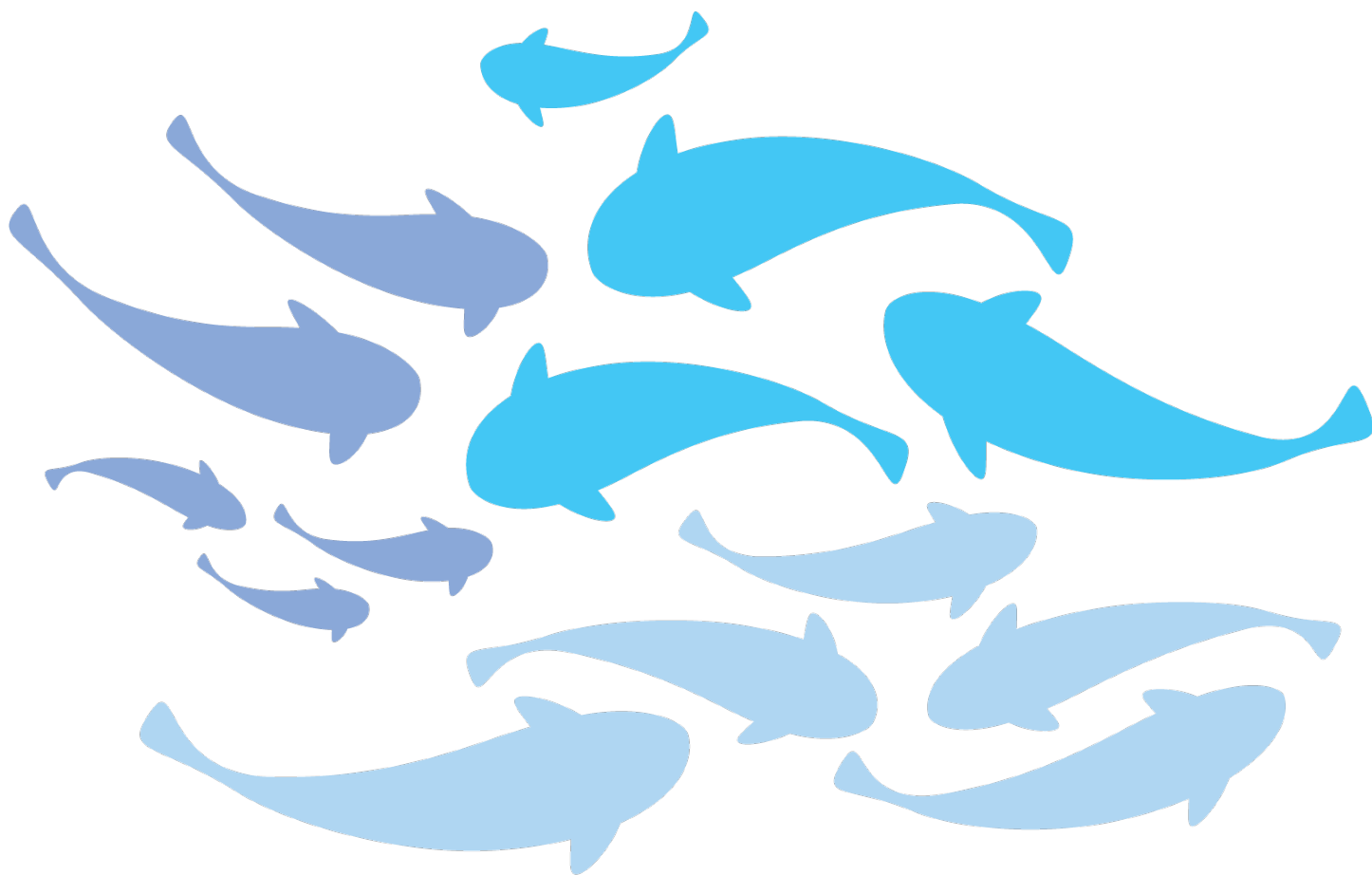


**NOAA
FISHERIES**

Office of Sustainable Fisheries

Using Frameworks to Facilitate Responsive Management



by Marian Macpherson

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LIST OF ACRONYMS

AA –	Assistant Administrator
ABC –	Allowable Biological Catch
ACL –	Annual Catch Limit
ACT –	Annual Catch Target
AKRO –	Alaska Regional Office
AM –	Accountability Measure
APA –	Administrative Procedure Act
B _{MSY} –	Biomass that will provide for achieving maximum sustainable yield
Council –	Regional Fishery Management Council
EEZ –	Exclusive Economic Zone
EFH –	Essential Fish Habitat
ESA –	Endangered Species Act
FMP –	Fishery Management Plan
GARFO –	Greater Atlantic Regional Fisheries Office
HMS –	Highly Migratory Species
MSA –	Magnuson-Stevens Fishery Conservation and Management Act
MSRA –	Magnuson-Stevens Reauthorization Act of 2007
MSY –	Maximum Sustainable Yield
NEPA –	National Environmental Policy Act
NMFS –	National Marine Fisheries Service
OGs –	Operational Guidelines
OY –	Optimum Yield
PIRO –	Pacific Islands Regional Office
RA –	Regional Administrator
RFA –	Regulatory Flexibility Act
SBRM –	Standardized Bycatch Reporting Methodology
SDC –	Status Determination Criteria
SERO –	Southeast Regional Office
SFA –	Sustainable Fisheries Act of 1996
WCRO –	West Coast Regional Office

Using Frameworks to Facilitate Responsive Management

I. Introduction

Fishery management under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires managers to understand, and respond to, dynamic biological, ecological, and economic systems in order to achieve a variety of competing policy objectives. Given the non-static nature of both fisheries and their related human systems, management measures must adapt to changing conditions, new information, and shifting priorities. The timing, procedural, and analytical constraints that apply to the development and implementation of Fishery Management Plans (FMPs) and FMP amendments can render the management process too slow and/or cumbersome to address real-time changing management needs. One mechanism that can facilitate greater speed and flexibility in management responses to changing information or conditions is the framework concept.

The National Marine Fisheries Service's (NMFS's) Operational Guidelines¹ define frameworking as:

[E]stablishing in an FMP/amendment or regulations a mechanism for implementing recurrent, routine, or foreseeable actions in an expedited manner. Such mechanisms may vary in terms of their structure, terminology, etc. A framework mechanism – and individual actions executed thereunder – must comply with the MSA and other applicable law.

Despite this broad definition, there have been misperceptions about what the basic framework concept is, and the many ways in which it can be applied. This paper is intended to provide examples of the many ways that frameworks can be used, describe how frameworks are being used in each of the regions, and identify limitations and trade-offs for managers considering development or application of a framework procedure. The discussion is organized into the following sections: (1) introduction; (2) review of some of the factors contributing to the need for rapid management responses; (3) review of statutory, regulatory, and contextual challenges to rapid response; (4) discussion of how frameworks can be used to facilitate flexible and adaptive management; (5) descriptions of the types and uses of frameworks currently in existence, with notes about time savings and limitations; and (6) a conclusion with recommended considerations to take into account when determining whether establishing or using a framework may be beneficial. A recurrent theme will be highlighting the trade-offs

¹ NMFS, PD 01-101-03, Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process (Oct. 25, 2017), available at: <https://www.fisheries.noaa.gov/national/laws-policies/fisheries-management-policy-directives> (*Hereinafter*, “Operational Guidelines”).

between retaining flexibility over future management responses versus greater speed and reduced workload at the time of the future action.

Finally, it should be noted that this paper focuses primarily on fishery management actions developed through the MSA's Regional Fishery Management Councils (Councils) process. For actions pertaining to Atlantic Highly Migratory Species (HMS), the Secretary directly develops frameworks and other management actions.

II. Need for Responsive Management and Rapid Response to New Information

A. Management Measures that Change Recurrently Science

Fishery managers realized early on that the FMP amendment process established by the MSA could be cumbersome, leading to challenges for management measures requiring recurrent changes. For example, in the context of the MSA's requirement to specify optimum yield (OY), initial efforts to establish OY as a specific number within an FMP created the burden of preparing FMP amendments to make adjustments each time new information became available. Councils, therefore, began recommending approaches for more flexibility in modifying OY. For example, in 1983, a Mid-Atlantic Council-developed FMP included a process that allowed NMFS, in consultation with the Council, to adjust OY at the beginning of each year, and throughout the year, on the basis of specified criteria.² This process allowed NMFS and the Council to use the best scientific information available to make timely adjustments to OY in response to unforeseen developing situations without requiring an amendment to the FMP.

B. Evolving Legal Mandates

In 1996, the Sustainable Fisheries Act (SFA) added new action-forcing mandates with deadlines pertaining to addressing overfishing. It required FMPs to include criteria for determining when a stock is overfished; it required NMFS to report annually to Congress on the status of stocks; and, for stocks determined to be overfished, the SFA established aggressive deadlines to end overfishing and establish rebuilding programs. In 2007, the Magnuson-Stevens Reauthorization Act (MSRA) created new obligations for annual catch limits (ACLs) and accountability measures (AMs) and added the requirement to end overfishing *immediately*. These evolving legal mandates have increased pressure on managers to be able to respond rapidly to new information.

C. Changing Ecological Conditions

Environmental change is not new to fisheries. For example, anchovy and sardine populations have well-known oscillations that began prior to human exploitation. In recent years, many species along the Atlantic Coast have experienced shifts in geographic distributions.

² See Amendments 1 and 2 to the Mackerel, Squid, and Butterfish FMP (1983, 1985) (available here: <https://www.mafmc.org/msb>).

The speed and magnitude of these types of changes can challenge the ability of scientists to make reliable predictions about future stock conditions. (Schindler and Hilborn 2015). Fisheries managers need additional tools that can provide for rapid response and future adaptability in order to address these changing conditions.

III. Challenges to Rapid Response

The MSA, Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and various other statutes impose procedural and timing requirements on the process for developing and implementing FMPs, FMP amendments, and regulations. For example, the MSA requires a 60-day public comment period on review and approval of FMPs and FMP amendments. For regulations that implement an FMP or amendment, or modifications to such regulations, MSA section 304(b) requires a public comment period of 15 – 60 days.³ The APA requires advance notice and public comment on all regulations, as well as a 30-day delay in effectiveness, unless there is good cause to waive these.⁴ In addition, all management measures must comply with all other applicable laws, which may include NEPA, the ESA, the Regulatory Flexibility Act (RFA), and others, and that can lead to the need for additional analysis, and in some cases additional public review periods.

The logistical and practical aspects of developing Council recommendations can also affect the speed of response, as the Council process is public and iterative. Addressing quickly shifting priorities, while balancing competing demands and meeting strictly mandated procedural requirements, can be challenging. Council meetings are scheduled far in advance, and there

³ The MSA provides 4 separate authorities for rulemaking and requires different procedures for each. In some cases, a proposed rule with a minimum comment period is required even when the similar requirements under the APA can be waived for good cause. Fishery managers considering developing or using a framework should be cognizant of the MSA's procedural requirements and plan accordingly. Details about these requirements are described further in NMFS's Operational Guidelines, Appendix 2, pp. 29 – 32.

The authorities are:

1. Standard Rulemaking/Regulations Deemed Necessary by Councils. MSA sections 303(c) and 304(b) describe the requirements for proposed regulations that a Council deems necessary or appropriate to implement an FMP or amendment.
2. Emergency Actions and Interim Measures to Reduce Overfishing. MSA section 305(c) provides authority for temporary rules to address unanticipated emergencies or reduce overfishing (Emergency Rulemaking, Interim Rulemaking).
3. Fishery Management Actions Developed by the Secretary. MSA sections 304(c)(6) and (7) provide NMFS authority to implement FMPs and amendments developed by NMFS (e.g., for HMS or other Secretarial actions).
4. General Rulemaking Authority. MSA section 305(d) provides general authority for the Secretary to promulgate regulations that are necessary to implement approved FMPs or regulations or to carry out any other provision of the MSA.

⁴ Under the APA, agencies need to provide a reasonable, meaningful opportunity for comment on proposed regulations (usually, at least 30 days), as well as a 30-day delay in effectiveness. NMFS can waive the APA's notice and comment requirement as well as the 30-day delay in effectiveness for final rules if good cause exists. For prior notice and comment, the good cause waiver must demonstrate that notice and comment was impracticable, unnecessary, or contrary to the public interest, and an explanation must be published with the rule. For additional information, see Operational Guidelines, *id.*, at p. 10 and p. 20.

are typically more management issues to address than resources. In addition, the scope of management issues and actions can change as a result of public dialogue or new information, and this can lead to actions taking longer than originally projected.

The timeframe for developing an FMP amendment and implementing regulations, including an iterative public process for identifying and developing alternatives, and completion of all requisite analyses of the issues and alternatives, generally can take between 2 and 4 years.

Structuring a management program to work within a set of pre-established parameters can minimize these statutory, regulatory, and logistical challenges and facilitate more efficient and rapid response to changing conditions.

IV. How Frameworks Function

The framework concept can be used to adjust management measures and reference points more quickly than through FMP amendments. Taking the time to structure a well-developed framework on the front end can lead to time savings in subsequent management responses. Time may be saved if management alternatives have been previously analyzed to a certain extent. For Council-developed actions, there may be time saved if the public has already been engaged, fewer Council meetings are needed to develop a response, and less time is required to finalize documentation after the Council has voted to recommend an action. The essence of the framework concept is to build into the FMP or regulation a mechanism to allow for future management adjustments without the need for amending the underlying FMP or regulations.⁵ Depending on how they are structured and used, frameworks can vary widely in terms of their time and workload savings and the amount of flexibility they allow in determining the future management action.

On one end of the spectrum, a very rapid and highly efficient framework is a simple “if/then” scenario, where a future condition can be predicted with certainty and a specific, pre-determined management response can be programmed into the FMP or regulation. An example of this type of framework would be providing for a closure upon attainment of a pre-specified catch level. Other types of measures that are frequently established in this manner include adjustments of trip limits or hours of fishing based on actual effort; alteration of closed seasons or areas based on biological data; and adjustment of quotas based on computational errors, late reporting, or for over- or underharvests.

On the other hand, not every management adjustment can, or should, be forecast and described with the same level of specificity. In some cases, Councils may prefer to retain more flexibility with respect to what management response to recommend in response to future

⁵ While this paper is focused on structuring frameworks within an FMP, the success of the FMP framework will be closely related to how well the associated analyses under other applicable laws can support the future actions. As discussed in section V.A., some Councils have categories of frameworks based on what future actions have been previously analyzed. Section V.C. provides additional considerations regarding planning for compliance with the other applicable laws.

conditions. For example, a Council may prefer not to recommend specific, pre-determined levels of catch for future specifications, but may instead recommend a range of acceptable catch level numbers (or amounts) within an FMP; or an FMP may provide for alternative management responses such as bag limits, closed areas, or size restrictions. A framework that allows for more options for future responses would require additional process in the future to determine the appropriate response, based on specified criteria. While determining which response to recommend could take more time in the future than specifying a response in advance, this approach might still result in some level of time savings by having a narrower field of options to analyze.

Other examples of situations in which a Council might want to refrain from recommending specific pre-determined future responses, in order to maintain greater flexibility in the future, include adjustments of area boundaries to respond to shifting fish populations, changes in size limits to minimize discards, prohibitions against use of certain gear to ameliorate gear conflicts, and modification of data collection requirements. For these cases, frameworking can still provide a degree of benefit in that the future actions will not require an FMP amendment. However, implementing management adjustments through these more flexible frameworks requires a greater amount of analysis and public process in the future than would be needed when using a framework with specific pre-determined management adjustments.

The extent to which potential future actions can be anticipated, specified, analyzed, and informed by appropriate public process in advance will dictate the speed and flexibility that the framework can provide for the future. Generally, providing less flexibility on what the potential future actions may be correlates to allowing a speedier future process for implementation.

V. Types and Uses of Frameworks.

There are 5 types of frameworks that currently appear in FMPs: (1) annual or multi-annual specifications, (2) pre-determined management responses to specified triggers (such as closures upon attainment of a quota), (3) re-openings, (4) a general class of broader, and less specified, potential adjustments to a wide array of management measures, and (5) customized frameworks. Typically FMPs provide for different procedural and timing considerations for the different types of frameworks. Most FMPs across regions and Councils, as well as Secretarial FMPs, include variations of the first 4 types. The fifth group consists of highly individualized frameworks that are specifically designed to address distinct circumstances. These are less common.

A. Framework Types.

1. Type 1 - Annual or multi-annual specifications

Most FMPs include a process outside of an FMP amendment for regularly, on an annual or multi-annual basis, establishing annual management measures, such as ACLs, quotas, and in

some cases, management measures to achieve these specifications.⁶ Most FMPs specify the data to be considered and the process to be followed when using these “specifications frameworks.” The main commonality among specifications frameworks is that they provide a regular, prescribed, public procedure for reviewing current information and using it to implement management measures. FMPs vary regarding the range of management measures that may be recommended via specifications frameworks, beyond simply numeric quotas.

A typical specifications framework establishes a regular (annual or multi-annual) process for the Council or a Council committee to review information about the fishery and make recommendations for catch levels, ACLs, quotas, and related management measures. These frameworks sometimes include detailed instructions for executing management decisions that have been previously made. For example, a specifications framework might set forth in regulations the percentages or formulas to be used in calculating numeric values for total allowable catch (TAC) and/or allocations based on the incoming data. Establishing specifications through such frameworks typically involves a 1 to 3 Council meeting process, with full analytical packages, through which relevant Council committees and interested constituents review information and provide input. Once the Council recommends specifications, NMFS may publish them as a proposed rule and, if approved, implements them through final rulemaking. It is common for specifications implemented through frameworks to be established annually, but depending on the FMP, some specifications may be effective for multiple years unless superseded by modifications through a subsequent year’s process.

The amount of time it takes to complete a specifications action pursuant to an FMP framework has typically ranged from approximately 6 to 15 months.⁷

2. Type 2 - Pre-determined Management Responses to Specified Triggers

Most FMPs include provisions for closures or similar responses, when a trigger is met, such as reaching a quota. Typically, the applicable regulation in the Code of Federal Regulations (CFR) will state that if a specified quota is reached, or projected to be reached, then NMFS “will close” the affected fishery, sector, area, or other appropriate subunit. Although NMFS must take an action to effectuate the closure, the choice of what that action will be has been previously specified in the FMP.⁸ In most cases, these actions can occur very rapidly, within days of when the quota is reached or projected to be reached. While each individual action must be

⁶ Note that not all FMPs are structured to follow this type of specification process. For example, in the Southeast Region, some FMPs provide for quotas that are codified in the CFR. Changes to these codified numbers would be made through a general framework adjustment as described in section 4(b)(ii) below. *See, for example*, 50 CFR 622.39, setting forth quotas for Gulf reef fish species.

⁷ This does not include the amount of time necessary to gather the underlying information that the frameworks may require the specifications to address.

⁸ A minor variation on this approach can be seen in some of the Greater Atlantic Regional Fisheries Office (GARFO) frameworks, which provide that NMFS must issue a closure, *unless* certain determinations can be made. *See, for example*, the provisions pertaining to closure of the Atlantic Mackerel fishery, which provide that NMFS has the discretion to not implement the closure if NMFS projects that commercial Atlantic mackerel landings will not exceed the domestic annual harvest (DAH) during the remainder of the fishing year. 50 CFR 648.24(b)(1)(ii).

evaluated in light of the facts to determine whether there is good cause to waive APA notice and comment and/or delayed effectiveness requirements, typically, facts have supported such waivers for actions under this type of framework.

The amount of time it takes to implement these actions has typically been 1 to 10 days.

3. Type 3 - Re-openings

Some FMPs include provisions for discretionary re-openings, upon determinations that the quota was actually not reached. These provisions are permissive rather than mandatory, but they typically set forth required considerations and may limit the available actions.

As in the case of closures at pre-specified triggers, NMFS can usually implement these actions rapidly, and facts have typically provided good cause for waiving APA notice and comment and delayed effectiveness for these actions. Time frames for implementation can be less than 10 days.

4. Type 4 - General Frameworks for Future Adjustments

Most FMPs include provisions that allow for modification of various other types of management measures ranging from things such as gear marking requirements, closed areas, or seasons to modifications of OY, MSY, SDCs, rebuilding plans or EFH provisions, and, in some cases, changes to any management measure currently described within the FMP. As described below, some FMPs provide more than one framework procedure that can be used depending on the amount of advance public participation and analysis that have taken place, the level of complexity and controversy, or other factors. This section describes two main categories of these general frameworks:

- (a) abbreviated procedures for actions that have been previously subject to analysis and public procedure and/or are not significant, and
- (b) more involved procedures for actions that are authorized to be changed outside of the FMP amendment process, but have not been specifically analyzed in advance and/or are significant.

The timing and procedural requirements for these types of frameworks vary according to the structure in each FMP.

a. Previously Analyzed and/or Not Significant

While most regions provide a method for expediting actions that are pre-analyzed and/or not significant, there is wide variation in both terminology and procedures. There is also variability in the speed of implementation for actions taken under these frameworks depending on the number of Council meetings required, which in some cases is a function of a Council's

prioritization of the action. Actions under these frameworks have typically qualified for APA good cause waivers, but each action must be evaluated on its own facts to support a waiver. A realistic range of time periods for taking action under this type of framework has generally been from 10 to 30 days, but they have taken up to 15 months. The following paragraphs describe the approaches and terminology that have been used in each applicable region.⁹

i. Southeast Regional Office (SERO)

SERO refers to these general frameworks as “open frameworks.”¹⁰ For actions that are considered “routine” or “insignificant,” such as gear-marking or reporting requirements or minor adjustments to bag limits or seasons, the framework allows for identification of alternatives through at least one Council meeting. After selecting a preferred alternative, the Council may send a letter to NMFS, including the justification for the action, and request implementation. It would likely be possible to find good cause for APA waivers for these types of actions.¹¹ While the FMP contemplates that these actions could be implemented via a single publication in the Federal Register if APA good cause waivers are available, in the event that these actions are considered rules promulgated pursuant to MSA section 304(b), there would still be a minimum public comment period under the MSA.¹²

ii. West Coast Regional Office (WCRO)

Several of the WCRO FMPs contemplate “Routine/Notice Actions” which can be developed and implemented via one Council meeting and through one Federal Register publication. For an action to qualify for this procedure, the Council must first designate the action as “routine” through the two-meeting Council process described in section (b) below.

The West Coast Salmon FMP provides for “fixed” and “flexible” framework actions which are designed for rapid implementation. Fixed actions include closures based on quota attainment and adjustments or corrections to those closures. Flexible actions include inseason modification of management requirements, such as quotas, bag limits, seasons, and areas. Under the FMP, NMFS is authorized to take fixed, inseason actions without further engagement with the Council. For flexible actions, NMFS must first consult with the States and Council. The FMP intends for both types of actions to be made effective by actual notice, followed by publication in the Federal Register as soon as practicable.¹³ In practice, the use of actual notice

⁹ GARFO’s regulations do not explicitly provide a separate framework process for pre-analyzed actions. However, for certain fisheries, GARFO’s general framework provisions do allow the relevant Council to recommend measures and request waiver of the APA requirement for a proposed rule and opportunity for public comment and for NMFS to determine whether an APA waiver is appropriate. *See, e.g.*, 50 CFR 648.55(j) (procedures for specifications and framework adjustments to management measures for the Atlantic sea scallop fishery).

¹⁰ *See, e.g.*, Gulf of Mexico Generic ACL Amendment (2011), Chp. 2.6. SERO’s regulations for all FMPs refer to procedures and timing requirements set forth in the FMPs.

¹¹ Although this provision is described in the regulations, it is not often utilized.

¹² *See supra*, note 3 and associated text.

¹³ 50 CFR 660.411(a)(2).

is not always a realistic approach due to the specific facts of each case. NOAA’s Office of General Counsel should be consulted on a case-by-case basis.

iii. Pacific Islands Regional Office (PIRO)

PIRO’s regulations provide for modification of “established measures,” i.e., “regulations for which the impacts have been evaluated in Council or NMFS documents in the context of current conditions.”¹⁴ The process requires public input, but could be done over one Council meeting.

iv. Alaska Regional Office (AKRO)

The North Pacific Council recognizes in its groundfish FMPs that, although the Council sets harvest levels annually, sometimes new information becomes available during the fishing year that may warrant inseason adjustments to a fishery. Therefore, the FMPs authorize NMFS to establish closures, openings, and modifications of TAC and other limits and gear requirements. To use this authority, NMFS must determine that the adjustments are necessary to achieve specified purposes and are supported by specified determinations listed in the regulations.¹⁵ This “Flexible Management Authority” provides for rapid response to incoming information about the ongoing fisheries. The trade-off for this speed and flexibility in response is that the Council does not have an opportunity to make a recommendation regarding the specific action to be taken prior to NMFS’s decision.

v. Atlantic HMS

Atlantic HMS regulations authorize NMFS to adjust a variety of measures, including quota shares and allocations, catch limits, retention limits, landing limits and size restrictions, based on listed criteria.¹⁶ The regulations provide for publishing these actions in the Federal Register.

b. Significant and/or Not Previously Analyzed

Many FMPs also provide a framework process through which a variety of management actions that have not been expressly specified, and which also may be more significant and/or not pre-analyzed may be recommended. There is wide variation in both terminology and procedures.¹⁷ The following paragraphs describe approaches and terminology that have been used in each applicable region.¹⁸

¹⁴ 50 CFR 665.18(a)(3).

¹⁵ BSAI Groundfish FMP, chp. 3.8.1. GOA Groundfish FMP, chp. 3.8.2.

¹⁶ See for example, 50 CFR 635.27(a)(7)-(9) (quota adjustments for bluefin tuna). See section V.A.4.b.v for reference to HMS frameworks that typically require additional rulemaking.

¹⁷ As noted, there is a wide variety of terminology used across regions and Councils in describing their frameworks. Some FMPs use the word “significant” to distinguish between their types of frameworks. That term is not intended to pertain to the determination of “significance” under other applicable laws or directives, such as the determination of “significant effects on the human environment” under NEPA or a “significant regulatory action” under E.O. 12866.

¹⁸ The AKRO regulations do not directly address this type of framework for the North Pacific fisheries.

i. GARFO

GARFO's regulations provide for "Framework Adjustment" procedures in each FMP. Though there are some individualized features for certain fisheries, in general, the GARFO framework adjustments feature a two Council-meeting process, multiple opportunities for public input, and development of a complete package of analytical documents (which may vary in level, depending on the action involved, and, with regard to NEPA compliance, may range from a Categorical Exclusion to a full environmental assessment (EA)). The regulations provide that a Council may request APA waivers, and the region will determine whether that is supported. (In practice Councils do not typically request APA waivers.) The regulations authorize modifications to an extensive list of management measures through this process, including every measure currently in the FMP. It is important to note that just being listed as "frameworkable" does not require that changes are made using this process. Each action is evaluated on a case-by-case basis to determine whether a framework adjustment is appropriate.

ii. SERO

In SERO, the Gulf and Caribbean FMPs describe "open frameworks" for actions that are "significant," such as specifications (or in some cases, "re-specifications) of ABCs and control rules, more significant changes to quotas and seasons, changes to rebuilding plans, etc., as requiring at least one Council meeting for the identification of alternatives.¹⁹ The FMPs provide that, after selecting a preferred alternative, the Council must send a complete rulemaking package to NMFS requesting implementation through proposed and final rulemaking.²⁰ In contrast, an FMP amendment would require several additional steps with Council involvement including scoping and review of an options paper.²¹

iii. WCRO

For WCRO FMPs, the framework process for actions other than "routine," normally requires at least two Council meetings, with a limited exception that sometimes allows for only one meeting.²² In contrast, the standard procedure for FMP development requires at least three Council meetings that are not necessarily consecutive.²³ The FMPs provide that actions that are not controversial may be considered for requesting NMFS to waive proposed rulemaking under

¹⁹ This is terminology set forth within the FMP itself. See Gulf of Mexico Generic ACL Amendment (2011), Chp. 2.6.

²⁰ It is not common practice for the Council to develop a rulemaking package on its own. Note that NMFS's Operational Guidelines encourage collaboration and coordination between NMFS and Council staff in developing these materials.

²¹ See the Gulf Council's "Navigating the Council Process," at p. 11. <http://gulfcouncil.org/wp-content/uploads/Navigating-the-Council-Process-12-14-12.pdf>

²² See West Coast Groundfish FMP, Amendment 18, 6.2, p. 52.

²³ See Pacific Council Operating Procedures, p. 2. <https://www.pcouncil.org/wp-content/uploads/cop11.pdf>

the APA. The FMPs provide that controversial actions are not appropriate for requests to waive proposed rulemaking.²⁴

iv. PIRO

For “new” measures developed for PIRO FMPs, there must be a minimum of two public meetings and Federal Register notices. Prior to the first Council meeting, a Federal Register notice must describe the issue, and a second Federal Register notice after public comment must describe the Council’s deliberations and rationale. Additional public meetings may be provided. NMFS would consider Council recommendations, then decide whether to implement them through rulemaking. These actions taken under this framework are essentially regulatory amendments.²⁵ The time savings compared to an FMP amendment is minimal but the MSA time period for public comment on regulations (15-60 days) can be shorter than what is required for FMP amendments (60 days).²⁶

v. Atlantic HMS

The Atlantic HMS framework process may have limited applicability in the Council context, given differences in how the Atlantic HMS FMP is developed, amended, and implemented.²⁷ The Atlantic HMS framework for adjustments to management measures is basically a proposed and final rulemaking process with a public meeting (or public meetings) during the comment period. This framework provides for modifying an extensive array of management measures.²⁸ Unlike Council-developed actions, there is a 60-day public comment period both for HMS FMP amendments and regulations, but the period may be shorter for “minor revisions” to existing regulations and specific types of regulatory actions.²⁹ One potential timing difference is that the MSA requires an HMS Advisory Panel (AP) to participate in all aspects of the development of any HMS FMP or amendment,³⁰ and the same requirement does not apply to HMS framework actions. However, NMFS generally involves the AP in framework actions as well, which could limit some of the potential time savings.

5. Type 5 - Customized Frameworks for Specific Issues

Some FMPs include frameworks that have been custom-tailored to address specific situations ranging from rapid response to bycatch information to long-term planning for future participation in limited access fisheries. Each of these customized frameworks is unique and

²⁴ Note that the FMP specifies that it is not intended to affect NMFS’s emergency rule authorities under the MSA.

²⁵ See, for example, the lists of actions taken under the Pelagics FMP, at <http://www.wpcouncil.org/pelagic/Pelagics%20FMP.html>, and under the Bottomfish FMP, at <http://www.wpcouncil.org/bottomfish/Bottomfish%20FMP.html>.

²⁶ MSA §§ 304(a), (b). See *supra* note 3 for a description of regulatory authorities under §§ 305(c) and (d) (which do not specify a mandatory, minimum comment period).

²⁷ The FMP process for Atlantic HMS is set forth in MSA § 304(g) (citing § 304(c)).

²⁸ See the regulations at 50 CFR 635.34.

²⁹ MSA §§ 304(c)(4), (6). See *supra* note 3 for a description of regulatory authorities under §§ 305(c) and (d).

³⁰ MSA § 302(g)(4).

individually designed to address a specific circumstance in a specific fishery. While there is some consistency in approach to the various types of frameworks described above, these frameworks are set forth in separate, stand-alone sections of the relevant FMP or regulations. While they may utilize some of the same tools available through the other types of frameworks (types 1-4), such as the ability to implement a closure, their trigger criteria and response parameters are detailed and specific to the particular circumstances at issue. Councils can develop individualized frameworks to address virtually any management need that can be predicted. However, the effectiveness of these individualized frameworks depends upon the ability to identify and pre-analyze the future need, trigger, and response.

Several examples of customized frameworks include: the West Coast HMS El Nino Closure framework; the Gulf of Mexico Shrimp/Red Snapper Bycatch Closure Zone framework; and the Western Pacific Bottomfish framework for admitting future entrants into the Ho'omalū Zone Limited Access Program. Each of these is discussed in greater detail in the next section.

B. Frameworks as Applied by Topic.

The following sections provide examples of how Councils have applied one or more of the five framework types to address important fishery management topics. Each section provides a brief overview of which framework types have been used to address the issue, and then provides specific details on customized frameworks that have been designed to address the specific fishery management issue.

1. Frameworks used to Address Bycatch

Councils have various framework tools within their FMPs for addressing bycatch. Councils can use the specifications process (framework type 1) to establish bycatch-related measures, such as allocations of bycatch among sectors, and even special allocations designed to encourage bycatch avoidance.³¹ Once allocations have been established, pre-determined actions (framework type 2) can be taken during a season to close areas or change allocations in response to bycatch levels.³² Broader changes to bycatch strategies in an FMP can also be developed through general framework procedures (framework type 4).³³

³¹ For example, Framework 56 to the Northeast Multispecies FMP established a sub-ACL for the scallop fishery “to create an incentive to minimize bycatch of windowpane flounder.” 82 FR 35660 (Aug. 1, 2017). This action was developed through the two council meeting process, and was implemented through proposed and final rulemaking, effective upon publication. 82 FR 28447 (June 22, 2017).

³² For the North Pacific groundfish fisheries, NMFS’s regulations pertaining to prohibited species catch (PSC) address bycatch by providing for mandatory actions, including reallocations and closures, in response to certain triggers being met. For example, the regulations require NMFS to review the use of halibut PSC in specific Gulf of Alaska groundfish fisheries by different sectors and reapportion the halibut PSC based on usage levels. 50 CFR 679.21(d)(4)(iii)(D). In a 2016 example of this measure, NMFS determined, on July 6, that a reapportionment was necessary, and implemented the reapportionment through an action published in the Federal Register, effective July 11, and published July 14, 2016. 81 FR 45423 (July 14, 2016). This action included APA waivers and was effective upon filing.

³³ For example, the Skate FMP provides for the following types of changes to be made through GARFO’s 2 Council-Meeting framework process: “Changes, as appropriate, to the SBRM, including the CV-based performance

Some FMPs include customized frameworks (framework type 5) that have been developed to address specific bycatch issues. The West Coast Groundfish regulations address bycatch in the whiting fishery through two provisions requiring, or authorizing, closures when certain levels of non-target species are taken. These frameworks, entitled “Ocean Salmon Conservation Zone,” and “Bycatch Reduction Areas,” utilize the pre-determined management response approach described in framework type 2 above, but incorporate additional specific criteria in a separate section of the regulations codifying the numeric triggers and the geographic zones to which the automatic actions will apply. These details are codified in stand-alone sections of the CFR.³⁴

The Gulf of Mexico Shrimp FMP includes a special framework (type 5) for closing zones to shrimping in order to reduce red snapper bycatch.³⁵ The framework specifies several geographic zones that could be closed. It establishes an annual process through which the Southeast Fisheries Science Center provides an assessment of shrimp effort, bycatch mortality on red snapper, and the bycatch mortality rate target. Based on this information, NMFS is to determine whether there is a need for a closure, and if so what the geographical scope and duration would be. If the needed closure falls within a previously analyzed range, NMFS would consider whether APA waivers could be asserted. Otherwise, further notice and opportunity for public comment would be required.

2. Frameworks to Address Allocations.

Once a Council has recommended what percentages or amounts of catch should be allocated to which groups, they can then recommend formulas to hard-wire into FMPs, through various framework provisions, to allow for implementing these allocations through distributions of specific amounts of harvest, based on timely information about total catch available or other factors. Specifications (framework type 1) can be used to assign numeric values to allocation levels. FMPs can also provide for pre-determined adjustments (framework type 2) to allocations in response to various management triggers.³⁶ In addition, general frameworks (types 4(a) and (b)) may provide for NMFS to take a variety of actions based on real-time

standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs.” 50 CFR 648.321.

³⁴ 50 CFR 660.131(c)(3), and 50 CFR 660.131(c)(4).

³⁵ 50 CFR 622.55(d).

³⁶ The BSAI Groundfish FMP establishes sliding scales of allocations for certain sectors and species depending on the total amount that will be available for harvest. These allocation percentages are then implemented through the annual specifications process. For example, with respect to one sub-allocation for yellowfin sole, the regulations provide that if the initial TAC of the species is greater than 125,000 mt, then two groups (group A and group B) are allocated 60% and 40% of the ITAC respectively. As the total TAC decreases, group A’s allocation increases up to 93% at 87,500 mt or below. BSAI Groundfish FMP, p. 64. The annual specifications framework provides the mechanism for reviewing the current data on available catch and applying the percentages and publishing numeric amounts of fish available for the relevant sectors. The Pacific Salmon FMP includes a similar sliding scale of allocation percentages based on amount of available harvest. Numeric values for the commercial and recreational allocations of Coho are established annually through the specifications process in accordance with the pre-established sliding scale of allocation percentages. See 50 CFR 660.408(d)(2).

monitoring information, and within prescribed parameters, for changing allocations when a bycatch trigger is met.³⁷ An FMP may establish conditions under which transfer of allocations can be made between commercial and recreational sectors as well as between States.³⁸ FMPs can also allow changes to allocations to be made through the more deliberative procedures of the general frameworks (type 4(b)).

Framework procedures may not be appropriate for all types of allocations. The West Coast Groundfish FMP prohibits designating allocations as “routine” management measures for purposes of its framework provisions.³⁹ In addition, it established a special framework procedure, the “SocioEconomic Framework,” that provides for adjusting allocations through the public Council process and requires consideration of seven additional factors beyond those required for other general frameworks.⁴⁰

3. Frameworks that Respond to Weather and Climate Events.

The effect of climate change on fisheries stocks is indirectly considered in SAFE reports. Thus ongoing management, including actions taken under framework types 1-4, indirectly address the impacts of climate change. However, several FMPs include customized frameworks (type 5) specifically designed to respond rapidly to issues relating to climate events.

The West Coast HMS FMP includes a special framework for closing areas to protect endangered sea turtles during El Nino events. The West Coast HMS regulations prohibit fishing with drift gillnet gear in a specified area of the EEZ from June 1 through August 31 during a forecasted, or occurring, El Nino event. According to the framework procedure, the Assistant Administrator (AA) determines if such an event is occurring, and, if it is, closes the area.⁴¹

³⁷ An example of this type of framework is the “flexible management authority” demonstrated in the North Pacific Groundfish discretionary reallocations of pollock allowances based on the likelihood of an allotted allowance going unused. 50 CFR 679.20(a)(5)(iii)(B)(4). If NMFS determines that vessels fishing in one area will likely not harvest the entire allowance, NMFS may reallocate some or all of the projected unused allocation to vessels fishing in a different area. This action can be accomplished by an inseason action published in the Federal Register. In a 2018 example, NMFS determined on January 17, that an allowance in a subarea would not be taken, and 19 days later issued a reallocation through a final rule effective upon publication. 83 FR 5052 (Feb. 5, 2018).

³⁸ The Mid-Atlantic Council and Atlantic States Marine Fisheries Commission work cooperatively to develop fishing measures for bluefish. The Bluefish FMP allows for transfer of quotas between commercial and recreational sectors, and/or between States, when one sector or State is not projected to land its share. Such reallocations can be made through the specifications process. The 2015 Bluefish specifications contained an example of each type. 80 FR 46848 (Aug. 6, 2015).

³⁹ Pacific Groundfish FMP, 6.3.2 states that Council recommendations to directly allocate the resource must be developed according to the criteria and process described in Section 6.2.3, the socioeconomic framework.

⁴⁰ Pacific Groundfish FMP, 6.3.1.

⁴¹ 50 CFR 660.713(c)(2)(ii). This provision triggered a closure in 2024, which was announced via publication of a temporary rule on May 31, 2024 (89 FR 47106). Although the closure was initially implemented from June 1 - August 31, 2024, the conditions for re-opening the closure early were met (see 660.713(c)(2)(iii)), so NMFS published another rule on August 1, 2024, re-opening the closure area effective immediately (89 FR 62667). In addition, in 2016, an El Nino event triggered this provision. On June 3, 2016, NMFS published a final rule, effective June 1 – August 31, 2016, prohibiting fishing with large-mesh drift gillnet gear in the specified zone. 81 FR 35653 (June 3, 2016).

The South Atlantic Shrimp FMP includes a framework allowing NMFS to close portions of the EEZ due to cold weather, if the adjacent states do.⁴² NMFS's decision to close the EEZ is permissive. However, if NMFS does close the EEZ, once the adjacent states re-open their waters, the framework requires that NMFS re-open federal waters as well.⁴³

4. Frameworks for Adaptive Management

The concept of adaptive management involves a structured, iterative process of managing in the face of uncertainty, with the goal of reducing uncertainty through monitoring, and then modifying management measures in light of improved information.

Utilizing a combination of framework tools, including the specifications process (framework type 1), the general adjustment process (framework type 4), and additional customized provisions (framework type 5), the Atlantic Sea Scallop FMP provides an approach for rotating open and closed areas, which can reduce impacts to sensitive habitat, minimize bycatch, and maximize economic opportunity.

The FMP establishes specific biological criteria that would trigger classification of an area as open, closed, or conditionally re-opened.⁴⁴ The framework builds on the existing structure of the specifications framework (type 1) to provide for regularized review of conditions, and it utilizes the structure of the general framework (type 4) provisions (two Council-meeting process) to implement changes when appropriate.⁴⁵ In contrast, the underlying amendment that put this framework into place (Amendment 10) took approximately 4 years to develop. The program depends on data collected through observer coverage and cooperative surveys with industry.

An older example of adaptive management was contained in the Stone Crab FMP. Although the FMP was repealed in 2011, its 1991 Amendment 4, establishing a framework for responding to overfishing, provides a good example of early adaptive management frameworks. It provided that if overfishing were to occur, the Council and State of Florida “will adjust the minimum claw length or fishing mortality rate (F)” to increase the egg production potential to at least 70 percent.⁴⁶ This would have required proposed and final rulemaking but not another FMP amendment.

5. Frameworks for Future Participants in Limited Access Systems

⁴² 50 CFR 622.206(a).

⁴³ In a 2018 example, Georgia closed its waters to shrimping on January 15, 2018, and on January 17, requested that NMFS implement a concurrent closure in the EEZ. On January 25, 2018, NMFS implemented the concurrent closure through a final rule, waiving both APA procedures and making the final rule effective January 24, 2018. NMFS also provided “actual notice” through postings on the Fisheries Bulletins website and via text message alerts to those who have signed up to receive them.

⁴⁴ Chapter 5 of Amendment 10 to the Scallop FMP.

⁴⁵ Although this Framework is implemented as part of the specifications process, it is discussed here as issue-specific due to its focused purpose and additional considerations and parameters.

⁴⁶ Stone Crab amendment 4, 1991, p. 4.

Limited access systems restrict participation in a fishery to a limited number of permitted fishermen or vessels. The MSA sets forth a list of criteria that Councils must consider when developing a limited access system. The Council process for identifying who may participate can be extremely contentious and time consuming. Frameworks can be established to speed up future actions after these systems have been established.

The Western Pacific Council recommended, and NMFS approved, a limited access system for the Ho'omalū Zone in the Bottomfish FMP. The FMP and implementing regulations authorized issuance of a limited number of permits, but also included a customized framework (type 5) for admitting future participants based on a determination of biological capacity, and pre-defined prioritization based on applicant participation. If NMFS, in consultation with the Council, determines that the stocks are able to support additional effort, the framework sets forth eligibility criteria for new participants and prescribes a point system and order of issuance of new permits.⁴⁷ No additional Council process or rulemaking is necessary to identify who can qualify for the future permits. Thus once the Council completed its initial cumbersome process of recommending qualifications for participants, the process will not need to be repeated in the future if the fishery is found able to support additional capacity.

6. Frameworks for Prevention of Gear Conflicts

When fishermen use different gear types to fish for different species in the same area, conflicts can arise. This can happen when the geographic area of effort for one species shifts into an area previously utilized for only another species. A classic example of this occurred in 1976, when effort in the stone crab fishery expanded into offshore waters and, at the same time, effort levels in the shrimp fishery increased in the same area. Armed conflict resulted. The Gulf of Mexico Stone Crab FMP (repealed in 2011) was developed to address this conflict.

The original FMP established a “line of separation” to separate activities of the different gear types. To modify the line, an FMP amendment was necessary. The time necessary to amend the FMP in a given year based on current data was longer than the season itself. Amendment 1 established a customized framework (type 5) to enable NMFS to modify the line of separation, based on specified considerations, through proposed and final rulemaking, saving enough time to make any changes relevant to the current year’s season.⁴⁸

The Gulf Shrimp FMP, includes a similar framework authorizing NMFS to modify or establish separation zones for shrimp trawling and the use of fixed gear to prevent gear conflicts. Speed is gained by the FMP’s providing for NMFS to act without awaiting further recommendations from the Council. The regulation requires that prohibitions or restrictions must be published in

⁴⁷ 50 CFR 665.203.

⁴⁸ 50 CFR 654.25(b) (1996-2011). See also Amendment 1, p. 28, (1981).

the Federal Register, but does not specify the type of rulemaking.⁴⁹ Thus, NMFS could assess whether APA waivers were appropriate on a case by case basis.

7. Frameworks for Implementing Accountability Measures

Most FMPs employ some form of framework for implementing AMs. Many provide for pre-specified paybacks of overages, either through specifications (type 1) or as pre-determined responses (type 2). Some allow for degrees of flexibility in how accountability is assured. Some include frameworks that are extremely specific and broken down into multiple if/then scenarios, based on stock status or other considerations. Some implement AMs through pre-determined closures (type 2), and some through general frameworks (type 4).

The recreational AMs for gag in the Gulf Reef Fish regulations incorporate a range of pre-determined actions based on triggers. The required actions, as well as the amount of flexibility, differ based on stock status. There is less flexibility in the response when the stock is overfished. For example, if recreational landings exceed the Annual Catch Target (ACT), the AA must file a notice that the season is closed.⁵⁰ If gag are overfished and the recreational ACL is exceeded, the AA must file a notice reducing the following year's ACL and the ACT by the amount of the overage.⁵¹ This example shows how frameworks can be tailored to respond to various foreseeable situations.⁵² When implementing this type of pre-determined action, NMFS has typically been able to provide factual support for APA good cause waivers.⁵³

With respect to the Scup and the Bluefish FMPs, the regulations for recreational AMs include specific and complex pre-determined payback provisions, which are to be implemented either via the specifications process (framework type 1) or through pre-determined closures or adjustments (framework type 2).⁵⁴ If the ACL is exceeded due to the recreational fishery landings, then the regulations require paybacks that vary based on the biomass of the stock.⁵⁵ This type of action has typically been implemented rapidly through a final rule, and been made effective immediately.⁵⁶

C. Limitations of Use of Frameworks

Various factors, including legal requirements (along with relevant court decisions), Council preferences, and availability of information, may affect whether frameworks should be

⁴⁹ 50 CFR 622.59(b).

⁵⁰ 50 CFR 622.41(d)(2).

⁵¹ *Id.*

⁵² 50 CFR 622.41(d)(2).

⁵³ See for example, the 2014 final rule implementing AMs for the red grouper recreational sector, published as a final rule on April 30, 2014, effective 5 days later. 79 FR 24353 (Apr. 30, 2014).

⁵⁴ 50 CFR 648.123(d) (scup) and 648.163(d) (bluefish).

⁵⁵ *Id.*

⁵⁶ See for example, the May 2017 final rule to implement red hake AMs, published on May 9, 2017, effective on May 9, 2017. NMFS asserted both APA waivers for the action. 82 FR 21477 (May 9, 2017).

considered and/or would be helpful. In some cases, frameworks may not function as originally envisioned.⁵⁷

Section 303(a) of the MSA lists 15 components that must be included within an FMP, including specification of OY, overfishing definitions, descriptions of EFH and measures to minimize impacts on it, and establishment of a standardized bycatch reporting methodology (SBRM). NOAA's Office of General Counsel should be consulted prior to considering or modifying a framework that addresses any of the issues raised under these MSA provisions.

The requirements of other applicable laws may also affect the usefulness of a framework. For example, NEPA requires analysis of environmental impacts and alternatives. When planning an MSA framework, Councils and NMFS should also structure the accompanying NEPA analysis in a way that will facilitate future tiering and efficiencies in analysis. If threatened or endangered species are present, the ESA requires NMFS to ensure that fishery actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. When planning an MSA framework, Councils and NMFS's sustainable fisheries staff should coordinate with NMFS's Office of Protected Resources and/or the U.S. Fish and Wildlife Service as appropriate, to plan for foreseeable ESA compliance needs.⁵⁸

The effectiveness of a framework depends upon the ability to prepare for, and analyze in advance, a set of future conditions. Changing environmental and socio-economic baselines can require additional analysis and may render previously selected management responses less appropriate. Other factors to consider include the level of controversy and the potential for changes to the underlying legal and regulatory baseline. Councils should be cognizant of unstable situations in contemplating whether to develop or utilize a particular framework.

Finally, it should be emphasized that, even if it is possible to waive notice and comment under the APA, for actions implemented under the authority of section 304(b) of the MSA (i.e., proposed regulations which a Council "deems" necessary for implementing an FMP or amendment, or modifying regulations implementing an FMP or amendment), there is a minimum 15-day public comment period required by the MSA which cannot be waived. NMFS rulemaking taken under the authority of 305(c) (emergency rules and interim measures to reduce overfishing) or 305(d) (actions taken by the Secretary to carry out an FMP or amendment) do not have this same requirement.⁵⁹

⁵⁷ For example, many FMPs include habitat-related actions among those that can be modified via framework. The West Coast Groundfish FMP includes a specific Habitat Conservation Framework, which requires use of the full two-Council meeting process. However, even for those FMPs, the Councils continue to address EFH issues primarily through the FMP Amendment process. Nonetheless, many other actions that are taken pursuant to such frameworks do provide beneficial impacts for habitat, such as the scallop rotational area program described above. See the discussion of Scallop Rotational Areas in section V.B.4 of this paper.

⁵⁸ For example, if it is anticipated that a new species may be proposed for listing, NMFS's guidance describes how conferencing can be conducted to support ESA coverage in the event of such future listings. See NMFS, Integration of ESA Section 7 with MSA Processes, Policy Directive 01-117.

⁵⁹ See, *supra*, note 3.

VI. Conclusion

In our current context of managing fisheries in a rapidly changing environment, managers need tools that provide for adaptability and speed in management response. Multiple laws impose a variety of analytical and procedural requirements on the fishery management process which can slow the speed of response to new information. Planning ahead and complying with these requirements in advance through frameworks can, in many cases and to varying degrees, improve the timing and workload requirements of future management responses.

Specifications frameworks provide a structured process for regularly reviewing new information and applying it to pre-arranged values and allocations, as well as for implementing AMs and adding or changing management measures, when necessary. Frameworks that specify pre-determined responses to triggers allow NMFS to make real time adjustments, such as closures, reopenings, and reapportionments of unharvested catch, in response to incoming information during the fishing season. One drawback to these types of frameworks is that Councils have less opportunity at the time of the trigger being met to provide input on customizing the recommended response. On the other end of the spectrum, frameworks that provide Councils more flexibility when recommending future responses (i.e., at the time the trigger is met) can have slower response times. Such frameworks do not provide for as much advanced analysis. However, even these frameworks can result in relative time-savings as compared to undertaking an FMP amendment. Finally, when Councils are able to identify and recommend a plan for an issue-specific framework, both speed and efficiency result.

There can be pitfalls associated with the use of frameworks. For example, volatile underlying conditions and/or highly charged political circumstances can result in baselines changing and undermining the framework's utility. Also, if the Council takes the time and effort to design and recommend a forward-looking framework, and the framework is never triggered, there is a question as to whether the time and effort were worth it.

Considerations: When deciding whether to recommend a new framework mechanism, Councils should consider how much predictability is possible, how quickly a management response will be needed, and how much flexibility the Council wants to retain over recommending the future response. The fastest response times are possible when the framework commits to a specific future response and does not provide for refining specifics in the future. When more flexibility is warranted, or there is more uncertainty regarding the impacts of the action, then response times may be longer. Factors to consider when evaluating whether to develop a new framework mechanism include:

- Amount of time and resources it will take to develop the mechanism and the expected efficiencies to be obtained.
- The desire to retain control/flexibility over recommendations for future responses to triggers being met.

- Ability to pre-analyze actions, including analyses required under other applicable law such as NEPA and ESA, in light of changing conditions.
- Ability to identify specific criteria that will “pull trigger.”
- Controversy that could lead to changes in the legal or regulatory baseline.
- Speed is a relative factor. Although a 15-month, iterative public process may seem slow, it may be much speedier than the amount of time required for an FMP amendment.

Ultimately, frameworks can be useful tools. The existing frameworks currently in place allow for a wide variety of actions. Councils (and NMFS for HMS) should consider whether recommending additional frameworks, issue-specific or others, would be useful in their fisheries.