



# Federal Action: Fisheries Management under the MSA

- Councils Recommend
- Fishery Management Plans (FMPs)
  - Achieve OY/Prevent Overfishing
  - Additional National Standards
  - FMP Components (Mandatory and discretionary)
  - Other Applicable Law
- Secretarial Review
  - Strict Timelines
  - Limited Discretion
- Implementation/Rulemaking

# Secretarial Review of FMPs

- **Strict Timelines**
  - 95 days for FMPs/amendments

- **Limited Scope**
  - 3 possible outcomes
    - Approve
    - Disapprove
    - Partially approve



- **Criteria for Approvability**
  - National Standards
  - FMP Components
  - **Other applicable law (including ESA and NEPA)**
  - Disapproval must be based on inconsistency with law

# Requirements and Timelines

ESA	<ul style="list-style-type: none"> <li>•“No jeopardy” record-based determination</li> <li>•Timing: consultation = 135 days</li> </ul>
MSA	<ul style="list-style-type: none"> <li>•Approve/Disapprove Council recommendation</li> <li>•Timing: Must decide within 95 days of transmittal</li> </ul>

Source	Start Date	Requirement
MSA (FMP)	Transmittal	Day 5, Publish NOA for 60 days comment; Day 65, CPE; Day 95, Decision Day
MSA (Regs)	Transmittal	Day 5, begin 15 day review; Day 20, publish Prop. Rule for 15-60 days comment; Publish Final Rule w/30 days CPE
ESA	I.D. preferred action + Initiation	Minimum 90 days to consult + 45 to write B.O. (135 days)

# Key Challenges for ESA/MSA compliance: Timelines and Linkages

Section 7 consultation cannot begin until there is a proposed action.

NMFS has limited or no ability to change a recommendation after the Council process.

Need to exchange information about potential impacts to listed species while recommendations are being developed at FMC level.

# Previous Efforts

## 2005 Draft Operational Guidelines

- High-level in-house working group proposed an approach for addressing ESA/MSA timing issues by providing for formalized technical assistance and pre-BO documentation of impacts based on a Council's preferred alternative

[http://www.nmfs.noaa.gov/sfa/domes\\_fish/OperationalGuidelines/DraftOGs\\_082405.pdf](http://www.nmfs.noaa.gov/sfa/domes_fish/OperationalGuidelines/DraftOGs_082405.pdf)

# Endangered Species Act

“The purposes... are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (b) of this section”

Section 2(b) of the Endangered Species Act

# Endangered Species Act

“The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities to further the purposes of the ESA by carrying out programs for the conservation of endangered species and threatened species.”

Section 7(a)(1)

# Endangered Species Act

**“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat....**

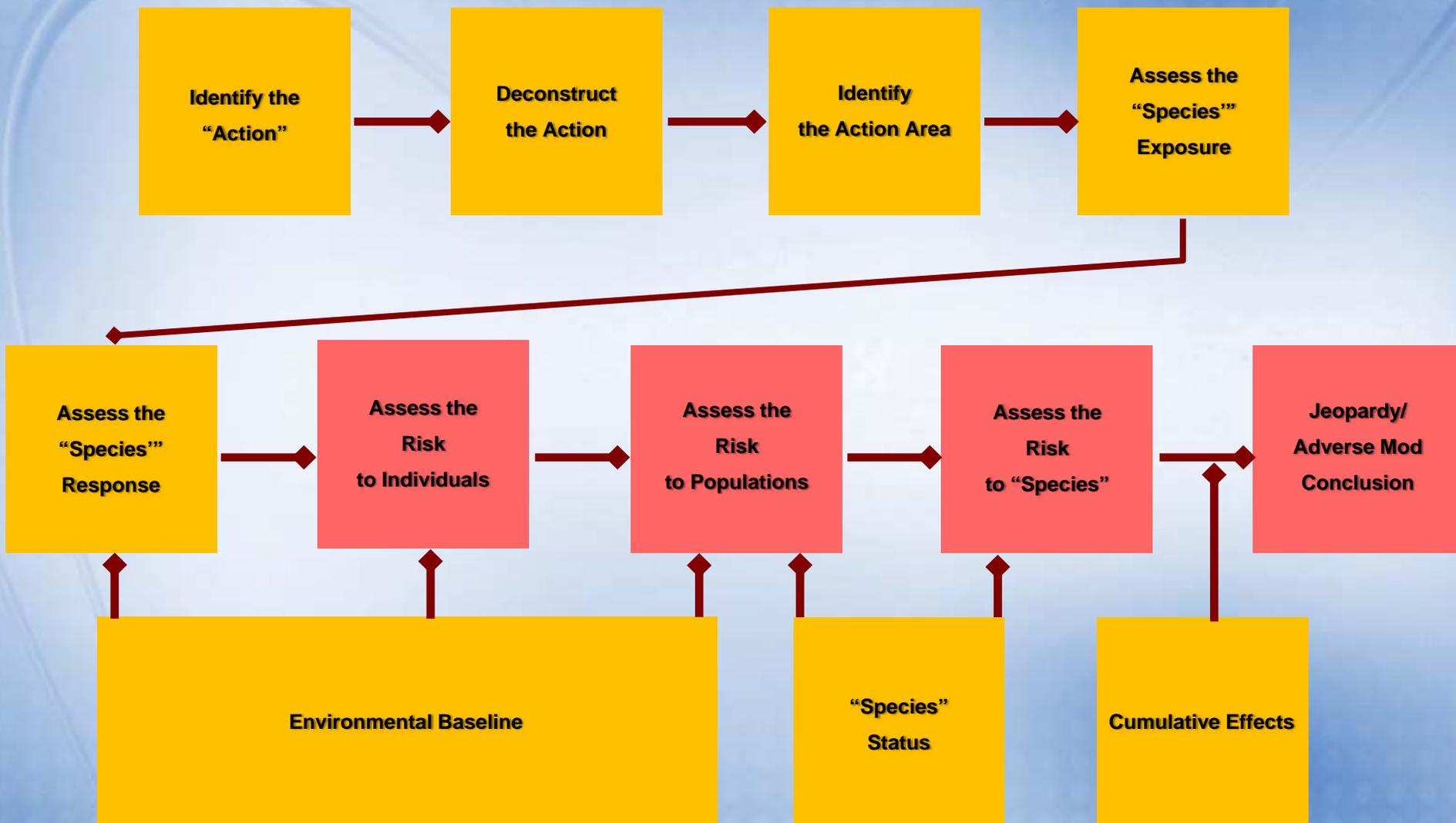
**“In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available....”**

# Standard of Review for Consultations

- Normally, a Biological Opinion (or an agency rule or action) would be arbitrary and capricious if
  - we relied on factors which Congress has not intended us to consider,
  - we entirely failed to consider an important aspect of the problem,
  - we offered an explanation for our conclusion that runs counter to the evidence before us, or is so implausible that it could not be ascribed to a difference in view or the product of expertise
  - we failed to articulate a satisfactory explanation for our conclusion

- Note: Courts will focus on the administrative record already in existence, not some new record made initially in the court
- See: Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (103 S. Ct. 2856) among others

# Assessment Framework



# Reasoning Process for Listed Species

Step	Apply the available evidence to determine if	Is the Statement...	Action
<b>B</b>	The Action <b>is not likely to produce stressors</b> that have direct or indirect adverse consequence on the environment	True	End
		False	Go to C
<b>C</b>	Listed individuals <b>are not likely be exposed</b> to one or more of those stressors or one or more of the direct or indirect consequences of the Action	True	NLAA (1)
		False	Go to D
<b>D</b>	Listed individuals <b>are not likely to respond</b> upon being exposed to one or more of the stressors produced by the Action	True	NLAA (2)
		False	Go to E
<b>E</b>	Any responses <b>are not likely to constitute “take”</b> or reduce the fitness of the individuals that have been exposed	True	NLAA (3)
		False	Go to F
<b>F</b>	Any reductions in individual fitness <b>are not likely to reduce the performance (viability)</b> of the populations those individuals represent	True	-
		False	Go to G
<b>G</b>	Any reductions in the viability of exposed populations <b>are not likely to reduce the viability of the species</b> those populations comprise	True	NLJ
		False	LJ

# Reasoning Process for Critical Habitat

Step	Apply the available evidence to determine if	Is the Statement...	Action
<b>A</b>	The Action <b>is not likely</b> to produce stressors that have direct or indirect adverse consequence on the environment	<b>True</b>	<b>End</b>
		<b>False</b>	<b>Go to B</b>
<b>B</b>	Areas of designated critical habitat <b>are not likely</b> be <b>exposed</b> to one or more of those stressors or one or more of the direct or indirect consequences of the Action	<b>True</b>	<b>NLAA (1)</b>
		<b>False</b>	<b>Go to C</b>
<b>C</b>	The quantity, quality, or availability of one or more Constituent Elements of critical habitat <b>are not likely to be reduced</b> upon being exposed to one or more of the stressors produced by the Action	<b>True</b>	<b>NLAA (2)</b>
		<b>False</b>	<b>Go to D</b>
<b>D</b>	Any reductions in the quantity, quality, or availability of one or more Constituent Elements of critical habitat <b>are not likely to reduce the Conservation Value</b> of the exposed area	<b>True</b>	<b>-</b>
		<b>False</b>	<b>Go to E</b>
<b>E</b>	Any reductions in the Conservation Value of the exposed area of critical habitat <b>are not likely to reduce the Conservation Value</b> of the Critical Habitat designation	<b>True</b>	<b>No AD MOD</b>
		<b>False</b>	<b>AD MOD</b>

# Common Agency Errors

- Action Agencies typically make it harder for the Services to concur with the conclusions of biological assessments or consultation requests by committing several common errors:
  - **failure to provide a clear or complete descriptions of the proposed action;**
  - failure to demonstrate that conclusions extend from a reasoning process that meets the arbitrary and capricious standards of the APA;
  - failure to demonstrate that they considered the best scientific and commercial data available;
  - failure to consider all pathways by which proposed actions may affect listed resources;
  - failure to consider all potential consequences, particularly “sub-lethal” consequences;
  - failure to consider cumulative impacts (sensu NEPA)

# The Three Points of Tension

- Timing constraints of MSA Decisions versus ESA Consultations
- Desire for fixed targets (for example, PBR-style targets) versus the context- and circumstance-specific considerations required by the ESA (for example, considerations of mortalities and other fitness consequences not related to fisheries)
- Differences in burden of proof
  - ESA requires us to establish that actions **are not likely** to jeopardize listed species and are not likely to result in destruction or adverse modification of critical habitat
  - Action Agencies commonly ask PR to “prove” that their actions **are likely** to jeopardize, etc.