

# **Procedural Directive: Guidance on Council Authority for Preparing Fishery Management Plans for Stocks that May Extend across the Geographic Areas of more than one Council, pursuant to MSA §304(f)**

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## **I. Introduction**

In anticipation of an increasing number of fish stocks shifting in geographic distribution, new fisheries emerging, and other demographic shifts in fisheries, the National Marine Fisheries Service (informally, NOAA Fisheries) has identified a need for guidance on determining the geographic scope of fisheries and on how to determine which Regional Fishery Management Council(s) (Council) will be responsible for preparing and amending new and/or existing fishery management plans (FMPs) for fisheries that extend or have moved beyond the geographical area of authority of any one Council, including those that move, across Council boundaries.<sup>1</sup>

Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), each of the eight Councils has responsibilities for fisheries within specified geographic areas (MSA § 302(a)(1))<sup>2</sup> and is required to prepare and submit FMPs for fisheries that “require conservation and management” (MSA § 302(h)(1); *see also* 50 C.F.R. § 600.305(c)). In situations where a fishery extends beyond the geographic area of any one Council, MSA § 304(f)(1) authorizes the Secretary of Commerce<sup>3</sup> to either designate a Council to prepare an FMP, or require the relevant Councils to prepare an FMP jointly. To date, NOAA Fisheries and the Councils have addressed management of fisheries that span multiple Council jurisdictions on a case-by-case basis.<sup>4</sup> However, given that the geographic scope of fisheries is expected to continue to shift across Council jurisdictions in the future, preparing in advance for these situations, and having an established process and guidance in place for addressing them, will give NOAA Fisheries, the Councils, and the public a more transparent, orderly, and responsive approach for fishery management.

This policy provides guidance on (1) determining whether to review the geographic scope of a fishery and/or the designation of Council authority; (2) determining the geographic scope of the fishery; (3) designation of Council authority under MSA § 304(f); and (4) guidance for transitioning management from existing Council(s), if needed.

## **II. Overview of Key Legal Provisions**

Section 302(a) of the MSA establishes the eight Councils and provides authority over fisheries off the coasts of their states. Section 302(h)(1) requires each Council to prepare an FMP and amendments “for each fishery under its authority that requires conservation and management.”

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<sup>1</sup> This policy does not apply to Atlantic Highly Migratory Species which are managed pursuant to sections 302(a)(3) and 304(g) of the MSA.

<sup>2</sup> Pursuant to MSA §304(f)(2), NOAA Fisheries has specified these exact geographic boundaries in terms of latitude and longitude at 50 CFR 600.105.

<sup>3</sup> MSA responsibilities were delegated from the Secretary to the NOAA Administrator (DOO 10-15 § 3.01(aa)) and redelegated to the Assistant Administrator for Fisheries (NOAA Transmittal 61 § II(C)(26)).

<sup>4</sup> For a review of NOAA Fisheries’ management of fisheries that span multiple Councils’ jurisdictions, see NOAA Technical Memorandum NMFS-OSF-10 September 2021 (Morrison). Link: <https://repository.library.noaa.gov/view/noaa/32347>

Section 303(a)(2) requires that Council-prepared FMPs contain a description of the fishery, including: the number of vessels, the type and quantity of fishing gear, and the species and their locations.

Section 304(f)(1) provides that for fisheries that extend beyond the “geographical area of authority of any one Council,”

(1) the Secretary may—

- (A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or
- (B) may require that the plan and amendment be prepared jointly by the Councils concerned.

The MSA defines “fishery” as:

- (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
- (B) any fishing for such stocks. §3(13).

The MSA defines “stock of fish” as:

a species, subspecies, geographical grouping, or other category of fish capable of management as a unit. §3(42).

The FMP’s description of the fishery must comply with National Standard 3, which requires that:

To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. §301(a)(3).

The NS 3 Guidelines explain that, within this strong preference for managing a stock as a unit throughout its range, a less comprehensive management unit may be justified. 50 C.F.R. § 600.320(c), (e)(2). For example, if complementary management exists or is planned for a separate geographic area or for a distinct use of the stocks, or if the unmanaged portion of the resource is immaterial to proper management, separate management units may be allowed. *Id.* § 600.320(e)(2).

### **III. Determining the Geographic Scope of a Fishery and Council Authority**

As of the date of this Procedural Directive, for most currently managed fisheries, initial determinations of geographic scope and designations of Council authority for preparing fishery management plans have already been completed. NOAA Fisheries does not anticipate changing these designations unless there is a change in circumstances. When there is a need to review geographic scope and/or Council authority, NOAA Fisheries will notify the relevant Councils and initiate the process set forth below.

For a newly emerging fishery that has not previously been managed under the MSA and is in need of an initial designation of Council authority, this process can begin at step 2.

A flow chart providing a high-level overview of this process is set forth in Appendix 1.

## **STEP 1: Consider Whether to Review Geographic Scope and/or Council Authority**

### **a. In general, NOAA Fisheries will conduct a review if:<sup>5</sup>**

- i. Criteria listed in paragraph (b) below indicate that a fishery may be experiencing geographic shift; or
- ii. Upon request from a Council. A Council requesting a review must provide information on why the review is being requested and data supporting the request.

### **b. Criteria that may indicate a need for review of Initial Determinations/Designations**

To prevent frequent transitions of management authority between Councils, NOAA Fisheries will use multi-year averages of the metrics described below. For example, for landings revenue, a comparison of two sets of 3-year averages could be used (e.g., 2019-2021 vs 2022-2024). Criteria that can indicate a need for review of the geographic scope of a fishery and/or Council authorities include, but are not limited to:

- Indicators of significant change in the location of species, sub-species, and/or stocks and/or fishing effort that could affect Council jurisdiction may include, but are not limited to:
  - A shift of greater than 15% in the proportion of a fishery's landings revenue that accrues to another Council's jurisdiction. This consideration should take into account any regulatory requirements that may be affecting where fish are landed as opposed to where they are caught.<sup>6</sup>
  - A shift of greater than 15% in the proportion of a fishery's recreational fishing effort occurs in another Council's jurisdiction.
  - Documented shift in stock distribution.
- Certain Council actions, such as allocation revisions or changes to permit requirements that have cross-jurisdictional implications.

### **c. Sources of data can include but are not limited to:**

- Stock Assessments.
- Fishery independent surveys.
- Fishery dependent data.
  - Landings.
  - Observer Information.
  - Logbooks.
  - Vessel Monitoring System (VMS) data.
  - Recreational fisheries catch and effort estimates.
- NOAA's Distribution Mapping and Analysis Portal (DisMap), <https://apps-st.fisheries.noaa.gov/dismap/>.

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<sup>5</sup> NOAA acknowledges there could be additional circumstances that could warrant a review other than those described here.

<sup>6</sup> This consideration should also address whether trends in state versus federal landings differ.

- Traditional and Ecological Knowledge.
- Stakeholder-provided Information.
- Ecosystem Status Reports or similar products.

**d. Determine whether to conduct a review.**

After analyzing the metrics and information described in (b) and (c) above, NOAA Fisheries will determine whether a review of initial determinations/designations is warranted, and, if so, proceed to Step 2 below.

**STEP 2: Determine the geographic scope of a fishery**

**a. Roles**

Determining the geographic location of a fishery involves consideration of legal, policy, and scientific issues and includes a certain amount of flexibility. Within their geographic areas of authority, Councils have discretion, subject to NOAA Fisheries’ approval, in describing the fisheries and stocks for management purposes, but must comply with the MSA and applicable laws including requirements to utilize the best scientific information available and demonstrate a rational basis for their descriptions.

In addition to the approval authority described above, under MSA § 304(f), NOAA Fisheries has the authority to evaluate and determine the geographic location of fisheries that may occur within the geographic areas of authority of more than one Council.

**b. Data to Consider**

i. In determining the location of a fishery, it is necessary to consider both the:

- Location of fish species, sub-species, and stocks.
- Location of fishing effort.<sup>7</sup>

ii. Sources of data can include, but are not limited to:

- Stock Assessments.
- Fishery independent surveys.
- Fishery dependent data.
  - Landings.
  - Observer Information.
  - Logbooks.
  - Vessel Monitoring System (VMS) data.
  - Recreational fisheries catch and effort estimates.
- NOAA’s Distribution Mapping and Analysis Portal (DisMap), <https://apps-st.fisheries.noaa.gov/dismap/> .
- Traditional and Ecological Knowledge.
- Stakeholder-provided Information.
- Ecosystem Status Reports or similar products.

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<sup>7</sup> In any location, effort may be categorized as commercial, recreational, subsistence, or a combination of these.

### **c. Additional Considerations**

There are multiple factors, in addition to the physical location of the fish and fishing effort, that are important to characterizing the geographic scope of fisheries. For example:

- Management goals and objectives of existing FMPs, if any (50 CFR 600.305(b)).
- Need for conservation and management.<sup>8</sup>
- Management efficiency.
- Biological considerations, including genetics.
- Infrastructure such as the vessels, dealers, ports, etc., that fish for, catch, purchase, process, and otherwise handle the product.

When considering “new” and “expanded fisheries,” NOAA Fisheries and the Councils must consider whether the appearance, or increased abundance, of a species in a new location, or a change in effort in a new location, indicates that a fishery extends beyond the geographic boundary of one Council. To mitigate against outlier occurrences, multi-year information should be used whenever possible.

### **d. Determination**

When determining the geographic scope of a fishery, NOAA Fisheries may choose to give the relevant Council(s) a specified period of time of up to 6 months from the date of notification in which to recommend how the fishery/ies should be identified pursuant to the considerations set forth in this document.<sup>9</sup>

NOAA Fisheries will evaluate the Council(s) recommendation and, at the conclusion of Step 2, document the geographic scope of the fishery/ies with three possible outcomes:

- Outcome 1: There is one fishery in one Council’s area of authority. That Council is responsible for that fishery under MSA § 302(a).
- Outcome 2: There are separate fisheries in multiple Council areas of authority. Each Council is responsible for the fishery/ies under its area of authority under MSA § 302(a).
- Outcome 3: There is one fishery that extends into areas of authority for more than one Council. NOAA Fisheries may designate a Council or Councils to be responsible for developing the FMP. If this is the outcome, proceed to Step 3.

## **STEP 3: Designation of a Council or Councils under MSA § 304(f)**

### **a. Roles**

If NOAA Fisheries determines that one fishery extends beyond the geographic jurisdiction of a single Council (i.e., outcome 3 in Step 2), the agency will designate one or more Councils to be responsible for preparing, or amending, the FMP.

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<sup>8</sup> NOAA Fisheries’ existing guidance pertaining to whether a fishery is in need of conservation and management is at 50 CFR 600.305.

<sup>9</sup> If specifying a period of time for Council feedback, NOAA Fisheries will consider relevant MSA deadlines.

In making these designations, NOAA Fisheries will consult with the relevant Councils, and provide 6 months (unless a different schedule is necessary to comply with MSA requirements), in which to recommend a designation.

- Councils may submit, jointly or separately, information describing how they would plan to cooperate with other Council(s), accommodate interests of stakeholders from other regions, and other information relevant to this designation. This may include descriptions of challenges in any current system such as lack of stakeholder representation or other concerns regarding equity or fairness.

#### **a. Fishery/ies Designations and Considerations**

Designation of management authority may be expressed as one of the following three options:

- Designation 1: One Council, One FMP. The Secretary designates one Council to manage the fishery throughout its range.
- Designation 2: Multiple Councils, One FMP. The Secretary designates multiple Councils to jointly manage the fishery throughout its range within a single FMP. This may include designating one Council as the “lead.”
- Designation 3: Multiple Councils, Multiple FMPs. The Secretary designates multiple Councils to manage the fishery via multiple FMPs.

NOAA Fisheries will consider, among other things:

##### **i. In General**

- Geographic range of the fishery or management units (current and historical).
- Number of and geographical distribution of species, sub-species, and/or stocks.
- Characterization of need/s for conservation and management (can include social, economic, ecological, ecosystem functions, etc.).
- Efficiency/responsiveness/adaptability of management.
- Representation, access, and participation of stakeholders and interested parties in the decision-making process that develops fishery management measures. This includes demonstrated ability, or articulated plans, of a Council to accommodate stakeholder needs from other jurisdictions.
- Location of fishing effort/activities.
- Location of landings.
- Location of current and potential future processing facilities.
- Existing permits.
- Community impacts, including community dependence, community adaptability, community access to adjacent fisheries, fairness, equity, and environmental justice.
- Inter-relationships with other managed species.
- Need for cross-jurisdictional coordination (e.g., potential for effort shifts if management measures are different under multiple FMPs).

- Objectives of existing FMPs, and effectiveness of existing oversight in achieving those objectives (e.g., overages, overfishing, or rebuilding progress) and reasons the oversight is effective or not.
- Optimum yield, NS 3, and other National Standards.
- Ability to maintain fishing mortality targets and limits across the range of the fishery.<sup>10</sup>
- Cost.
- Existence of data collection programs.
- Comparative effectiveness of existing examples of single versus joint Council management in other fisheries.
- For fisheries with an international component, which Council primarily works with the relevant regional fisheries management organization.
- Other factors deemed as relevant to the specific scenario under consideration.

ii. Presumptions pertaining to designations: To prevent frequent transitions of management authority between Councils, NOAA Fisheries will use multi-year averages of the metrics described below.

- If more than 75% of a fishery's landings revenue accrues to, or recreational fishing effort occurs in, another Council's jurisdiction, there is a presumption that NOAA Fisheries will assign/reassign management authority to the other Council;
- If between 40% and 75% of a fishery's landings revenue accrues to, or recreational fishing effort occurs in, another Council's jurisdiction, there is a presumption that NOAA Fisheries will either assign joint management authority to the two Councils or assign multiple Councils to develop multiple FMPs.
- [If data from non-fishery dependent sources indicate [15 - 75 % distribution changes], then [we are seeking input on how to establish a presumption here].

iii. General recommendation. When appropriate, NOAA Fisheries may choose to remind Councils that, if there is a need for conservation and management and Councils fail to act within a reasonable time, NOAA Fisheries may take action under MSA § 304(c)(1)(A).

Additional considerations and recommendations applicable to each potential designation result are set forth in Appendix 2.

## **b. Designation of Council FMP Authorities**

NOAA Fisheries will document the rationale for the designation decision and notify the relevant Councils. NOAA Fisheries will work with the relevant Councils to assure a smooth transition to revised governance pursuant to Step 4.

## **STEP 4. Transitioning to Revised Council Authority**

If there is a change in authority from one Council to another, there will be at least a 2-year phase-in period, starting with the notification of revised designations, during which the Councils transition

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<sup>10</sup> When splitting responsibilities for management of a single stock, NOAA Fisheries must ensure all requirements of the MSA can be met under split authority. Each FMP and each management action under that FMP will be evaluated for compliance with the MSA and other applicable law.

responsibilities. The existing FMP and regulations should remain in-place until superseded or amended by the responsible Council(s). It will be important to ensure that, pending completion of any new FMP or amendment, the fishery remains compliant with the MSA and other applicable law. When planning for a management transition, Councils and NOAA Fisheries must comply with any statutory deadlines for action.<sup>11</sup>

In addition, there is a presumption that, during the 2-year period following the notification of revised designations, any modifications to allocations or permitting requirements should not be undertaken by the Council that historically led the FMP. Any such modifications should be part of the development of the new FMP(s) or amendments.

When transitioning to a new Council governance structure, NOAA Fisheries and the Councils should seek to mitigate disruptions to the degree practicable, and provide for:

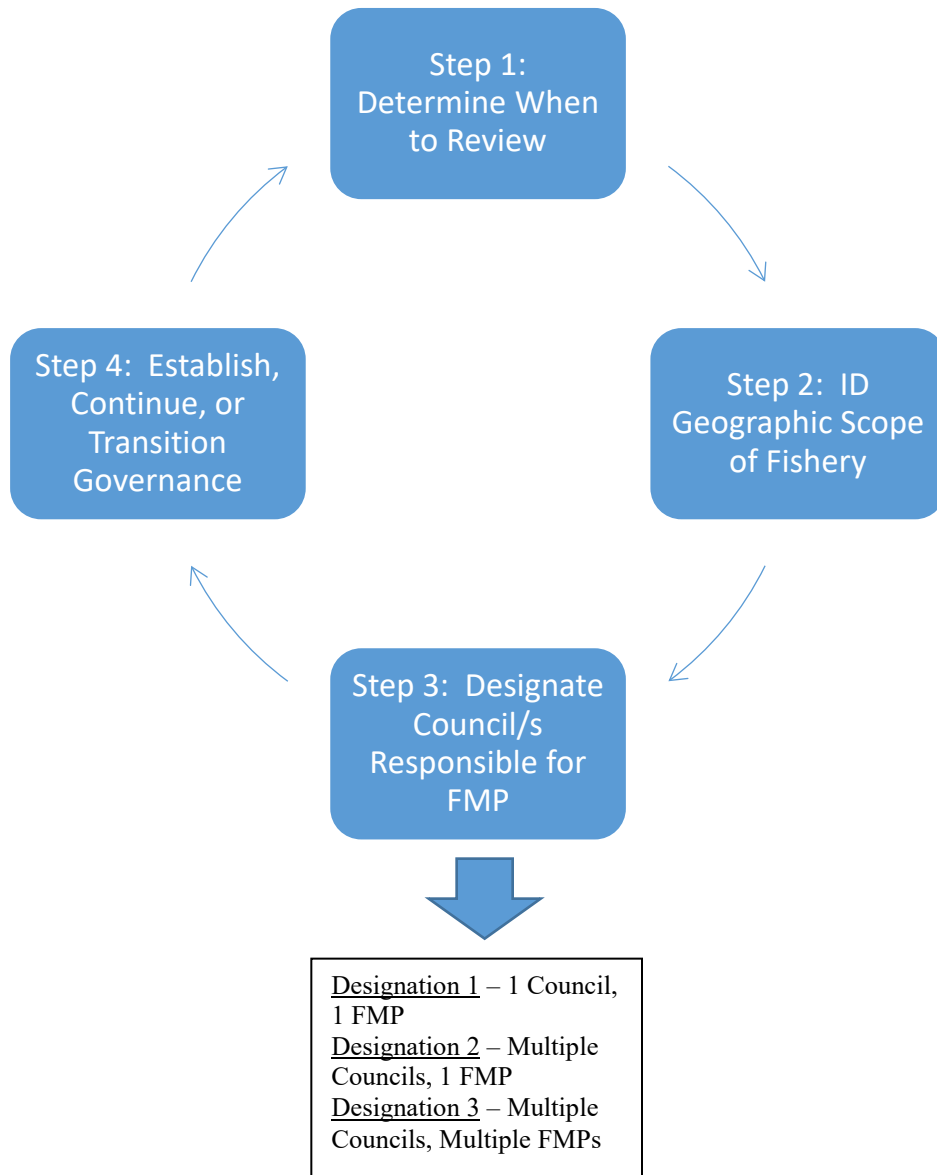
- The existing FMP and regulations should remain in-place until superseded or amended by the responsible Council(s).
- Phased-in transition. The transition period should be adequate for the receiving Council to prepare sufficient staffing responsibility. This includes providing for transfer of knowledge between Council staff and SSCs. Where applicable, NOAA Fisheries regional offices and science centers will similarly need to prepare for appropriate transfer of knowledge and data collection and analysis responsibilities. [We are seeking additional input on this section from the CCC, particularly with regards to management during a transition].
- Deadlines and time targets.
- Transition plan that addresses permitting and allocation issues.
- Plans for future adaptability that balance the need to respond to shifting stocks with the need for sufficient long-term stability to support investment in infrastructure.
- Data collection and any necessary modifications to methods.
- A data management plan addressing data storage, data integration, and shared data access.
- [We are seeking additional input on this section from the CCC, particularly with regards to addressing the need to balance stability with the need for adaptability].

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<sup>11</sup> In the event that special requirements or deadlines of the MSA are triggered, NMFS will work with the relevant Council/s to determine roles and responsibilities for compliance. For example, MSA provides that, within 2 years after notification that a fishery is overfished, the appropriate Councils shall prepare and implement an FMP or amendment or proposed regulations. 16 U.S.C. 1854(e)(3).



**APPENDIX 1: Flow Chart of Process**



## APPENDIX 2: Specific Considerations and Recommendations for Each Potential Designation

### **One Council, One FMP for entire range of the fishery**

#### Considerations:

- Challenges for stakeholders from other jurisdictions to provide meaningful input and/or have access to the fishery.
- Cost-effectiveness and efficiency in terms of centralizing decision-making within one body
- Costs of management and enforcement.
- Ability to provide timely management responses.

#### Recommendations:

If this option is selected, the following are recommended:

- Provide for consistent use of committees and liaisons.
- Allow liaisons from adjacent Councils to vote on committee decisions.<sup>12</sup>
- Conduct hearings and meetings in other jurisdictions and/or enable meaningful participation in a virtual setting.
- Partner with adjacent Council(s) on stakeholder outreach.

### **Multiple Councils, One FMP**

#### Considerations:

- Provides for more representation of relevant stakeholders.
- Determination of which Council has lead (and therefore which Scientific and Statistical Committee (SSC) provides advice) can have significant implications.
- It will be necessary to specify who is responsible for collection, management and provision of data.
- Councils will need to clarify roles of the SSCs regarding authorities and provision of advice to ensure that the ACL is appropriately identified and utilized.
- Less efficient in terms of staffing and reaction time.

#### Recommendations:

If this option is selected, the following are recommended:

- Consider use of frameworks<sup>13</sup> to allow Councils to move unilaterally on issues, and/or management units, affecting only their interests and to support advanced planning and if-then scenarios to reduce need for coordination in predictable situations that affect the interests of all relevant Councils.

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<sup>12</sup> A Council could demonstrate commitment to providing for input from stakeholders in other geographic areas by structuring their committees to include voting representation from other jurisdictions. For example, a Council could create fishery committees that provide for one vote for each state that lands at least 8% of landings.

<sup>13</sup> "Frameworks" generally refers to mechanisms in an FMP and regulations for implementing recurrent, routine, or foreseeable actions in an expedited manner (e.g., in-season closures, quota adjustments, etc.). See Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process (October 25, 2017) at Appendix 2, sections C(2)(v) and D. Frameworks, and subsequent regulatory actions taken pursuant to them, must be developed and implemented consistent with requirements of the MSA and other applicable law, including the Administrative Procedure Act, National Environmental Policy Act, Endangered Species Act, and Marine Mammal Protection Act. *Id.*

- Councils should clearly identify processes for review and approval regarding fishery management decisions and FMP amendments.

### **Multiple Councils, Multiple FMPs**

#### Considerations:

- If a stock is not managed as a unit throughout its range, there must be strong justification (per NS 3 and NS 3 guidelines).
- How to facilitate effective coordination between SSCs, and between Science Centers (if applicable), for providing advice.
- Designating responsibilities for collection, management, and provision of data.
- How to ensure overfishing is prevented.

#### Recommendations:

If this option is selected, the following are recommended:

- Develop a plan to ensure that Councils (including SSCs) coordinate on appropriate level and allocation of fishing mortality across jurisdictions.
- If Councils manage separate stocks of fish, stocks should be monitored for changes in biological stock structure.