



Mid-Atlantic Fishery Management Council

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MEMORANDUM

Date: July 27, 2023
To: Council
From: Kiley Dancy, Brandon Muffley, and Mary Sabo, Staff
Subject: NOAA Fisheries Climate Governance Policy (MSA §304(f) guidance)

Overview and Council Objectives

At the May 2023 meeting of the Council Coordination Committee (CCC), NOAA Fisheries presented a draft procedural directive titled “[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\(f\)](#)” (also referred to as the “Fisheries Climate Governance Policy” or “draft policy”). The draft policy is intended to provide guidance on when and how the Secretary of Commerce will review and assign management authority over existing (and potentially new) fisheries found across more than one Council jurisdiction. NOAA Fisheries has requested input on the draft policy from the regional Councils. The agency is accepting comments until **November 17, 2023**, with a goal of completing and implementing the policy in Summer 2024.

Given the Mid-Atlantic Council’s shared regional boundaries with two other East coast Councils, as well as the number of Mid-Atlantic stocks that extend beyond the Council region boundaries, this policy has the potential to directly impact a number of Mid-Atlantic Council fishery management plans.

On **Wednesday, August 9**, the Council is scheduled to discuss the draft policy and consider potential Council comments. The following briefing materials are included for the Council’s consideration of this issue:

1. Scientific and Statistical Committee (SSC) comments on the draft policy – report from the July 12, 2023, SSC webinar meeting.
2. A copy of the NOAA Fisheries Draft Climate Governance Policy.

In addition, the following will be posted as a supplemental material on the Council meeting page:

3. Preliminary staff comments for potential inclusion in a comment letter.

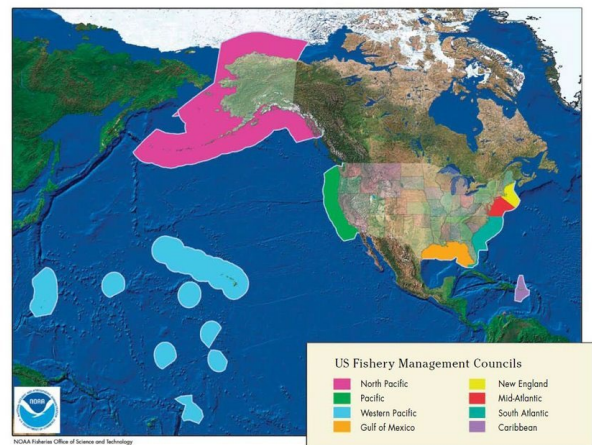
Following the discussion at the Council meeting, staff will develop a draft letter which will be circulated to Council members for review. Council staff recommend submitting comments well ahead of the November 17 deadline to give NOAA Fisheries more time to consider and incorporate the Council’s comments. Council staff are also coordinating with the other regional Councils on the development of a CCC comment letter. Updates will be posted at <https://www.mafmc.org/actions/nmfs-climate-governance-policy>.

Public Comment Concerns

It is staff's understanding, based on the information presented at the May 2023 CCC Meeting, that NOAA Fisheries is not planning to solicit public comments on the draft policy. On July 7, 2023, the Mid-Atlantic Council [sent a letter to NOAA Fisheries](#) expressing concern about the lack of planned public outreach or comment opportunities. The letter, which noted that the policy had not yet been made publicly available on the NOAA Fisheries website, requested that NOAA Fisheries "immediately take steps to inform the public about the availability of this draft policy and schedule a formal public comment period including several public meetings or webinars." Depending on the response (if any) to this letter, the Council may choose to independently solicit comments from stakeholders to submit to NOAA Fisheries. Staff is seeking input from the Council on this matter at the August Council Meeting.

Background on the Draft Fisheries Climate Governance Policy

Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), each of the eight regional fishery management councils has responsibility for fisheries within specified geographic areas and is required to prepare and submit fishery management plans (FMPs) for fisheries that "require conservation and management." In situations where a fishery extends beyond the geographic area of any one Council, §304(f) of the MSA authorizes the Secretary of Commerce to either designate a single Council to prepare an FMP or require two or more Councils to prepare an FMP jointly.



To date, the Councils and NOAA Fisheries have addressed management of fisheries that span multiple Council jurisdictions on a case-by-case basis. However, NOAA Fisheries has stated that additional guidance is needed to address governance issues associated with climate-related shifts in stock distributions. As such, their draft policy was developed to provide guidance on when and how the Secretary will review and assign management authority over existing (and potentially new) fisheries found across more than one Council jurisdiction.

The draft policy proposes a four-step process for reviewing the geographic scope of fisheries and Council management authority. A brief summary of each step is provided below.

Step 1: Consider Whether to Review Geographic Scope and/or Council Authority

In Step 1, NOAA Fisheries would determine whether a review of geographic scope and/or Council authority is needed. The draft policy states that NOAA Fisheries would consider conducting a review under the following circumstances:

- If information indicates a potential geographic shift of the species or fishing effort, including, but not limited to:
 - A shift of greater than 15% of landings revenue or recreational effort to another Council's jurisdiction (based on a comparison of multi-year averages).
 - Documented shift in stock distribution.
 - Certain Council actions that have cross-jurisdictional implications.
- Upon request from a Council (with supporting information and rationale)

Step 1 lists an array of data sources that NOAA Fisheries could consider, including stock assessments, fishery independent and dependent data, traditional and ecological knowledge, stakeholder-provided information, ecosystem status reports, and more. After analyzing the available information, NOAA Fisheries would determine whether a review of initial determinations/designations is warranted, and, if so, proceed to Step 2.

Step 2: Determine the Geographic Scope of a Fishery

The objective of Step 2 would be to determine the geographic scope of the fishery, considering both the location of the fish (species, sub-species, and stocks) and the location of fishing effort. The draft policy lists a variety of data sources and “additional considerations” that could be considered during this step. However, it does not provide details on the process that would be used for making a determination. The draft policy states that Councils could be given up to six months to make a recommendation to NOAA Fisheries on how the fishery should be identified. If Step 2 concluded that there is one fishery that extends into areas of authority for more than one Council, the process would move on to Step 3.

Step 3: Designation of a Council or Councils under MSA § 304(f)

In Step 3, NOAA Fisheries would designate one or more Councils to be responsible for preparing, or amending, the FMP. The possible outcomes of this step would be: (1) one Council is designated to manage the fishery throughout its range, (2) multiple Councils are designated to manage the fishery jointly throughout its range under one FMP, or (3) multiple Councils are designated to manage the fishery via multiple FMPs.

The draft policy includes an extensive list of “considerations” that could be considered as part of Step 3, as well as several “presumptions pertaining to designations”:

- If more than 75% of a fishery’s landings revenue accrues to, or recreational fishing effort occurs in, another Council's jurisdiction, there would be a presumption that NOAA Fisheries would 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 would be a presumption that NOAA Fisheries would 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 [TBD, NMFS is seeking input about how to develop a presumption here].

Appendix 2 of the draft policy describes additional considerations and recommendations for each potential designation. The relevant Councils could be given up to six months to make a designation recommendation. At the end of this step, NOAA Fisheries would document the rationale for the designation decision and notify the relevant Councils.

Step 4: Transitioning to Revised Council Authority

Step 4 describes the process and guidelines for transitioning management authority from one Council to another. The policy states that there would be at least a 2-year phase-in period, starting with the notification of revised designations, during which the Councils transition responsibilities. It also states that the existing FMP and regulations should remain in-place until superseded or amended by the responsible Council(s), and the Council that historically led the FMP should not undertake any modifications to allocations or permitting requirements during this transition period.



Mid-Atlantic Fishery Management Council Scientific and Statistical Committee Meeting

July 12, 2023

Terms of Reference

In May 2023, the NMFS released the draft Fisheries Climate Governance Policy. This policy is intended to provide guidance on Council authority for stocks that may extend across the geographic area of more than one Council, pursuant to §304(f) of the Magnuson Stevens Act (MSA). The Mid-Atlantic Council intends to submit comments to NMFS and has requested that the SSC review and comment on the draft policy. Upon review of the draft policy, the SSC will provide a written report that addresses the following:

- 1) *Comment on the overall proposed process to review the geographic scope and/or Council authority as described in the draft Fisheries Climate Governance Policy developed by the NMFS.*

(Note: Given the overlap and interconnection between the draft policy and different Terms of Reference, similar comments/responses may be found under multiple Terms of Reference)

- The SSC recognizes that stocks and fisheries are shifting as a result of climate change and other drivers, and that this may result in an increasing disconnect between the location of fisheries and the Council(s) with their primary jurisdiction. The draft Fisheries Climate Governance Policy is an attempt to proactively define an adaptive procedure to address the likely consequences of such shifts. The SSC broadly agrees with the need for transparency and forward thinking in addressing the challenges that might be posed by shifting stocks.
- The objectives of this policy should be more clearly and specifically defined. Councils have successfully managed stocks with overlapping boundaries and have taken numerous management actions to address the impacts of climate change without the need for changes to the current NMFS process or designating a new lead Council authority. What is the specific problem the draft policy is trying to address? What are the anticipated benefits and what are the expected costs associated with a change in lead Council designation? How would these costs and benefits be measured and evaluated relative to National Standard 7?
 - NOAA Directives do not have the force and effect of law and are not meant to bind the public. Given this discretion, what is the purpose/utility of such guidance if it is not binding?
 - Optimally, the specific objectives of a policy would be used to define the appropriate metrics by which the need for management intervention would be identified. The lack

- of objectives in this proposed policy makes interpreting and assessing the appropriateness of the proposed indicators and thresholds impossible.
- Major changes to management, like changing the primary Council, should be a last resort after other potential options have been deemed insufficient.
 - The implications of this policy are potentially large for many different stakeholders. A meaningful stakeholder comment process will be important. These stakeholders should include the interstate fisheries commissions (e.g., ASMFC). Changes in Council management could be more disruptive for jointly managed fisheries.
 - Range shifts are not monotonic - they shift in multiple directions over time. How will this policy address species that shift northward for a few years and then back to their earlier distribution? Will the management structure revert as well?
 - Many components of the decision points are not operationally defined. Thus, they will not lead to predictable and scientifically defensible decisions. This limits the benefit of transparency that is one of the stated goals of this directive.
 - The policy does not provide clear operational definitions of the criteria used to evaluate potential fishery/jurisdiction changes. For example, apparent shifts in stock distribution differ depending on factors such as which survey(s) is used to define the distribution of fish, and how boundary lines are drawn in federal waters (see Palacios-Abrantes et al. 2023, <https://doi.org/10.1371/journal.pone.0279025>). Thus, identifying a specific percentage of fish inside or outside the region is problematic.
 - Similarly, other aspects of the decision points are defined very specifically (e.g., a 15% threshold) with no evaluation presented to justify these choices or their implications. The descriptions about calculating averages over time are vague, with only examples that describe a three-year moving average.
 - Only four Councils have contiguous boundaries: New England, Mid-Atlantic, South Atlantic, and Gulf of Mexico. A national directive would then seem to apply only to the east and Gulf coasts.
 - Many Fishery Management Plans (FMPs) are intended for more than one species. The directive does not clarify how the process would apply to multiple species under a single FMP. It seems this would require even more work to possibly move one or more species out of the group covered by the FMP.
 - There is also no process specified for independent scientific peer review of these determinations/designations. This may lead to many transitory disturbances in the fishery. The absence of a well-defined scientific review process could lead to poorly justified and expensive changes to the *status quo* without compelling scientific evidence.
 - Processes other than climate change may cause the proposed metrics to change. For example, offshore wind farms could change available habitat or areas that can be fished. Management (e.g., changes to state or sector allocations, changes to closed areas) could also cause metrics to change.
 - How would this process interact with other NMFS guidance related to management under climate change, including National Standard 3 and the [agency-wide EBFM policy](#) and [EBFM Road Map](#)? This should be clarified. Are the procedures outlined here intended to help implement these policies? If so, how?

2) *Provide feedback on the application and potential implications of the proposed review criteria, metrics, and data sources described in Section III, Step 1 (Review Considerations), Step 2 (Geographic Scope of Fishery), and Step 3 (Council Designation). For Steps 1 to 3 consider appropriateness of the criteria and metrics, their feasibility of application, and the ability of current data streams to support decision making. Propose alternative criteria, metrics, and data sources where appropriate.*

- Some consideration should be given to the purported permanence of the change in these factors. Much of this document relies on the principle that such changes are irreversible and are caused by climate change instead of other factors like management.
- The bases (i.e., “criteria indicators”) for change may not be the same ones that were used to establish jurisdictions originally. Scallops and Monkfish might be good case studies. Blueline Tilefish would be another.
- Documenting a change in a stock’s distribution will not be easy to define. The variable definitions used in the literature will need to be tightened considerably before such changes can be used for decision making.
 - Methodologies will need to be sufficiently standardized to define relevant threshold criteria and how the uncertainty should be estimated. The document does not prioritize data sources or indicators used in defining or documenting a shift in stock distribution. Some hierarchy or prioritization of data sources/indicators would improve operational use and reduce instances of conflicting interpretations of distributional change. Data sources and criteria used to make decisions may be prioritized based on data quality and to avoid potential social-economic consequences of the decision, but details are lacking.
 - What is the basis for a 15% shift as a trigger of interest? What constitutes a “documented” shift in stock distribution? What statistical criteria would apply? How will interannual shifts in distributions be separated from longer-term and more permanent trends? This needs more technical specificity and is probably more suited for longer-term research.
 - A first step would be a review of historical changes in these metrics. Concepts from statistical control theory would be useful to distinguish signal from noise.
 - Criteria will often conflict (some indicating change, others no change or change in other directions). This can even be true within a single indicator (e.g., spring vs. fall trawl survey). How will divergent indicators be reconciled (e.g., recreational fishery appears to be shifting whereas commercial does not)?
 - The period for this shift (i.e., shift of greater than 15% in the proportion of a fishery’s landings revenue) is not specified. For small or non-target fisheries, spikes in catches or revenue might be fairly common. Moreover, alternative economic metrics should be considered - for example, net revenue might be more appropriate than landings revenue. Identifying the appropriate metric will depend on exactly what is intended to be captured (e.g., economic impacts vs welfare, etc.).

- Data sources have inherently different levels of quality and uncertainty. For example, defining such a metric from the MRIP data will be difficult (i.e., shift of greater than 15% in the proportion of a fishery’s recreational fishing effort: does the 15% refer to the point estimate?) because the MRIP estimates are often highly uncertain at small spatial scales (e.g., states). Therefore, determining changes in stock distributions may require greater precision than MRIP is currently able to provide at the state level.
- The problems in determining the fraction of catch in an area becomes especially critical as catches are restricted because it takes a smaller amount of fish or effort to make a big change percentage-wise.
- The SSC supports using multi-year information to mitigate against outliers; however, the ambiguity of geographic boundaries will impede any specific application of this recommendation.
 - Presumptive multi-year metrics - what happens to stocks with 25-40% change in landings revenue?
- The criteria currently seem to conflate footprint of the biological stock and footprint of the fishery. According to MSA (§3(13)), the definition of a “fishery” has two components: “(13) The term "fishery" means— (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** [emphasis added] (B) any fishing for such stocks.” Thus, is it accurate to assume that distribution of both components must change significantly?
- How would a significant change in stock distribution be determined? What is the time period over which that change is observed? Three years, as proposed, is likely too short to differentiate a range shift from interannual variability, and is less than a generation for many managed species.
 - As well, any multi-year average should be longer than the timetable for evaluation and implementation of governance changes (12 months for Council feedback on geographic scope and designations and a two-year transition evaluation, after which an updated three-year average could trigger reinitiation of the process). The latter includes a tradeoff between the risk of frequently changing management authority (too short a time period) vs risk of insensitivity to trends in changing distribution (too long a time period). These periods may also differ depending on individual stock and effort dynamics – distributions of some stocks and associated effort may be inherently more variable over time.
 - Changes may emerge through a suite of drivers: climate change, ocean acidification, wind energy areas (potentially affecting distribution of both stocks and effort). We currently do not have adequate infrastructure to monitor changes in stock distributions as wind energy areas expand.
- The draft policy ignores the data uncertainty in the “Sources of Data” section and therefore makes the proposed policy risk-prone, not risk-averse - i.e., how will uncertainty be evaluated and accounted for in the decision process?

3) *Comment on any social and economic implications and considerations the draft policy could have on Mid-Atlantic fisheries and communities.*

- The changes in management contemplated in this policy could be extremely disruptive for fishing because of different practices followed by each Council. These potential changes could introduce management uncertainty that influences capitalized values of quota, permits/licenses (and associated vessels), and/or long-term business planning. For example, the Councils use different approaches to set OFLs, ABCs, and ACLs. The potential to change which Council is in charge of management may create substantial uncertainty in future management.
- Six months to evaluate candidate changes in Council leads does not allow for multiple Council meetings, coordination with states and Interstate Commissions, and full public participation, no less proper compliance with NEPA and other applicable laws. There appears to be no opportunity in the process to get input on the potential implications from stakeholders on the potential change in management.
- The draft policy has a blind spot in its underlying assumptions and subsequent policy analyses regarding social and economic behaviors, relying on currently inadequate data collection programs. Scientific approaches largely do not exist to monitor and predict changes in markets, entry and exit, changes in home port, profitability, scalability, and business and financial health and flexibility. So the consequences of changes in lead Council, and under whose jurisdiction a user would actually fall under, are uncertain based solely on readily available information like permit address.
- The draft policy may create perverse incentives, including: (1) a disincentive for collaboration among Councils; (2) a response in which a proliferation of defined stocks occurs, increasing management complexity and costs (i.e., multiple FMPs across Councils for the same species); (3) relatively minor changes in real or reported landing locations to cause/prevent a jurisdiction shift. Ambiguities in definitions, delineations, and timelines identified above could also increase the number of court challenges.
- The policy should recognize that there is a difference between a fishing business and a fishing vessel. A business could have vessels fishing from multiple ports, but a headquarters at a specific location. It seems that the current draft directive should anticipate and address this type of integrated business in its design.
- As defined under step 4, a freeze on modifications to allocation or permits during the phase-in period could have serious consequences for business planning, which would be exacerbated by possible court challenges.

4) *Comment on the potential science and stock assessment implications of this policy (including development and timing of scientific advice to inform the management process).*

- Data responsibilities and workload consideration across Science Centers will be particularly important to understand because changing the Council in charge of the FMP may change the Science Center that provides advice.
 - Who conducts the standardized analysis of distribution shifts is yet to be determined.
 - How will the distribution shift analyses be conducted? Will one or multiple independent committees conduct the distribution shift analyses to meet the needs of steps 1 and 2? If so, how will the committees be formed? The data and the probable

- methods/approaches used are likely the same, although the objectives of steps 1 and 2 are different.
- How will data be shared across regions, Science Centers, Councils, and other agencies? Sometimes different data are collected in different regions.
 - Will a change in Council be associated with a change in the NMFS Science Center responsible for assessment and, if so, how will resources be shifted to accommodate this change?
 - Will data and sampling infrastructure be improved and standardized across regions? If resources can be made available for this, it would be highly beneficial to science and assessment across all regions.
- A transition to a new Council governance structure will likely require development of new data streams and/or integration of existing streams within and between NOAA Fisheries Regional Offices and Science Centers. This will require new resources, but the policy only advises mitigation “to the degree practicable.”
 - Many current data collection programs are region-specific, so recognizing shifts is complicated by differences among collection programs.
 - Current assessment science teams and stock assessment peer review processes are region-specific (e.g., SARC/SAW vs SEDAR) and may require modification under new Council management.
 - Data collection protocols designed for larger scale assessments may not support smaller management areas separated across Councils.
 - Increasing spatial resolution in assessments may require additional resources for both development and review of assessments.
 - Management Strategy Evaluation (MSE) is increasingly being used to guide development of approaches for setting ABCs. However, current MSEs don’t consider potential changes in management procedures associated with changing the Council (e.g., changing the OFL to ABC policy). Thus, guidance derived from MSEs may no longer be relevant once jurisdiction changes.
 - Transition would also erode the substantial institutional knowledge that resides within each Council and Science Center staff, which would be difficult to replicate in the transition period defined.
- 5) *Provide guidance and/or recommendations for Council consideration and possible inclusion in the Council's comments on the draft policy.*
- A Policy Directive that outlines the underlying science and/or management issue should have been developed and approved before making a Procedural Directive (i.e., the Climate Governance Policy). Then a procedural directive follows that would outline the process to address the policy. The current draft policy contains no information on the foundation as to what this policy is based on, and no science was presented to demonstrate issues exist. Particularly important is a review of how Councils have been responding to stocks shifting their distributions to date.
 - A policy directive should clarify what the primary concern regarding representation might be. In the current situation, all stakeholders have an opportunity to comment irrespective of council jurisdiction. If the primary concern is the absence of a voting

- member on the Council, modification of council membership might be simpler than spawning multiple FMPs.
- The policy directive should also include a review of previous Council efforts to manage stocks with shifting ranges. While challenges remain, these efforts appear to be effective without the need for many of the approaches described in the procedural directive.
 - It is unclear how this directive intersects with the [East Coast Scenario Planning](#) process and [possible outcomes](#).
 - It would be helpful to have a list of species and associated Councils with management authority that might be driving the need for this directive.
- Fishery Designation options 1-3 – some information on the current status of designation of stocks in categories 2 and 3 would be helpful. Spiny Dogfish and Monkfish fall in Designation 2. Golden Tilefish and Blueline Tilefish are in Designation 3.
 - All of these Fishery Designation options imply either *status quo* or expansion of management council involvement. What about contraction of jointly managed stocks to only being managed by a single Council? For example, might scallops be transferred from New England to the Mid-Atlantic?
 - Designation 3 (multiple councils, multiple FMPs) will require stock assessments that would likely occur at smaller spatial scales than is currently done. In general, there has not been sufficient advancement in the science and, as important, the data to support such estimates.
 - Who supports the research to develop improved techniques and approaches to support this policy?
 - The section of the policy that describes transitioning to revised council authority (step 4) specifies no permitting or allocation decisions by the lead council should be taken during the transition period. This implies a freeze on management actions, which could be problematic for species experiencing overfishing or other aspects of management.
 - Perhaps an "ombudsman" seat on the Council could address specific concerns of a state without a seat at the table. For example, a RI ombudsman could be part of the Mid-Atlantic process for squid issues. This might be more efficient than completely changing management authority.
 - The amount of change that would need to happen to trigger a change in management should be extremely large. Otherwise, there is the risk of the stock flickering back and forth over the threshold. Major changes to FMPs with changes in Councils would likely be very disruptive to stakeholders and management partners.
 - NOAA should test these rules through different case studies on a wide range of species (e.g., life history, management history) to see how their rules might be applied and understand when a change in management is truly needed. These case studies should envelop the entire process: define the problem and objectives, identify metrics to support objectives, and test any proposed approaches. The formation of a national working group, similar to those formed to review National Standard guidance, to provide technical advice on best practices should be considered to evaluate and determine significant changes in stock and fishing distribution, with worked examples when possible. Care should be taken in this process to avoid giving the impression to stakeholders that these case-study tests represent policies that are likely to be implemented. Rather these should only be paper exercises to make sure potential rules appear to work as intended.

- The base period and the time period used for comparison should be considered based on the species' life history, the uncertainty of the population dynamics, and the specific ecosystem characteristics (warming trend versus oscillation).
- There is no consideration or discussion of costs (besides mentioning the word) associated with these changes in responsibilities. How will NMFS address the modification of Council budgets to reflect the additional burdens, in particular on science, management and administration?
- There is another set of issues that is left undescribed. The draft directive policy fails to acknowledge the close intersection and integration of MSFCMA management with state partnerships in science and management that need to be considered in evaluating lead Council changes. For example, if a lead Council shift occurs that moves responsibilities to a new Region and Science Center, existing Cooperative Agreements, Research Set Asides, etc., with states for state data collection, research, and enforcement of FMPs and JEAs may have to be renegotiated under a potentially new management and administrative regime - is a two-year transition sufficient and will the state partners be willing participants? It will be hard to say because the policy is not being shared with them in advance for review, which is a major oversight and may strain relationships with key management and science partners. Greater public input on policy with a focus on other management partners (i.e., regional fisheries commissions) is recommended.

Attachment 1

MAFMC Scientific and Statistical Committee

July 12, 2023

Meeting Attendance via Webinar

Name

Affiliation

SSC members in attendance:

Tom Miller	University of Maryland – CBL
Ed Houde	University of Maryland – CBL (emeritus)
John Boreman	NOAA Fisheries (retired)
Jorge Holzer	University of Maryland
Yan Jiao	Virginia Tech University
Sarah Gaichas	NOAA Fisheries NEFSC
Wendy Gabriel	NOAA Fisheries (retired)
Mike Wilberg (Vice-Chairman)	University of Maryland – CBL
Cynthia Jones	Old Dominion University
Gavin Fay	U. Massachusetts Dartmouth
Alexei Sharov	Maryland Dept. of Natural Resources
Geret DePiper	NOAA Fisheries NEFSC
Andrew Scheld	Virginia Institute of Marine Sciences
Mark Holliday	NOAA Fisheries (retired)
Rob Latour	Virginia Institute of Marine Science
Olaf Jensen	University of Wisconsin-Madison

Others in attendance:

M. Sabo	K. Dancy
G. DiDomenico	C. Moore
H. Hart	J. Fletcher
M. Lapp	B. Muffley
J. Beaty	B. Brady
A. Bianchi	J. Hornstein
M. Seeley	M. Duval

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)

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.¹

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))² 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 Commerce³ 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.⁴ 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.”

¹ 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.

² 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.

³ 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)).

⁴ 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:⁵

- 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.⁶
 - 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/>.

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

⁶ 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.⁷

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.

⁷ 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.⁸
- 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.⁹

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.

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

⁹ 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.¹⁰
- 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

¹⁰ 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.¹¹

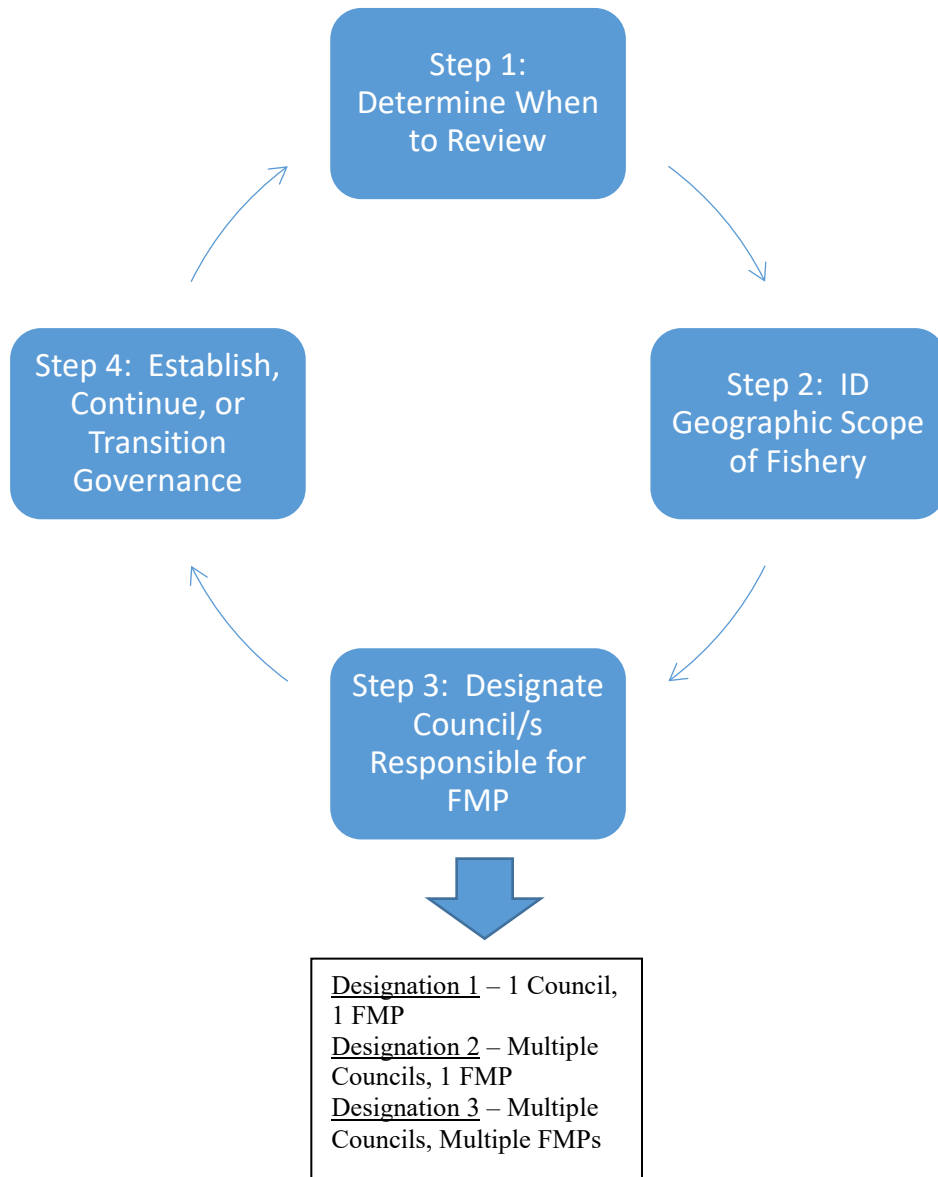
In addition, there is a presumption that, during the 2-year period following the notification of revised designations, any modifications to allocations or permitting requirements should not be undertaken by the Council that historically led the FMP. Any such modifications should be part of the development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

¹¹ 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.¹²
- 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 frameworks¹³ 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.

¹² 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.

¹³ "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.