which may lead to inconsistent reporting.

On the Statement of Financial Interests, NOAA instructs that the amount of financial interest is not required to be disclosed. However, without this information, NOAA, individual FMCs, and the public are unable to properly determine if the reported financial interests exceed the

[10] The MSA states that "Each affected individual must disclose any financial interest held by— (A) that individual; (B) the spouse, minor child, or partner of that individual; and (C) any organization (other than the council) in which that individual is serving as an officer, director, trustee, partner, or employee; in any harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction, or with respect to an individual or organization with a financial interest in such activity." 16 U.S.C. § 1852(j)(2).
[11] NOAA Form 88-195 (Sept. 1993).
[12] In 9 instances, the "nothing to disclose" box was checked, but information was disclosed.

thresholds and whether the council member should be excluded from voting on issues that conflict with financial interests.

Each council member subject to the MSA financial disclosure requirements is responsible for ensuring information on the form is complete and accurate. According to NMFS officials, the NMFS Office of Sustainable Fisheries reviews the disclosures but does not independently verify the information.

We also found that instruction provided to FMC executive staffs on how to review for or report potential red flags on disclosure forms in their jurisdiction is limited and informal. In one instance, we spoke with an executive director who suspected misreporting by a council member yet felt there was no available recourse or means to discover whether a misreporting had actually occurred. Review by council leadership can be a valuable tool if review methods and escalation procedures are in place. However, the general perception of executive staffs seems to be that, aside from meeting the requirements of the MSA, very little value comes from completion of these forms.

To increase the transparency provided by financial interest disclosures and assist voting FMC members in avoiding conflicts between official council duties and private financial interests or affiliations, the Assistant Administrator for NOAA Fisheries should strengthen financial disclosure requirements and procedures.

Recommendations

We recommend that the Assistant Administrator for NOAA Fisheries strengthen:

1. policy guidance on financial disclosure by FMC voting members, with emphasis on how NOAA intends to handle specific consequences for conflicts or potential conflicts it identifies;

2. processes for formal reviews of financial interest disclosures, considering the time period that the disclosure covers, how financial interest amounts relate to voting restrictions, and when affiliations with outside organizations should be reported; and

3. criteria for identifying conflicts of interest and processes to follow up on any conflicts that are identified.

II. NMFS Has Not Fully Implemented Regulatory Streamlining Remedies

In 2003, based on direction from Congress and as a result of regulatory challenges and court cases that NOAA faced related to fishery management, NMFS developed a Regulatory Streamlining Project (RSP). The RSP responds to criticisms of the fishery management process from Congressional members, their constituents (such as fishers), and other knowledgeable individuals. Criticisms include a lack of clarity in responsibilities among NMFS regional offices, science centers, and the FMCs and disconnected processes between NMFS and the FMCs. Table 4 summarizes the progress NMFS has made in implementing changes described in the RSP.

Table 4. Changes NMFS Proposed in the RSP and Status of Implementation

Proposed Changes	Implemented	Partially Implemented	Unimplemented
Front-loading the NEPA process	X		
Revising the Operational Guidelines for the Fishery Management Process			X
Establishing a national training program	X		
Hiring environmental policy coordinators	X		
Improving the administrative process		X	
Improving the fishery management process		X	
Addressing science issues		X	
Workforce organization/prioritization		X	

Source: OIG and Regulatory Streamlining Report to Congress[13]
Note: NEPA = National Environmental Policy Act.[14]

NMFS described the RSP as proposals that are the result of years of activities, which led to a larger effort to improve fishery management. As NMFS developed and began implementing its RSP, it also cautioned that more staff and funding would be needed to fully implement it. NMFS received $2.5 million in its FY 2005 appropriation for the RSP. As of 2012, the RSP has not been fully implemented.

One of the many components of the RSP was revision of the Operational Guidelines for the Fishery Management Process. The guidelines identify past problems in developing FMPs and managing fisheries, such as delays and inefficiencies, and explain how NOAA and the Councils will work together to integrate the many statutory requirements that apply to the development of fishery management actions. The current Operational Guidelines, dated August 2005, remain in draft form. Although the guidelines are available to NMFS employees through their Regulatory Services intranet page, the guidance has not been finalized, and several NMFS employees we interviewed were unaware of or only vaguely aware of the guidelines. Additionally, elements of the draft guidelines that could help to improve fishery management processes have not been fully implemented. One example is the regional operating agreement between each NMFS regional office and its FMCs. The purpose of the agreement is to provide a clear understanding of roles, responsibilities, and obligations between FMCs and NMFS regional offices. As of summer 2012, only one of the eight councils had a regional operating agreement with its NMFS regional office.

When questioned about why the guidelines were not finalized, NMFS officials explained that National Environmental Policy Act (NEPA) requirements, reauthorization of the MSA, and demands on Office of General Counsel staff affected the review and approval process for the Operational Guidelines and regional operating agreements. In 2005, NMFS officials indicated

[13] NMFS submitted the "Report to Congress on the Regulatory Streamlining Project" on December 16, 2002, with a stated goal to improve the efficiency and effectiveness of NMFS operations and increase compliance with all procedural requirements.
[14] National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321*et seq.*

that the delay in formal issuance of the guidelines had not significantly affected progress in implementing regulatory process improvements. [15]

Without the guidelines, expectations that should be clearly defined and communicated early on—such as responsibility between NMFS and the FMCs for preparation of documents supporting fishery management decisions and designation of which reports need to be produced by which entity and with what frequency (e.g., Stock Assessment and Fishery Evaluation reports[16] and fishery performance reports)—may not be stated and understood. There is greater opportunity for miscommunication and frustration in an already complex and time-consuming process, especially when staff changes at NMFS and FMCs can lead to practices that differ from those followed previously.

NMFS officials explained to us that they have not finalized the agreements because all of the regions have established individual coordination systems;[17] however, communicating and documenting processes and expectations should give NOAA a better opportunity to identify necessary tasks and ensure they are appropriately assigned and completed.

Recommendations

We recommend that the Assistant Administrator for NOAA Fisheries:

1. finalize draft Operational Guidelines and provide them to NMFS regional offices and

2. finalize regional operating agreements between NMFS regional offices and FMCs.

III. Maintenance of Rules Packages and Administrative Records Needs to Be Consistent

The role of the NMFS Sustainable Fisheries Division is to collaborate with and advise FMCs in their respective jurisdictions by contributing to the development and implementation of FMPs and other actions. The Sustainable Fisheries Division in the NMFS regional offices maintains the official written records supporting regulations implementing FMPs within their geographical area of responsibility.

However, record-keeping processes and file organization are not uniform across NMFS regional offices. Of the four regional offices we visited, one has a records officer, whereas the others rely on various staff familiar with the particular regulation to store and maintain the supporting

[15] National Academy of Public Administration, "Improving Fisheries Management: Actions Taken In Response to the Academy's 2002 Report." Report for Congress and the NMFS, February 2005.
[16] The Stock Assessment and Fishery Evaluation reports provide to FMCs the most recent biological condition of stock and the marine ecosystems in the fishery management unit and the social and economic condition of the recreational and commercial fishing interests, fishing communities, and fish processing industries. 50 C.F.R. § 600.315(e)(1). The reports periodically summarize the best available scientific information concerning the past, present, and possible future condition of the stock, marine ecosystems, and fisheries being managed under federal regulation. The information may be used to update or expand previous environmental and regulatory impact documents and ecosystem and habitat descriptions.
[17] According to NMFS officials, region–FMC pairs have systems for assigning and tracking tasks and responsibilities. The systems are documented in varying formats, including flowcharts, and are often informal.

documentation. Normally, the information is stored centrally and in a combination of manual and electronic or digital formats, including scanned images. The large volume of inconsistently maintained documents made our review more complicated. This lack of standardization would also make it difficult for NMFS headquarters to provide effective oversight. For example, standardization would allow headquarters the opportunity to ensure regional offices sufficiently maintained the necessary documentation for each rule in the event of a Freedom of Information Act request or a lawsuit. Uniform procedures for managing documentation supporting fishery regulations are needed to help ensure that the documentation supporting regulations is complete and accessible. For the fishery management actions we examined, we noted that NMFS regional offices either submitted proposed rules to the science center[18] for review or certified in decision memos that the action was consistent with national standard 2, requiring the use of the best scientific information available. Table 5 in appendix A contains the final rules we reviewed and the date when each was published in the *Federal Register*.

Recommendation

We recommend that the Assistant Administrator for NOAA Fisheries:

1. develop uniform procedures for the collection, management, and maintenance of documents supporting decisions and administrative records associated with fishery regulations.

[18] NMFS science centers generate scientific information and analyses in support of fishery conservation and management. The centers plan, develop and manage NMFS' scientific research programs related to fisheries.

Summary of Agency Response and OIG Comments

On December 18, 2012, we received NOAA's comments on our draft report, which we include as appendix E of this report. NOAA did not dispute our findings. Also, NOAA accepted all recommendations and had no comments, concerns, or suggestions regarding them. NOAA provided clarifications and additional technical information related to implementation of the MSA. We considered NOAA's suggestions in preparing this final report and made several of the suggested changes.

Appendix A: Objectives, Scope, and Methodology

We initiated this review of controls and processes used by NOAA and the FMCs as related to developing rules for the commercial fishing industry, pursuant to a joint request made by Massachusetts Congressmen Barney Frank and John Tierney on August 17, 2011.

This is our first report on FMCs and rulemaking. Our review will be conducted in phases and will result in possible additional products produced at several intervals. In this phase of the review, our objectives were to evaluate the role of NOAA and the FMCs in the fishery rulemaking process and the transparency of the rulemaking process prescribed under the MSA:

- We identified fishery management rules developed by NOAA during the period 2007–2011 as a result of the MSA.
- We examined rules packages and administrative records for a selection of fishery regulations in four of the six NMFS regions, comparing the process that was followed with what was described in the laws and regulations. Table 5 lists the fishery management actions we reviewed.
- We collected publicly available information on standard rulemaking practices, including practices deployed elsewhere within the Department of Commerce.
- We compared the rulemaking process employed by NOAA with the prescribed Administrative Procedure Act[19] process.
- We compiled standard information from the eight regional FMCs, visited three council offices (New England, Gulf of Mexico, and Pacific FMCs), and interviewed council members and staff (including administrative officers, fishery biologists, economists, and an anthropologist).
- We interviewed the eight FMC executive directors.

[19] The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, was passed in 1946 to clarify the process of making regulations and to allow greater accessibility and participation by the public in the rulemaking process.

Table 5. Summary of Fishery Management Actions Reviewed

NMFS Region	Regulatory ID	Description	Date the Final Rule Was Published in the *Federal Register*
Northeast	0648-AW72	Implements Amendment 16 to the Northeast Multispecies FMP	4/9/2010
	0648-BA23	Implements the Omnibus Annual Catch Limits/Accountability Measures Amendment	9/29/2011
	0648-AY29	Implements measures in Framework Adjustment 44 to the Northeast Multispecies FMP	4/9/2010
	0648-AW87	Secretarial interim action implementing measures to reduce fishing mortality and maintain stock rebuilding at the Northeast Multispecies Fishery	4/13/2009
Southeast	0648-AV14	Revises allowable bycatch reduction devices for the Gulf of Mexico Shrimp Fishery	11/18/2008
	0648-AY55	Implements amendments to the Queen Conch and Reef Fish FMPs of Puerto Rico and the U.S. Virgin Islands (fisheries of the Caribbean, Gulf of Mexico, and South Atlantic)	12/30/2011
	0648-BA54	Regulatory Amendment to the FMP for the reef fish resources of the Gulf of Mexico (GOM) to implement a 2011 total allowable catch for GOM red snapper	4/29/2011
	0648-AY11	Amendments to the Snapper–Grouper FMP	12/30/2010
Southwest	0648-AW50	Initiates collection of a permit fee for vessel owners participating in commercial and charter recreational fishing for highly migratory species	7/28/2009
	0648-BA49	Revises vessel identification requirements for fishing vessels with west coast highly migratory species permits	11/29/2011
	0648-AU26	Implements Amendment 12 to the Coastal Pelagic Species FMP, prohibiting harvest of all species of krill off the West Coast (i.e., California, Washington, and Oregon)	7/13/2009
Northwest	0648-AY68	Implements Amendments 20 and 21 to the Pacific Coast Groundfish FMP (Trawl Rationalization Program)	10/1/2010

Source: OIG

We conducted this evaluation from January 2012 to July 2012, under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated August 31, 2006, as amended. We conducted the evaluation in accordance with the Quality Standards for Inspection and Evaluation, January 2011, issued by the Council of the Inspectors General on Integrity and Efficiency.

Appendix B: Goals of MSA Reauthorization and NOAA Implementation Priorities

The MSA is the predominant legislation for U.S. conservation and management of fisheries. Over the years in an attempt to improve implementation of the requirements of the MSA and to promote more effective decision making and fishery management, Congress revised the MSA. Table 6 outlines the goals of the most recent revisions to the act and NOAA's priorities for implementing them.

Table 6. Overview of the Goals of the Reauthorized MSA

Goals of MSA Reauthorization	NOAA Implementation Priorities
✓ More stringent requirements to end and prevent overfishing ✓ Expansion of management tools ✓ Increased use of science ✓ Improved international cooperation	✓ Develop and expand annual catch limits ✓ Improve data on recreational fishing ✓ Address bycatch, illegal, unreported, and unregulated fishing ✓ Streamline MSA and National Environmental Policy Act requirements

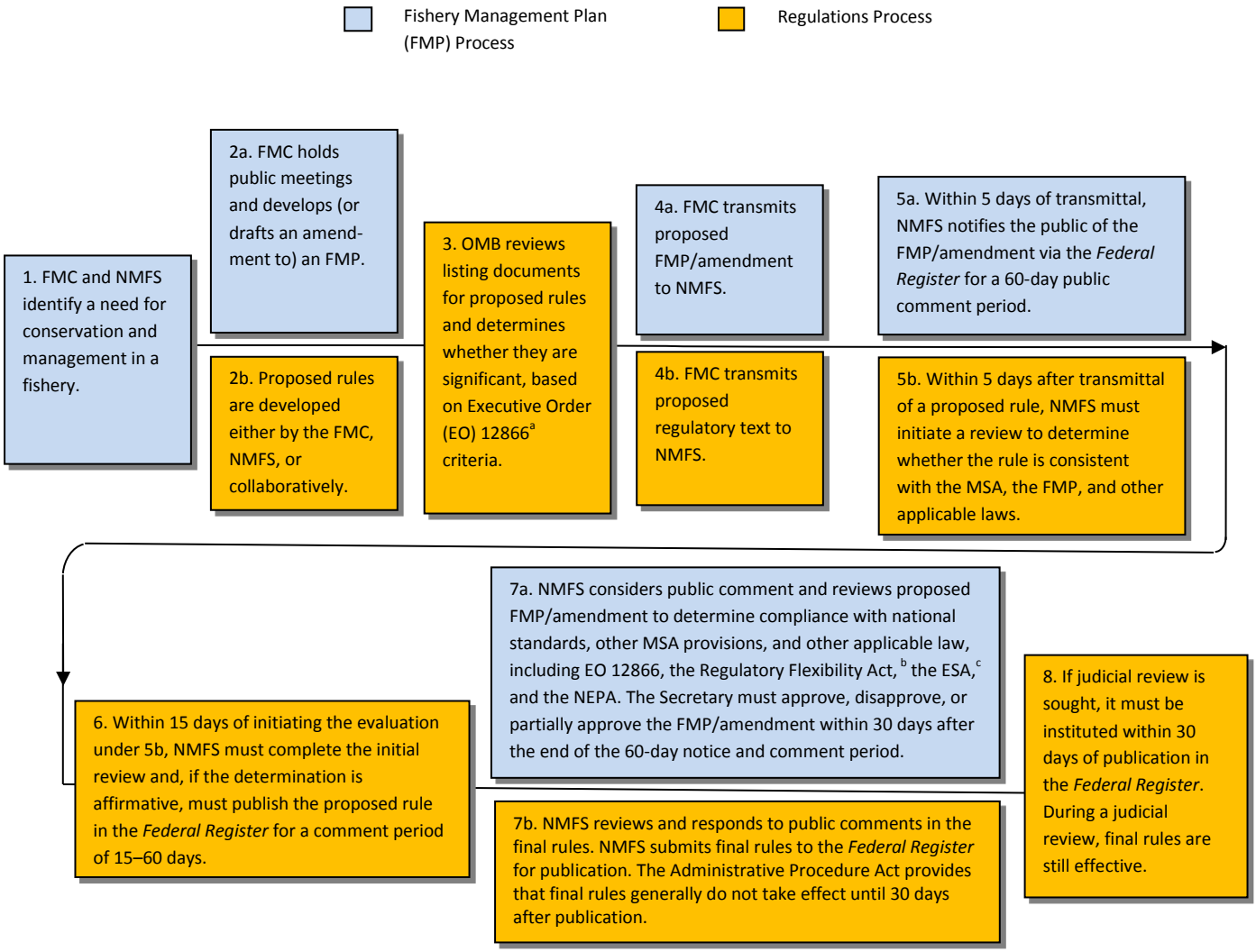
Source: NMFS

A primary goal of the reauthorized MSA was to end and prevent overfishing through the use of annual catch limits and accountability measures, which were required to be implemented by 2010 for stocks subject to overfishing and by 2011 for all others (with the exception of those limited by annual life cycles or international agreements). FMCs use various tools—including annual catch limits and limited access privilege programs (LAPPs), as well as general catch limits, trip limits, seasons, gear restrictions, and bag limits—to prevent overfishing. LAPPs involve transferable permits, which specify the amount of catch that may be harvested during a given time period.

To effectively meet MSA goals and use new management tools, FMC decisions must be based on timely, reliable scientific information. This creates a need for FMCs to have close relationships with their science centers. The MSA requires that FMCs develop 5-year research plans outlining their anticipated needs and priorities. One area of scientific data that has historically been a challenge to gather is recreational fisheries. Therefore, NOAA has made improvement of recreational fishery data a priority.

The requirements of both MSA and NEPA have a substantial effect on the enactment process of fishery management rules. The details of these requirements and effects are substantial and are outside the scope of this report. Note, however, that the acts have overlapping, as well as individual, requirements and time frame restrictions. Careful planning by both NMFS and the FMCs is needed to ensure that every requirement is met in the prescribed time frame.

Appendix C: Simplified Diagram of the Process for Developing (and Amending) FMPs and Implementing Regulations Under the MSA



Source: OIG with input from NMFS Office of Sustainable Fisheries

[a]Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[b]Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*[20]

[c]Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

[20] The Regulatory Flexibility Act requires federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden. The chief counsel for advocacy of the U.S. Small Business Administration is charged with monitoring federal agencies' compliance with the act and with submitting an annual report to Congress.

Appendix D: Fishery Management Actions

Proposed rules – Announcements of agencies' plans to manage fishing activities and implement objectives stated in FMPs that give interested persons an opportunity to submit comments to improve the final regulation.

Final rules – Regulations that have gone through the rulemaking process, are approved by the Commerce Secretary, and have final legal effect. The codified text is published in the *Code of Federal Regulations.*

In-season actions – Regulatory actions taken pursuant to, or implementing, regulations that have been published in the *Federal Register.* Examples include closing or reopening a fishery and transferring quota. (These do not make changes to the *Code of Federal Regulations.*)

Emergency rules and interim measures – Regulations issued in response to events or problems that require immediate action, such as a public health emergency or oil spill. Emergency rules are limited to 180 days and can be extended for an additional 180 days if public comment has been taken.

Notices – Non-rulemaking documents, which do not have regulatory effect, used to inform and involve the public. Examples include notices of availability (of FMPs and FMP amendments), notices of permit issuances and applications, notices of stock status determinations, notices of intent to prepare National Environmental Policy Act documents, and corrections.

Appendix E: Agency Response

MEMORANDUM FOR: Ann C. Eilers
Principal Assistant Inspector General for Audit and Evaluation

FROM: David W. Titley, PhD 12/18
NOAA Deputy Under Secretary for Operations

SUBJECT: *NOAA Needs to Continue Streamlining the Rulemaking Process and Improve Transparency and Consistency in Fisheries Management*
Draft OIG Audit Report

Thank you for the opportunity to comment on the Office of the Inspector General's draft audit report evaluating the controls and processes used by NOAA's Fishery Management Councils for fishery rulemaking. Our specific comments on the report's findings and recommendations are attached.

Attachment

Department of Commerce
National Oceanic and Atmospheric Administration
Comments on the Draft OIG Report Entitled
"NOAA Needs to Continue Streamlining the Rulemaking Process and Improve Transparency and Consistency in Fisheries Management"

General Comments

In general, NOAA Fisheries feels the information and feedback contained in the draft report are both accurate and constructive, and we look forward to the development of an action plan to address the recommendations. Outlined below are comments NOAA believes will further enhance and improve the accuracy and clarity of the final report.

Your cover memo notes your appreciation for the assistance from NOAA staff during the review. NOAA would also like to extend our appreciation to your staff for their effort to understand fully the complexity of the regulatory process and their dedication to completing this comprehensive review.

Recommended Changes for Factual/Technical Information

Page 1, paragraph 3.
Some of the requirements mentioned are not specifically required by the MSA. For clarity, NOAA offers the following amendment to the first sentence so it is revised to read: "... complied with certain MSA requirements and taken additional actions to improve implementation, (1) its required financial disclosures ...."

Page 1, Footnote 2.
The reference should be to 16 U.S.C. 1801, *et seq.*, not "6 U.S.C."

Page 1, Footnote 3.
This footnote defines "fishery" more narrowly than the MSA. Based on MSA definitions of "fishery" and "stock of fish" at 16 U.S.C. §§ 1802(13) and (42), we offer the following language to better conform with these definitions: "A fishery refers to fishing for a species, subspecies or other grouping of fish (which includes shellfish) that can be treated as a unit for conservation and management purposes and identified based on geographical, scientific, technical, recreational, and economic characteristics."

Page 1, last sentence, continuing on to page 2.
Note that MSA section 304(e) sets forth rebuilding requirements and section 303(a)(15) sets forth requirements for annual catch limits and accountability measures. 16 U.S.C. §§ 1854(e) and 1853(a)(15). For clarity about the timeline of changes to these MSA provisions, we offer the following language (starting changes with the second sentence of the paragraph):

> "Since it was first enacted in 1976, Congress has amended the MSA several times and as a result fisheries management has undergone significant changes in goal and priorities. The requirement to rebuild overfished fisheries within 10 years, subject to certain exceptions, was added to the MSA in 1996. When the MSA was last reauthorized in

2007,[1] its rebuilding provisions were amended to require ending overfishing 'immediately.' In addition, new requirements for annual catch limits and accountability measures to address overfishing were added."

Page 2, third paragraph, line 2
In lieu of the words, "within their exclusive economic zone (EEZ)," we offer the following language to be more accurate: "within statutorily-prescribed areas within the exclusive economic zone (EEZ)." *See* 16 U.S.C. § 1852(a)(1) (describing geographical areas of responsibility for each regional fishery management council).

Page 2, Footnote 5.
For federal fisheries management purposes under the MSA, note that the inner boundary of the EEZ is the seaward boundary of each of the coastal States. 16 U.S.C. § 1802(11). Most states' seaward boundary is 3 nm offshore. In a few cases, the boundary is 9 nm offshore. Also, please note that the MSA allows for State regulation of its fishing vessels outside the boundaries of the State in certain circumstances, 16 U.S.C. § 1856(a)(3), and provides a process for Federal management within state waters in certain limited circumstances, 16 U.S.C. § 1856(b). To be more accurate, we offer the following revision to Footnote 5 to read as follows: "The EEZ generally extends from 3-200 nautical miles offshore. Coastal states are responsible for managing fisheries within state waters, which extend out to 3 nautical miles for most states but 9 nautical miles for Florida and Texas."

Page 2, third paragraph, 4th line.
Please note that NMFS does not always "approve" an FMC's recommendation. NMFS must approve, disapprove or partially approve a fishery management plan or amendment based on whether the action is consistent with applicable law. 16 U.S.C. § 1854(a)(3). To be more accurate, we offer the following language instead: "NMFS approves, disapproves or partially approves Council-developed plans and amendments and implements approved measures."

Page 2, last sentence.
To more accurately reflect the representation on the Councils (16 U.S.C. § 1852(b)(1)), we offer the following language to replace that sentence: "Other voting council members include representatives from the constituent states and NMFS regional administrators."

Page 3, First paragraph, second and fourth sentences.
Whether an FMC employee is treated as an employee of the Executive Branch is a complex issue, and requires an analysis of the particular law (statute, regulation, executive order) at issue. For example, FMC staff are not considered federal "employees" under 5 U.S.C. § 2105; Title 5 of the U.S. Code sets forth general provisions regarding Government Organization and Employees. However, they have been considered "special government employees" for purposes of criminal conflict-of-interest statutes set forth at 18 U.S.C. § 207. To be more accurate, we offer the following language to replace the independent clause of the second sentence: "the status of FMC staffs as Executive Branch employees depends on the particular statute or other law at issue." We further offer the suggestion of deleting the word "member" from the fourth sentence so as to avoid confusion from the current reference to "Council staff members."

[1] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479 (2007). [Note: This is in current draft report as footnote 4].

Page 3, First paragraph, 5th line.
We note that rulemaking is an activity conducted by NMFS to implement an approved-FMC recommendation. We suggest distinguishing the FMC's role in providing for public input during the development of fishery management recommendations (*see* 16 U.S.C. § 1852(h)(3) (public hearings by Council during development of plans and amendments) from NMFS's provision of public participation opportunities during rulemaking (*see* 16 U.S.C. § 1854(b) (rulemaking action by Secretary)). In order to draw that distinction, we offer the following language to replace the words "rulemaking process": "development of management recommendations."

Page 3, paragraph 3, first sentence.
The description of FMPs should specifically state the conservation requirements of the MSA. *See e.g.* 16 U.S.C. §§ 1851(a) (specifying that national standards for FMPs include preventing overfishing and minimizing bycatch and bycatch mortality), 1853(a)(15) (requiring FMPs to have annual catch limits such that overfishing does not occur) and 1854(e) (requiring rebuilding overfished fisheries). To be a more complete statement, we offer the following rewording to the first part of this sentence: "FMPs are intended to rebuild overfished fisheries, end overfishing and achieve other conservation and management goals while minimizing adverse effects on..."

Page 3, paragraph 3, second sentence.
As explained above in comments for *Page 2, third paragraph, 4th line*, note that the Secretary's approval, disapproval or partial approval is based on whether an FMP or amendment is consistent with applicable law.

Page 3, 4th paragraph, third sentence.
We note that the public has opportunities to comment on FMPs both through the council process during development of the FMP, and during the agency review and rulemaking stages through formal notice and comment. We offer the following to replace that sentence in order to identify all opportunities for public input: "As part of the statutory MSA process, designed to encourage public participation and promote transparency, the public has an opportunity to comment on FMPs both during their development at the council level, and then through NMFS's formal public review process, and subsequent formal rulemaking process for implementing regulations."

Page 3, Footnote 9.
Please note that National Standard Guidelines are "advisory guidelines (which shall not have the force and effect of law)." 16 U.S.C. § 1851(b). To more accurately reflect the status of the Guidelines, we offer the following: replace the word "regulations" with the word "guidelines."

Page 4, note (a).
Pursuant to Section 301(b) of the MSA, the Secretary publishes the National Standard guidelines providing the Secretary's interpretation of the Standards. Table 1 summarizes the National Standards themselves as set forth in MSA section 301(a). To be more complete, we offer the following to replace the language in note (a): "Listed here are summaries of the National Standards as set forth in section 301(a) of the MSA. Additional information and the Secretary's guidance on the National Standards is set forth in 50 CFR 600.305 et seq."

Page 4, note (b).
We note that, under the MSA, "bycatch" is defined with reference to "fish," and "fish" is defined not to include marine mammals and birds. 16 U.S.C. §§ 1802(2), (12). To draw that distinction, we offer the following language: "The term "bycatch" means fish which are harvested in a

fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program. "Fish" do not include marine mammals or birds."

Page 4, Table 1.
We offer the following clarifications to track better the text of the MSA National Standards at 16 U.S.C. § 1851(a)(1), (4), (5), (9) and (10):
NS 1 -- add underlined text: "...while achieving, on a continuing basis, optimum yield"
NS 4 -- revise as follows and to add underlined text: "...different states. Any allocation...fair and equitable; reasonably calculated to promote conservation; and carried out to avoid excessive shares"
NS 5 -- revise to say "consider" efficiency instead of "promote" efficiency. This language was statutorily revised in 1996.
NS 9 -- revise to add underlined text: "To extent practicable, minimize bycatch and mortality from bycatch"
NS 10 -- add "to the extent practicable" at the end.

Page 4, Table 2.
NOAA suggests that a note be added associated with the table reminding the reader that regulations may take a year or more to complete. Thus comparing the number of regulations from year-to-year may be difficult and not reflect increases or decreases in regulations. We offer the following language to provide that clarification: "Note: Regulations may take more than one year to complete; thus, the numbers in the table only illustrate general levels of regulatory action from year-to-year."

Page 5, Table 3
We request clarity on what information was missing from the "Acknowledgement of no financial interests to disclose." If someone did disclose information on the form, then it would be appropriate for the acknowledgement to be left blank.

Page 7, Table 4
We suggest that "Revising the Operational Guidelines for the Fishery Management Process" be considered partially implemented, rather than unimplemented. While the 2005 revisions to the operational guidelines remain in Draft, aspects of those guidelines are being used, such as frontloading and interdisciplinary plan teams.

Page 7, second paragraph.
We offer the following language to replace the second paragraph to clarify the relationship between the RSP and the Operational Guidelines and the current status and function of the Operational Guidelines: "The RSP identified past problems, such as delays and inefficiencies, in developing FMPs and managing fisheries. One of the many actions included in the RSP was revision of the Operational Guidelines for the Fishery Management Process. The Operational Guidelines are an internal NMFS document that explains how NOAA and the Councils will work together to integrate the many statutory requirements that apply to the development of fishery management actions. The guidelines currently in effect were last updated in 1997. NMFS developed draft revised Operational Guidelines in 2005 and they remain in draft form. Although the 2005 draft is available to NMFS employees through their Regulatory Services Intranet page, the guidance has not been finalized, and several NMFS employees we interviewed were unaware or only vaguely aware of the 2005 draft. While some elements of the 2005 draft are being

applied, such as the use of interdisciplinary plan teams and frontloading, additional elements of the draft guidelines that could help to improve fishery management processes have not been fully implemented. One example is the regional operating agreement between each NMFS regional office and its FMC. The purpose of the agreement is to provide a clear understanding of roles, responsibilities, and obligations between FMCs and NMFS regional offices. As of summer 2012, only one of the eight councils had a regional operating agreement with its NMFS regional office."

Page 7, third paragraph.
This paragraph does not fully reflect NMFS's explanation of why the 2005 draft Operational Guidelines were not finalized. We offer the following language to replace the third paragraph to clarify the reasons for why the 2005 draft Operational Guidelines were not finalized: "When questioned about why the guidelines were not finalized, NMFS officials explained that reauthorization of the MSA, which included a requirement for NMFS to revise and update its procedures for complying with the National Environmental Policy Act (NEPA), affected the application of the 2005 draft Operational Guidelines, which also addressed the application of NEPA to fishery management actions. In addition, early efforts to implement provisions in the 2005 draft on a test basis revealed that some features placed unworkable demands on the Office of General Counsel staff and created undesirable redundancies. In 2005, NMFS officials indicated that the delay in formal issuance of the guidelines had not significantly affected progress in implementing regulatory process improvements."

Page 9, first paragraph
As written, this paragraph appears to assume that NMFS compiles discrete administrative records as each fishery management action is being developed. Although documents and other materials related to fishery management actions are retained consistent with requirements under the Federal Records Act, given the large volume of actions taken NMFS only compiles administrative records in those instances where litigation challenging a regulation is filed or, sometimes, where litigation is expected. Further, it is not feasible to have a uniform practice for compiling an administrative record. In some cases, NMFS may take joint action with another agency that utilizes a different approach to assembling administrative records, or controlling legal precedent or other litigation considerations may dictate a different approach.

Page 12, first paragraph after the table, first and second sentences.
As written, the first and second sentences confuse the actions required generally to end and prevent overfishing (16 U.S.C. § 1853(a)(15) (annual catch limits)) with those required when a stock is declared overfished (16 U.S.C. § 1854(e) (overfished fisheries)). To clarify these sentences, we offer the following language to replace the first and second sentences of this paragraph: "A primary goal of the reauthorized MSA was to end and prevent overfishing through the use of annual catch limits and accountability measures, which were required to be implemented by 2010 for stocks subject to overfishing and by 2011 for all others."

Page 12, first paragraph after the table, line 4.
Councils use many management tools to address overfishing. *See* 16 U.S.C. §§ 1853(a)(15) (requiring annual catch limits), 1853a (providing that Council *may* develop a LAPP) and 1853(b) (providing other discretionary provisions, such as gear restrictions and time and area closures, that Council *may* use in FMPs or amendments). To be more complete, we offer the the following additional language. After "FMCs use", insert "various tools including", and after

"(LAPPs)", insert "as well as general catch limits, trip limits, seasons, gear restrictions, and bag limits,".

Page 13, box 3.
Section 3(f) of Executive Order 12866 sets forth 4 criteria for determining whether an action is "significant." *See* next comment for text of the criteria. Economic impact is not the only test. To be accurate, we offer as a suggestion striking the word "economically" from this box.

Page 13, footnote a.
If more information about the determination of "significance," is desired, we offer the following language after the citation to accomplish that objective: "A regulatory action is significant under the EO if it is likely to result in a rule that may: 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 EO. *See* E.O. 12866 § 3(f)."

Page 13, box 8.
To track the MSA's judicial review provision, specifically 16 U.S.C. § 1855(f)(1)-(2), we offer the following in lieu of the current language in the box: "If judicial review is sought, a complaint must be filed within 30 days after a final rule is promulgated or an action taken under regulations is published in the *Federal Register*. A final rule or action remains in effect pending resolution of the case."

Page 13, footnote 20, lines 1 and 2.
To be more accurate, we offer the following language to replace the first sentence: "The Regulatory Flexibility Act requires federal agencies to conduct analyses for regulatory actions that may have a significant economic impact on a substantial number of small entities, including consideration of significant alternatives that minimize any such impact and meet the objectives of applicable statutes. *See* 5 U.S.C. §§ 603, 604 and 605(b)." Note that sections 603 and 604 set forth requirements for initial and final regulatory flexibility analyses. Section 605(b) provides that those analyses are not required for a proposed or final rule if an agency certifies that it will not "have a significant economic impact on a substantial number of small entities.

Editorial Comments

The statement in the cover memo and on page 1 that NMFS has complied with "certain" MSA requirements contains a negative inference that may understate NOAA's compliance.

NOAA Response to OIG Recommendations
All of the OIG Recommendations in this draft report pertain to and can be implemented by NOAA Fisheries. NOAA Fisheries accepts all of the recommendations and has no comments, concerns or suggestions regarding these recommendations. We will develop a detailed action plan to implement each recommendation upon the report being finalized.

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