

Administrative Records & Responses to FOIA Requests: Legal Requirements

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Relationship to Fishery Management Councils

- NOAA GC Represents Agency
- NOAA GC regional attorneys provide legal guidance at Council Meetings
- Councils May Not Sue or Be Sued
- Fisheries and Protected Resources Section (Silver Spring) advises HQ and provides national coordination

Part 1 : Administrative Records

What is a record?

The Federal Records Act mandates the creation and preservation of “records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”

What is in an Administrative Record?

- Final Decision Document
- FMPs, Amendments, Committee Reports, SSC Reports
- ARs from earlier decisions, if relevant
- Policies, guidelines, directives, manuals
- Reference documents
- Public Input and Response, including summaries of public meetings, public comments, and Council meeting transcripts
- Any Other Materials that Contain Relevant Facts

Why is the Administrative Record so Important?

- In most cases, the Court can *only* consider the record
- In other words, we cannot go back after the fact to provide support and a rationale for an action—it must be done at the time the decision is made.

Under what statutes can NMFS be sued?

- **Magnuson-Stevens Act**
 - final agency actions can be challenged within 30 days (no later)
 - no injunctions
 - expedited review
- **Other statutes**
 - Administrative Procedure Act
 - National Environmental Policy Act
 - Regulatory Flexibility Act
 - Endangered Species Act

Administrative Procedure Act (APA)

- Provides for “Notice and Comment” Rulemaking
 - 30-day delay in effectiveness
 - Good cause waivers
- Sets Standards and Procedures for Judicial Review of Federal Agency Actions
 - Applies to Review of MSA Regulations
- Establishes “Arbitrary and Capricious” Standard for Judicial Review
 - Gives “Deference” to Agency Decisions
 - Provides for Court review “on the Record”

How Courts decide whether an agency's interpretation is "Arbitrary and Capricious":

COURTS LOOK AT WHETHER AGENCY:

- relied on factors which Congress had not intended agency to consider
- entirely failed to consider an important aspect of the problem
- offered an explanation for its decision that runs counter to the evidence before the agency
- is so implausible that it could not be ascribed to a difference in view or the product of agency expertise

Example : A Tale of Two Records

- Pacific Dawn v. Bryson (2011) and Pacific Dawn v. Pritzker (2013)
- Two challenges to the same underlying decisions, two different records, two different outcomes

A Tale of Two Records

- **BACKGROUND:**

- Challenges to the Pacific Council's Trawl Rationalization program
- This case came from participants in the program who were challenging the way in which quota shares were initially allocated for whiting

- **ISSUE:**

- Was there a rational justification for the formula used to allocate shares, or was the allocation arbitrary and capricious?

A Tale of Two Records

- **2011 HOLDING:**

- Even if it was conceptually reasonable for Defendants to have relied on a 2003 control date when promulgating regulations in 2010, the manner in which they did so here was not rational.

- **Why was it arbitrary?**

- Council used data from after 2003 for some purposes but not others. For example, Council used data from 2004 for allocations to processors, in spite of the control date—treating the two different sectors differently was arbitrary.

A Tale of Two Records

- **2011-2013:** Council and NMFS undertake a year long “reconsideration process.” Council considers a range of potential qualifying years including the original set of years.
 - Following much process, including development of a EA, seven hours of public testimony, and advisory committee reports, Council votes to retain the original qualifying period.
- **2013:** Reconsidered action is finalized, and then challenged again by Pacific Dawn

A Tale of Two Records

- **2013 Holding:**
 - NMFS considered the relevant factors and articulated a rational connection between the facts found and the choices made
- **Processors v. Harvesters:**
 - The Court's earlier concerns with the explanation as to why the qualifying period for processors was extended to 2004 were sufficiently addressed during reconsideration

With a Record Like This, How Could We Lose?

- We have to take actions that reasonably comply with the statute.
- Even if we can support them with our administrative record, our actions cannot be arbitrary and capricious.

So, We Lost Now What?

- Vacatur: Court orders that the challenged action is “set aside.” This means that the subject FMP or amendment is no longer in place.
- Remand: Court orders agency to fix identified problems, but leaves the challenged action in place in the mean time.
- No injunctions under MSA, but possible for an injunction under ESA if that is coming into play.

Wrapping Up on Administrative Records

- The overlapping regulatory requirements can help the Council and NMFS make well-reasoned, well-supported decisions
- It is as important to comply with *procedural* requirements as *substantive* requirements

Part 2: FOIA

What is FOIA?

- The Freedom of Information Act provides any person with a right of access to federal agency records unless those records are protected from disclosure under the law.

How does FOIA work?

- All federal agencies are required to disclose records upon receiving a written request for them, except for those parts of records that are protected from disclosure by nine exemptions and three exclusions of the FOIA.
- Councils fall under the agency category.
- This right of access is enforceable in court.
- The federal FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals.

What is a record under FOIA?

- Any agency records are those created or obtained by NOAA and are, when the request is filed, in NOAA's possession and control
- Includes off-site storage
- Agency records can be in any format like print documents, photographs, videos, maps, e-mail and electronic records

What Council Records are Subject to FOIA?

- Records generated or received by the Council when the Council is in session as a body.
- Records written or received by an individual Council member if it relates to a matter within the Council's jurisdiction and the document is specifically discussed or disseminated at a Council meeting.
- All Council staff records including emails, drafts, correspondence, etc.
- Records generated when a Council member utilizes a NOAA or Council email address.

What are the Council Staff's FOIA Responsibilities?

- Forward any FOIA request received by the Council to the agency for processing
- Seek clarification on the request as needed with their Regional FOIA Coordinator
- Search for all responsive records and provide them to the Regional FOIA coordinator
- Councils may let the agency know if they have concerns about releasing documents, but they must provide all responsive documents to the agency regardless of their concerns

What are the Agency's FOIA Responsibilities with regard to Council Records?

- Process any FOIA request received by the Councils
- Communicate as needed with the requester
- Gather responsive records from the Council records
- Review all records for exemption application – the agency solely has denial authority

Relevant Council Record Resources

- NMFS Council regulations:
 - 50 CFR 600.150 (Disposition of Records)
 - 50 CFR 600.155 (FOIA Requests)
- NOAA FOIA Website:
 - <https://www.noaa.gov/information-technology/foia>



Questions?