

Development of Council Comments on NOAA Fisheries Climate Governance Policy

August 2023 Mid-Atlantic Fishery Management Council Meeting

Prepared By Council Staff
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Background information on NOAA's Draft Fisheries Climate Governance Policy can be found in the August Council meeting briefing tab here: https://www.mafmc.org/s/Tab08_NOAA-Fisheries-Climate-Governance-Policy.pdf, and on the Council's website at: <https://www.mafmc.org/actions/nmfs-climate-governance-policy>. This document summarizes preliminary feedback from Council staff and is intended to be considered by the Council in conjunction with the Scientific and Statistical Committee's (SSC) [comments on the draft policy](#).

Staff note that this policy as written would have major implications for Mid-Atlantic Council managed fisheries. Based on the criteria included in the draft policy, at a minimum, several Mid-Atlantic managed species would be likely be subject to frequent reviews of their geographic scope. These reviews may or may not trigger changes in management authority; however, based on the draft presumptions pertaining to designations described in the policy, there is the potential for one or more of the Mid-Atlantic Council's species or Fishery Management Plans (FMPs) to be designated as jointly managed with, or fully managed by, the New England Fishery Management Council.

Overarching Comments and Key Takeaways

- **The document does not adequately describe the problem that this policy is attempting to address.** While it is clear that species distributions are not static and will continue to change into the future, the Magnuson-Stevens Act (MSA) provides considerable flexibility for Councils to manage fisheries throughout their ranges. In fact, all of the management units for Mid-Atlantic Council-managed species extend outside of the Council's area of management authority. The Secretarial authority to designate Council responsibility for managed species already exists within MSA §304(f). It is not clear why this guidance is necessary now or how it would benefit fisheries or stakeholders. It is difficult to provide feedback on many of the elements of the draft policy without any factual information about the present-day problems the policy is intended to address.
- **The draft policy does not define specific objectives.** The lack of objectives makes it impossible to assess the appropriateness or potential effectiveness of the proposed process.
- **The draft policy treats changes in Council management authority as a first course of action for addressing shifting stock distributions.** This is a drastic response which may create as many governance challenges as it solves. Revisions of management authority could be extremely disruptive and should be exercised as a last resort when other approaches have been deemed inadequate.
- **The draft policy undermines the efforts of the recently completed East Coast Climate Change Scenario Planning Initiative,** which was undertaken to consider and address

governance challenges posed by changing species distributions along the East Coast. The East Coast Councils are likely to be most immediately affected by this policy. A number of actions were identified as the result of the scenario planning process, and NOAA Fisheries should first invest resources into helping those actions succeed instead of taking a prescriptive approach to the application of Section 304(f) of MSA as a solution.

- **The draft policy is overly prescriptive.** Such a policy should map out general principles, instead of providing overly specific guidance and criteria and thresholds that may not be appropriate to apply across all regions, fishery management plans, and stocks.
- **The draft policy as written could lead to near-constant reviews for some species, creating the possibility of frequent changes in management authority.** In addition to being extremely disruptive for fishery stakeholders, the agency and Council staff time and resources required to conduct such frequent reviews will be considerable and divert bandwidth from other critical projects, including initiatives that could increase the climate resilience of our fisheries.
- **Some of the review criteria are potentially problematic and/or unclear in their underlying intent, rationale, and technical justification.** Staff have particular concerns about the heavy reliance on commercial revenue and recreational fishing effort, as described in more detail in the “Detailed Comments” section. Many of the triggers and thresholds (e.g., a 15% shift in revenue or fishing effort to trigger an initial review) seem arbitrary and lack justification, and the suggested time frames for review (e.g., two sets of 3-year averages) seem too short to capture meaningful change and long-term shifts.
- **The draft policy also does not acknowledge the complexities of evaluating changes in stock distribution.** As discussed by the Council’s SSC, this is a very complex issue and different conclusions may be reached with different data sources or methods. The guidance should clarify that evaluation of this criterion should meet the standards of the best scientific information available and include a peer review component.
- **The draft policy is poorly organized, difficult to follow, and lacks critical details needed to ensure consistent and predictable implementation of the policy.** Review of the draft policy by Council staff produced nearly as many questions as comments. The following section provides a list of questions and areas of ambiguity that should be addressed if NOAA Fisheries proceeds with further development of this policy.

Questions and Areas Requiring Clarification

- What problem is this policy attempting to address?
- What are the objectives of this policy?
- What is the rationale for using a procedural directive as the vehicle for this guidance? Is it linked to an existing policy directive, or is one under development?
- The policy states that “for most currently managed fisheries, initial determinations of geographic scope and designations of Council authority for preparing fishery plans have already been completed.” Is this referring to the initial determinations made during development of each species original FMP or does it mean that NOAA Fisheries has recently conducted this type of

review for “most” managed fisheries? For which fisheries would this review not have been completed, and why?

- Is the policy intended to be applied to individual species or at the FMP level?
- How would the application of this policy differ between new/emerging fisheries and existing fisheries?
- Would this policy be applied to all species, including those for which the management unit has always included significant portions of the fishery beyond the Council jurisdiction boundaries (as is the case for most MAFMC species)? Or would it only apply to species that have exhibited recent changes?
- What are the anticipated costs and benefits associated with a change in lead Council designation? How would these costs and benefits be measured and evaluated relative to National Standard 7?
- Who, specifically, would be responsible for carrying out each step of the proposed process?
 - Who would be responsible for tracking the criteria and considerations listed in the document? Who would conduct the review? What would the role of the Councils be?
 - What kind of independent external review might occur?
- How would this policy take into account the existing role of the Atlantic States Marine Fisheries Commission, in the case of jointly managed species?
- How and why were the triggers and thresholds selected? What is the basis for using a 15% shift in revenue or recreational effort as triggers for conducting a review? What is the time period over which that shift is observed? What statistical criteria would be applied in the evaluation of a fishery under review? How will divergent indicators be reconciled (e.g., recreational fishery appears to be shifting whereas commercial does not)?
- What constitutes a “documented” shift in stock distribution? What is the time period over which that change is observed? How will interannual shifts in distributions be separated from longer-term and more permanent trends? What happens if different data sources or studies reach differing conclusions about stock distribution changes?
- How will uncertainty be evaluated and accounted for in the proposed process?
- The MSA definition of a “fishery” includes both the footprint of the biological stock and footprint of the fishery. Would both components have to change significantly for a change in management authority to occur?
- How would this process interact with other NOAA Fisheries guidance related to management under climate change, including National Standard 3 and the agency-wide EBFM policy and EBFM Road Map?
- How will data be shared across regions, Science Centers, Councils, and other agencies?
- Will a change in Council be associated with a change in the NOAA Fisheries 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?
- How will NOAA Fisheries address the modification of Council budgets to reflect the additional workload and administrative burdens, in particular on science, management and administration? How would this policy ensure compliance with the National Standard 7 requirement to minimize costs and avoid unnecessary duplication?

Policy Recommendations

The Council recognizes that climate change is having a profound impact on the Mid-Atlantic ecosystem and its fisheries, increasing the need for climate-ready management. Over the last 15 years, the Council has developed many actions and tools to build climate-ready fisheries and management¹, including the collaboration with other East Coast management partners on the [climate change scenario planning initiative](#). As noted above, the draft policy as written has a number of concerning issues. However, recognizing that §304(f) of the MSA is an existing provision that provides the Secretary of Commerce the authority to designate the Council(s) responsible for a given fishery, the Council acknowledges that greater transparency regarding the application of this authority could be beneficial. If NOAA Fisheries maintains its position that a policy on changes in Council authority under MSA §304(f) is needed, staff advise that the following general tenets be incorporated in such a policy:

- NOAA Fisheries should engage with the Councils directly on development of a revised policy, ideally via the recently created Council Coordination Committee Climate Change Working Group.
- This policy should provide a clearly defined description of the problem.
- Reviews and consideration of changes in management authority should be tied to clear and documented governance issues that have well-established connections to changes in species distribution. The policy should establish guidelines to assess whether a governance problem truly exists with individual species or FMPs that may come under review.
- Reassignment of management authority should be a last resort to be applied when all other attempts to address governance concerns have failed.
- The process of reviewing geographic scope and modifying management authority should include levels of analysis, documentation, and public input that are at least on par with the requirements for an FMP amendment.
- A policy should be designed such that reviews of the geographic scope of a fishery or fisheries begin at the request of one or more Councils. These requests should highlight a specific governance challenge and problem statement and a summary of information to support the need for a review. Councils are well positioned to track and identify changes in their managed fisheries, including resulting representation and governance concerns.
- If criteria or metrics are included in the policy and used in any evaluation and determination, they should be technically robust and have a well-supported connection to clearly defined objectives for evaluation. Determinations should be reached using an evaluation of multiple factors including, but not limited to, stock distribution, fishing locations, shoreside infrastructure, fishing communities, and unique fishery characteristics.
- The policy should clearly distinguish between the process for new/emerging fisheries and fisheries managed under existing FMPs.
- The policy should be applied at the species level. Species that are currently grouped together under one FMP may not need to be managed together in the future, and it would be difficult to

¹ See <https://www.mafmc.org/climate-change> for more information on Council actions to support and increase the Council's capacity to respond to climate change.

apply the current draft policy to an FMP complex if different species are showing different trends in their fisheries.

- Commercial and recreational fishermen have often highlighted the need for consistency and stability. The policy should prioritize avoiding disruption to the management system and should be designed to minimize the frequency of reviews and changes in management authority.
- The policy should clearly define the role of NOAA Fisheries, the Councils, and where applicable, the Commission, for each step of the process.
- The policy should require that a cost/benefit analysis be conducted when a transition in management authority is proposed.

Detailed Comments on the Draft Policy

I. Introduction

- The introduction does not adequately explain the purpose and need for this type of guidance. Beyond a footnote to the 2021 review of fisheries spanning multiple Council jurisdictions, the document does not acknowledge the long history of Councils successfully managing stocks that extend beyond their regulatory boundaries. While we acknowledge the need to prepare for changing conditions, including possible changes to our governance systems, the policy does not explain what characteristics of the current system would necessitate this type of policy for transfer of management authority.

II. Overview of Key Legal Provisions

- The description of relevant legal provisions includes some, but not all, relevant portions of the National Standard 3 guidelines, specifically the portions pertaining to political boundaries and the preference for one FMP where a species range overlaps Council areas.²

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

- Clarification is needed on the assertion that “for most currently managed fisheries, initial determinations of geographic scope and designations of Council authority for preparing fishery plans have already been completed.” It is not clear if this is referring to the initial determinations made during development of each species original FMP or FMP amendment establishing management, or whether it implies that NMFS has recently conducted this type of review for

² 50 C.F.R. § 600.320(b) and (c):

(b) General. The purpose of this standard is to induce a comprehensive approach to fishery management. The geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries.

(c) Unity of management. Cooperation and understanding among entities concerned with the fishery (e.g., Councils, states, Federal Government, international commissions, foreign nations) are vital to effective management. Where management of a fishery involves multiple jurisdictions, coordination among the several entities should be sought in the development of an FMP. Where a range overlaps Council areas, one FMP to cover the entire range is preferred.

“most” managed fisheries. In either case, it is not clear for which fisheries this review would not have been completed and why.

- There should be further distinction and explanation within the policy about how it’s intended to be applied to new/emerging fisheries vs. existing fisheries.
 - There is already a process in place to determine the geographic scope of new/emerging fisheries and their appropriate management authority via the Council development of an FMP and its approval by NOAA Fisheries. As such, it is unclear why this part of the policy would be necessary beyond providing additional transparency.
 - Additional context is needed about who is responsible (between the Councils and NOAA Fisheries) for this step for new/emerging fisheries. Typically, the Council would develop a description of the fishery and its geographic scope as part of the management action (subject to approval by NOAA Fisheries).
 - It would be beneficial to describe separate processes to be applied to new/emerging fisheries vs. existing FMPs where the distribution may be changing. Commingling these processes may cause confusion, and there are likely major differences in the types and availability of data for evaluation in these different situations.
- There is a lack of clarity in the document about roles and responsibilities for most steps of this process. Additional explanation of roles and responsibilities would be beneficial.

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

a. Circumstances under which NOAA Fisheries would conduct a review:

- As noted above, reviews should be initiated at the request of one or more Councils.
- Frequent reviews will require considerable time and staff resources (from NOAA Fisheries and/or the Councils) and detract from other priorities, including other initiatives and actions to increase the climate resilience of fisheries management, as well as ongoing required elements of management.

b. Criteria that may indicate a need for review of initial determinations/designations:

- It is unclear if/how NOAA Fisheries would plan to track these criteria for every managed species to determine if a trigger was met, and how frequently the criteria would be reviewed. Tracking these criteria for all Council managed species could represent a substantial task.
- The inclusion of “Certain Council actions, such as allocation revisions or changes to permit requirements that have cross-jurisdictional implications” is concerning as a trigger for review.
 - Many Council actions have “cross-jurisdictional implications,” particularly on the East Coast. These actions may be unrelated to whether the species is experiencing a geographic shift and Councils must already consider impacts on the Nation as a whole.
 - We would expect this criterion to trigger frequent reviews, and are concerned that it would result in unwarranted controversy for completed actions that have followed the existing rigorous public input process, documentation of compliance with all relevant federal laws, and review and approval by NOAA Fisheries.

- It is not clear what other types of “certain Council actions” may trigger an automatic review of the geographic scope of a fishery, or whether all actions pertaining to the allocation and permitting examples given would necessarily trigger a review. This indicator does not seem to fit with the other types of indicators included in this section.
- The metrics within this section appear to be overly simplistic to capture what is presumably the underlying intent to assess changes in a “fishery” as defined by the MSA.³ This definition encompasses both the location of fish species and the location of fishing effort. The criteria should be revised to reflect that relying on a single metric is unlikely to reflect the bigger picture of fishery changes.
- As noted above, it is unclear how a “documented shift in stock distribution” would be defined or evaluated. As discussed by the MAFMC’s SSC, this is a very complex issue and different conclusions may be reached with different data sources or methods. The guidance should clarify that evaluation of this criterion should meet the standards of the best scientific information available and include a peer review component.
- It is unclear why 15% is used as a threshold for changes in revenue and effort metrics. Depending on the years evaluated and the fishery, a 15% change in these metrics could be well within the typical variation driven by a variety of factors and seems to be a low threshold for change, potentially leading to frequent and unproductive reviews.
- Commercial revenue is problematic to rely on heavily given that it can be highly variable (overall and by region) and is confounded by many other economic and management factors. The draft policy notes that reviews should account for “any regulatory requirements that may be affecting where fish are landed as opposed to where they are caught.” However, it is not clear how this would be done, and this calls into question whether commercial revenue is the right metric if the intent is to assess catch location. The policy may also create inefficient incentives to return fish to particular home ports for the purposes of maintaining (or modifying) management authority rather than the most efficient or profitable port.
- Similarly, overly relying on recreational effort as a metric to indicate species distribution shifts is problematic.
 - Recreational effort may be more difficult to tie to a target single species or FMP compared to the commercial fishery.
 - Recreational effort is influenced by many factors other than species distributions, particularly local and regional trends in weather, economic factors, recreational measures, and access to shoreside fishing sites or marinas.
 - There is limited spatial data for recreational effort. It is unclear if the intent would be to evaluate recreational effort by state or region as captured by the Marine Recreational

³ MSA §3(13). (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.

Information Program (MRIP) or other data sources. In any case, the uncertainty in the underlying data (including by region) would need to be considered.

- Using three-year averages, as used in the example in the document, is not a long enough time frame to capture true, longer-term trends in fishery changes. This is particularly true when multiple short time frames are compared with little or no separation in time between the two periods. These comparisons are much more likely to capture shorter-term changes that may be unrelated to climate change including natural variability, temporary changes in fishing effort, changes in stock dispersal, changes in fishing regulations, etc.

c. Sources of data

- There should be a clearer connection between sections (b) and (c) in Step 1. The data sources listed in section (c) appear to be broader than those that would be needed to evaluate the criteria in section (b).
- Any policy should note that data sources could include federal/state fishery-independent data or fishery dependent data.
- Where possible, other information beyond just federal trawl survey data should be considered, particularly in light of partial survey coverage in some years, changes in survey timing, infrequent encounters for some species, and potential future survey conflicts due to offshore wind energy development and other ocean uses.

d. Determine whether to conduct a review

- The Council’s role, if any, in the determination of the need for a review is not clear from this description.
- The policy should specify that the “preliminary review” and its conclusions should be documented in a transparent manner.

Step 2: Determine the Geographic Scope of a Fishery

a. Roles

- The text describing the role of the Council vs. NOAA Fisheries here is confusing and could benefit from further clarification.

b. Data to Consider

- In defining the geographic scope of a fishery, the policy should consider ways to incorporate fishing communities and shoreside support infrastructure in addition to the location of the fish stock and the location of fishing effort.

c. Additional Considerations

- Several of the additional considerations are unclear in their connection to defining the geographic scope of the fishery. For example, it is not clear how management goals/objectives and management efficiency are tied to identifying the geographic scope of a fishery.
- Aspects of recreational infrastructure should be referenced in addition to the commercial infrastructure elements included in this section.

d. Determination

- The language stating that NOAA Fisheries “may choose to” give the relevant Councils time to comment is concerning as it implies that this may not necessarily be standard procedure.
- Similarly, the time frame of “up to 6 months” could imply a much shorter time frame. This time frame is already of concern as it is difficult to get meaningful engagement from the Council and stakeholders within this time frame.
- The relationship between “Outcomes 1-3” in this section and “Designations 1-3” in Step 3 is difficult to follow.

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

a. Roles

- The 6-month time frame for the Council(s) to consult on a designation is very short. As noted above, it is very difficult to develop comments on such an impactful issue within such a short time frame given Council agenda development.
- It is unclear what types of MSA requirements would result in a “different schedule” being necessary, particularly if any transition in management authority has a phase-in period.
- It is not clear if NOAA Fisheries would put forward a proposal for a revised designation if they determine that one is needed, or if they would consult with the Councils before developing a potential revision in designation.

b. (Labeled as “a” in the Document) - Fishery/ies Designations and Considerations

- The distinction between “multiple Councils, one FMP” and “multiple Councils, multiple FMPs” may need additional clarification. There are some joint management situations where this distinction may be unclear, including where there are complementary FMPs with nearly identical measures. It is not clear from this description whether one FMP means all decisions need to be joint and/or all FMP elements need to be jointly agreed to.
- Under Designation 3, the ability for SSCs and Councils to appropriately specify ABCs within different Council jurisdictions will be very challenging since most stock assessments in the region are not spatially explicit and don’t provide spatially explicit fishing mortality or biomass estimates to assign appropriate catch and will require new/expanded science. It is unclear if this designation would conflict with the objectives of National Standard 3 to manage fisheries as a unit stock throughout their range to the extent practicable.

- i. General considerations:

- The list of general considerations should include information and comments from the Councils.
- Many listed considerations would require extensive analysis and it is not clear how these evaluations would be completed, documented, or reviewed.
- It’s unclear if these considerations are being evaluated and reviewed on the same 6 month time frame given to the Councils to provide comments, or before/after.

- It's unclear how NOAA Fisheries would consider several elements of this list, including "efficiency/responsiveness/adaptability," locations of "future" processing facilities, community impacts, and cost.
- It should be clarified whether NOAA fisheries would consider permit activity in combination with "existing permits," or just the existence of permits and their theoretical capacity.
- While the "need for cross-jurisdictional coordination" could be appropriate to consider, it is not clear what is meant by "(e.g., potential for effort shifts if management measures are different under multiple FMPs)."
- ii. *Presumptions pertaining to designations:*
 - In combination with the long list of general considerations listed on pages 6-7 of the draft policy, the presumptions listed in Step 3(b)(ii) are confusing and concerning. It is unclear to what extent the other considerations would factor into determination given these seemingly prescriptive presumptions which are based only on commercial revenue, recreational effort, and stock distribution data. It is also unclear how the listed presumptions would be used in combination with each other. A transition of management authority is a major, disruptive change and should not be undertaken based on very limited metrics that do not adequately describe the dynamics of a changing fishery.
 - The thresholds included in the presumptions appear arbitrary and are in need of justification.
 - As discussed above for Step 1, overly relying on commercial revenue and recreational effort is problematic.
 - Also as noted above, characterizing species distribution changes is a complex science with multiple possible data sources and methods. The lack of a defined presumption here is concerning and indicates a serious need for additional development of any stock distribution change considerations, and additional coordination with NOAA's science enterprise.

c. (labeled as "b" in the document) - Designation of Council FMP authorities

- What would be the extent of documentation of rationale? Would NEPA or other applicable laws apply in this case?

Step 4: Transitioning to Revised Council Authority

- The guidance states that during the minimum 2-year phase in period, "existing FMP and regulations should remain in place." It is unclear if this refers to all FMP elements and regulations, including routine specifications of annual management measures. Transition to revised management authority will be difficult and complex and may take much longer than two years. It is unrealistic to expect all regulations to remain unchanged over this time frame while still meeting the objectives of the FMP and "remain[ing] compliant with the MSA and other applicable law."

- The description of the transition period does not address the East Coast Scenario Planning Summit recommendation to use joint management as a transition mechanism where appropriate.
- The guidance states that NOAA Fisheries and the Councils should provide for a “transition plan that addresses permitting and allocation issues.” It is not clear what is meant by this, especially given that the guidance also states that the existing FMP and regulations should remain in place until superseded by the new responsible Council(s).