

# 2014 Bevan Symposium: Congress, Councils, Courts and Sustainable Fisheries

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# Objectives

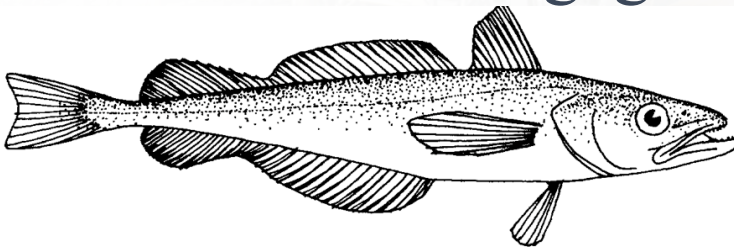


1. Developments from 1980s through Sustainable Fisheries Act
2. Basics of federal fishery legislation
3. Early SFA implementation

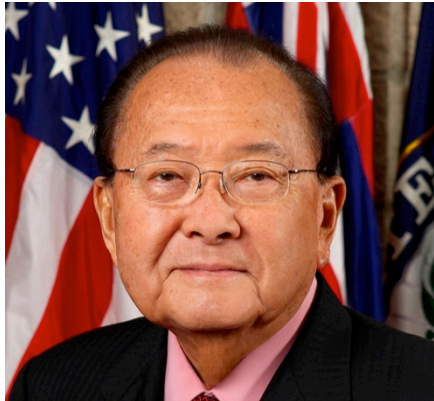


# Fishery Trends 1980 – 1995

- 60% increase in U.S. fishery catches between 1980 – 1994
- Boom in size of fishery fleet with full capacity to harvest U.S. resources reached by 1991
- Decline in PNW salmon stocks with listing of Snake River sockeye in 1991 under ESA
- 36 Fishery Management Plans in place by 1995
- Growing New England fish stock concerns contrast with more conservative Alaska fishery development
- Increased engagement of environmental organizations



# Focus of 1990 Reauthorization



## Driftnets

- International ban
- U.S. sanctions



## Highly migratory species

- Tuna defined as “fish”
- NOAA Fisheries FMPs for Atlantic species



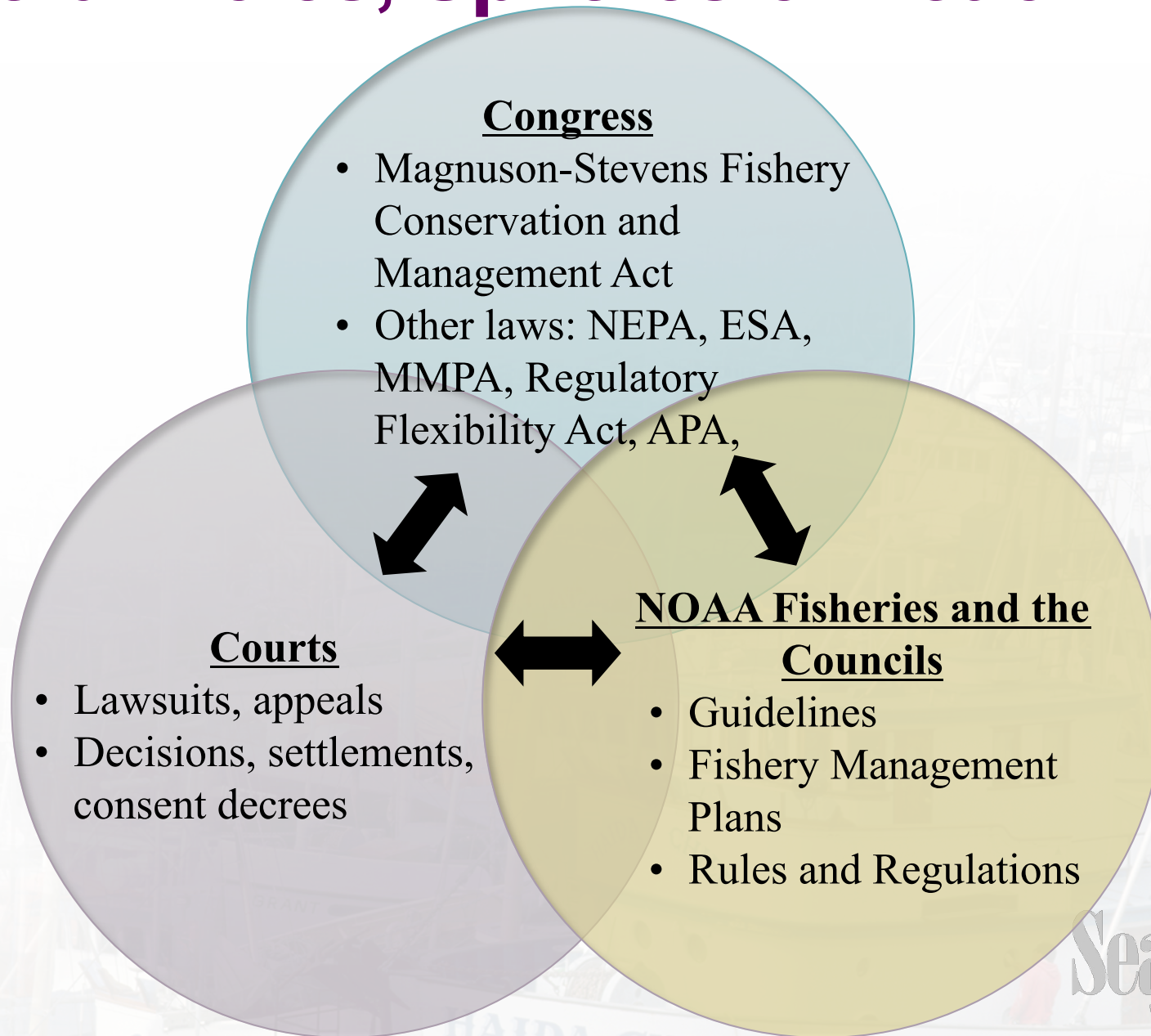
## Council member term limits

## Increased penalties





# Federal Roles, Spheres of Action



# New England Groundfish Disaster



- 1965** 780,000 metric tons of groundfish harvested off New England and Canada
- 1980** US landings dropped to 200,000 metric tons
- 1987** Council-NOAA Fisheries impasse over failure of New England Groundfish Plan to prevent overfishing and provide comprehensive rebuilding strategy
- 1991** Conservation Law Foundation legal challenge and negotiation with NOAA of consent decree; agreement to rebuild cod, yellowtail in 5 years, haddock in 10 years
- 1993** Groundfish landings decline to 65,000 metric tons
- 1994** Secretary Brown declaration of fishery resource disaster; use of \$30 million in emergency funds available from California earthquake appropriations



# SFA Legislative Process

House Introduction of H.R. 39  
Referred to Resources Committee

Committee Hearings

Markup and Vote to report bill  
H. Rpt. 104-171

Floor Activity, Refer to Rules  
Committee, Debate, Votes  
Congressional record H9116-9121,  
H10213-10247

House vote on Senate bill (or  
conference) Congressional record  
H11418-11445, H11468-11469

Senate Introduction of S. 39  
Referred to Commerce Committee

Committee Hearings  
S. Hrg. 104-174

Markup and Vote to report bill  
S. Rpt. 104-276

Floor Activity, Debate, Votes  
Congressional record S10906-10913

President signs  
Public Law 104-297

Law printed and codified  
16 U.S. Code 1801



# SFA – Overfishing and Rebuilding

- Revised definition caps “optimum” yield in National Standard 1 at the maximum sustainable yield (MSY)
- FMP requirement to specify objective and measurable criteria for overfished and overfishing
- Mandatory rebuilding plans for overfished species:
  - Specify the shortest possible rebuilding time period (not exceeding 10 years unless exception)
  - Allocate restrictions and recovery benefits fairly and equitably
- Annual NOAA Fisheries report on fishery status, overfishing
- Reports on ecosystem principles, stock assessments





# SFA – Habitat Protection

- Essential fish habitat (EFH) definition
- FMP requirements to identify EFH, minimize adverse fishing effects
- Require federal agency consultation with NOAA Fisheries on proposed action that could adversely affect identified EFH
- Council authority to comment on federal and state actions that affect EFH



# SFA – Bycatch Reduction



- National Standard 9 to minimize bycatch and bycatch mortality
- Definitions of “bycatch,” “economic discards,” “regulatory discards”
- FMP requirement for bycatch reporting and management measures
- FMP discretion to provide harvest incentives for use of fishing practices that reduce bycatch



# SFA – Fishing Communities

- New national standards on safety (NS10) and fishery dependent communities (NS8)
- Moratorium on individual fishing quota program development and report requirement
- Fisheries disaster relief
- Fishery capacity reduction authority
- Reports on CDQs, overcapitalization



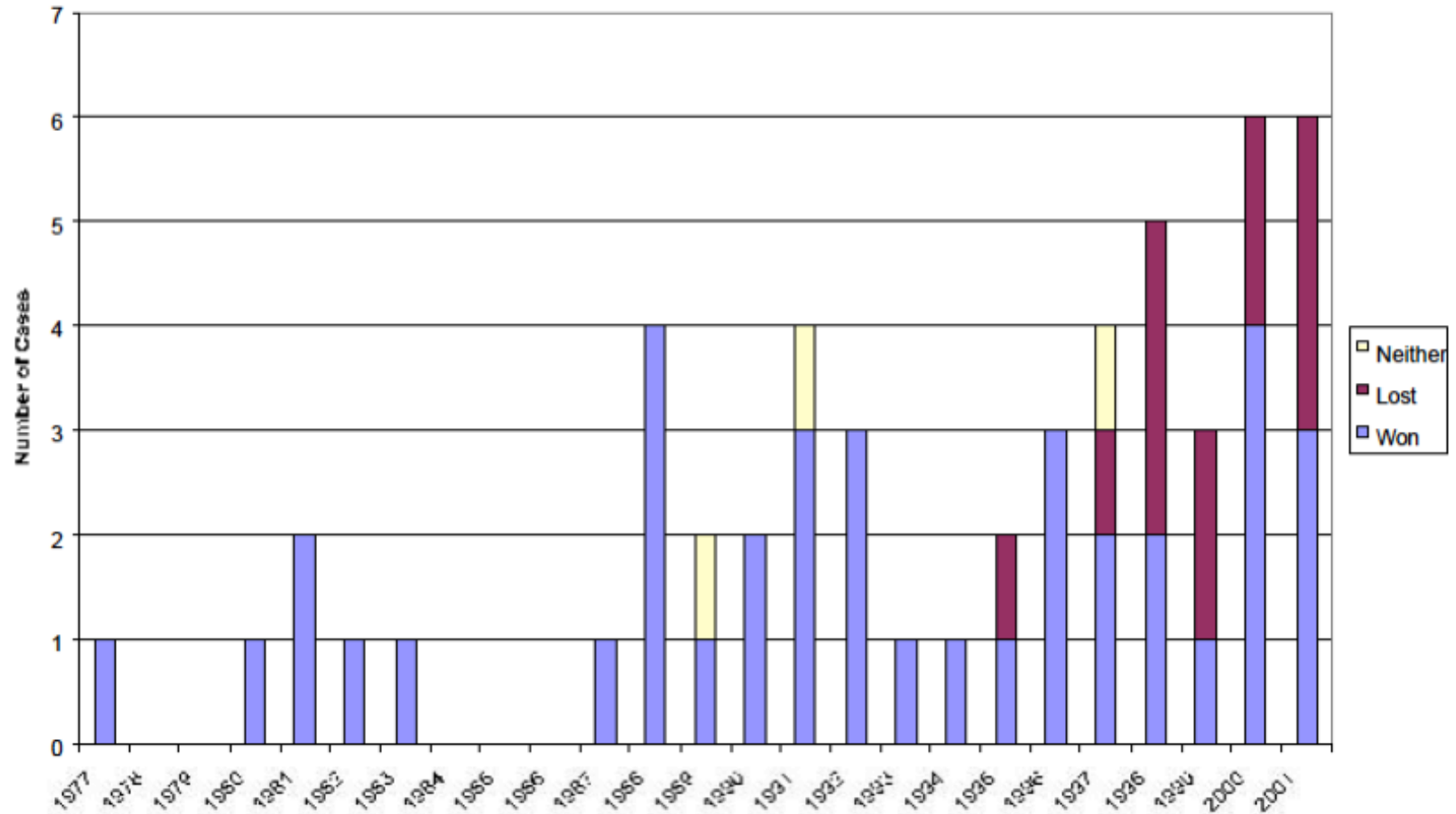
# Post SFA – Growth and Change

- New guidelines, regulations, FMP changes required as a result of SFA amendments
- Federal Register entries jump from 623 regulatory actions in 1995 to 1000 in 2000



- FY1995 NOAA Fisheries budget of \$269M increases to \$816M in FY2001
- Continued intense discussion, Congressional action (e.g., American Fisheries Act in 1998)
- Increased activity in the courts

# MSA Litigation 1977-2001



National Academy of Public Administration, 2002



# Superman Comics' Bizarro World

Natural Resources Defense Council, Inc. v. Daley -

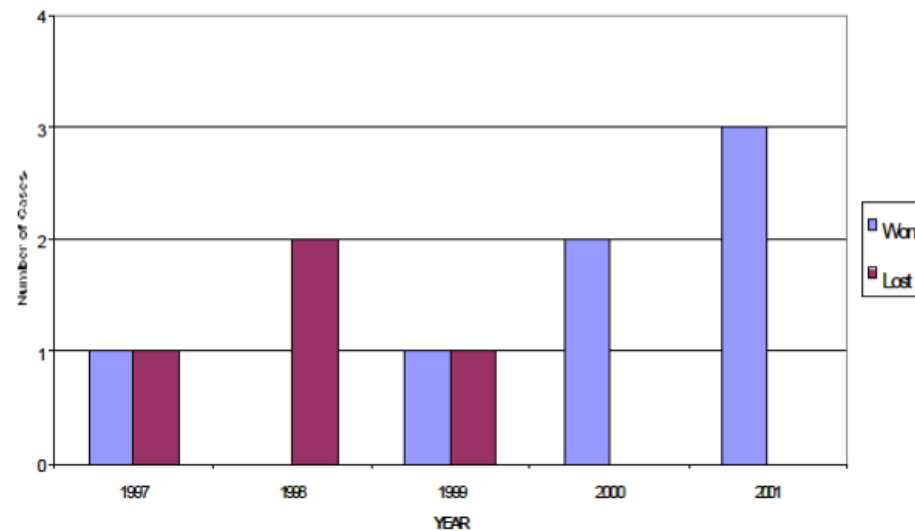
“Only in Superman Comics' Bizarro world, where reality is turned upside down, could the Service reasonably conclude that a measure that is at least four times as likely to fail as to succeed offers a ‘fairly high level of confidence.’”



# Regulatory Flexibility Act – Adapting to a Changing Regulatory Landscape

- Change of law in late 1996 made judicially reviewable
- Flurry of litigation activity until NOAA adjusted procedures to address requirements

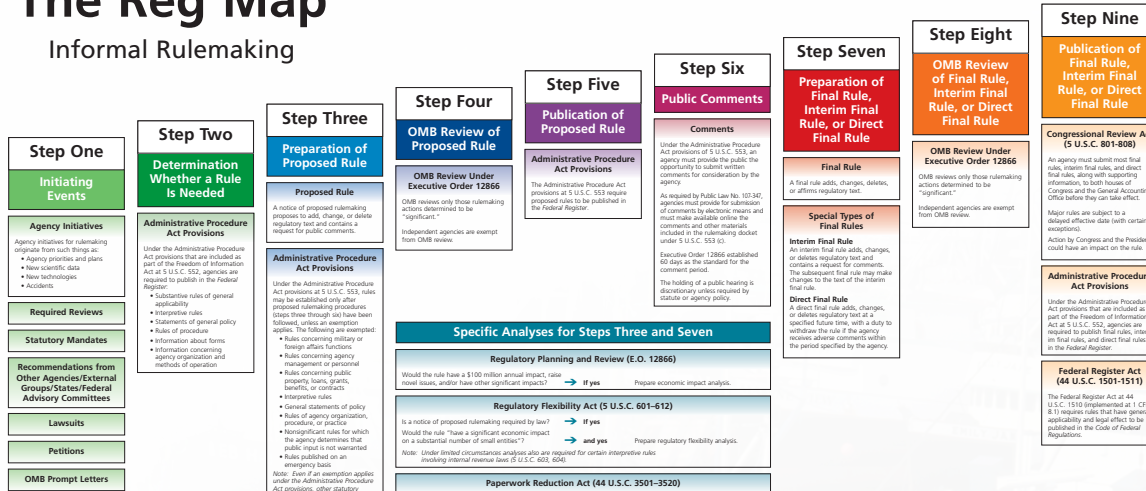
Figure 2-11: REGULATORY FLEXIBILITY ACT: WIN-LOSS RECORD, 1997-2001



National Academy of Public Administration, 2002

# Administrative Procedures Act – Procedural Complexity

## The Reg Map Informal Rulemaking



### Using The Reg Map

The Reg Map is based on general requirements. In some cases, more stringent or less stringent requirements are imposed by statutory provisions that are agency specific or subject matter specific. Also, in some cases more stringent requirements are imposed by agency policy.

In a typical case, a rulemaking action would proceed from step one through step nine with a proposed rule and a final rule.

However, if a rulemaking action is exempt from the proposed rulemaking procedures under the Administrative Procedure Act provisions (explained under step three) or under other statutory authority, an agency may:

- promulgate a final rule omitting steps three through six, or
- promulgate an interim final rule omitting steps three through six, but providing a comment period and a final rule after step nine.

Also, if an agency determines that a rule likely would not generate adverse comment, the agency may promulgate a direct final rule, omitting steps three through six, but with a duty to withdraw the rule if the agency receives adverse comments within the period specified by the agency.

### Specific Analyses for Steps Three and Seven

<b>Regulatory Planning and Review (E.O. 12866)</b>	Would the rule have a \$100 million annual impact, cost, or novel issue, and/or have other significant impacts?	→ if yes	Prepare economic impact analysis.
<b>Regulatory Flexibility Act (5 U.S.C. 601-612)</b>	Is a notice of proposed rulemaking required by law?	→ if yes	Prepare regulatory flexibility analysis.
<b>Paperwork Reduction Act (44 U.S.C. 3501-3520)</b>	Does the rule contain a "collection of information" requiring disclosure, or recordkeeping?	→ if yes	Prepare information collection clearance package for OMB review and approval, and prepare request for public comments.
<b>Unfunded Mandates Reform Act (2 U.S.C. Chs. 17A, 25)</b>	Does the rulemaking process include a proposed rule?	→ if yes	Prepare unfunded mandate analysis (unless an exclusion applies).
<b>Federalism (E.O. 13132)</b>	Does the rule include any federal mandate that may result in the expenditure (direct costs minus direct savings) by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year (adjusted annually)?	→ and yes	Prepare federalism summary impact statement.
<b>Indian Tribal Governments (E.O. 13175)</b>	Does the rule have federalism implications and does the rule have tribal implications and preempt State law?	→ if yes	Prepare tribal summary impact statement.
<b>National Environmental Policy Act (42 U.S.C. 4321-4347)</b>	Is the rule categorically excluded from review?	→ if no	Prepare environmental assessment or environmental impact statement, as appropriate.
<b>National Technology Transfer and Advancement Act (15 U.S.C. 272 note)</b>	Does the rule contain provisions for which the use of voluntary standards is applicable?	→ if yes	Adopt voluntary consensus standards or explain why not.
<b>Governmental Actions and Interference with Constitutionally Protected Property Rights (E.O. 12630)</b>	Does the rule regulate private property use for the protection of public health or safety?	→ if yes	Prepare takings analysis.
<b>Protection of Children from Environmental Health Risks and Safety Risks (E.O. 13045)</b>	Is the rulemaking a "covered regulatory action"?	→ if yes	Prepare analysis of the environmental health or safety effects on children.
<b>Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)</b>	Is the rulemaking action a "significant energy action"?	→ if yes	Prepare statement of energy effects.

### Drafting Requirements for Rulemaking Documents

- Regulatory Planning and Review (E.O. 12866)**  
Rulemaking documents must comply with the specified regulatory glossology and principles of regulatory.
- Civil Justice Reform (E.O. 12988)**  
Rulemaking documents must be written in clear language designed to help reduce litigation.
- Presidential Memorandum on Plain Language (63 FR 31865)**  
Rulemaking documents must comply with plain language principles.
- Federal Register Publications**  
Rulemaking documents must comply with the Federal Register regulations (1 CFR). Additional guidance and requirements are contained in the Federal Register's Document Drafting Handbook.

### Agendas for Rules Under Development or Review

- Unified Regulatory Agenda**  
The Unified Regulatory Agenda provides information concerning agency rules under development or review.
- Regulatory Plan**  
The Regulatory Plan provides information concerning the most important significant regulatory actions that the agency is planning to take.
- Regulatory Flexibility Agenda**  
The Regulatory Flexibility Agenda provides information concerning any rule that an agency expects to prepare or promulgate that is likely to have a significant economic impact on a substantial number of small entities.



Experts in drafting rulemaking documents and preparing supporting analysis

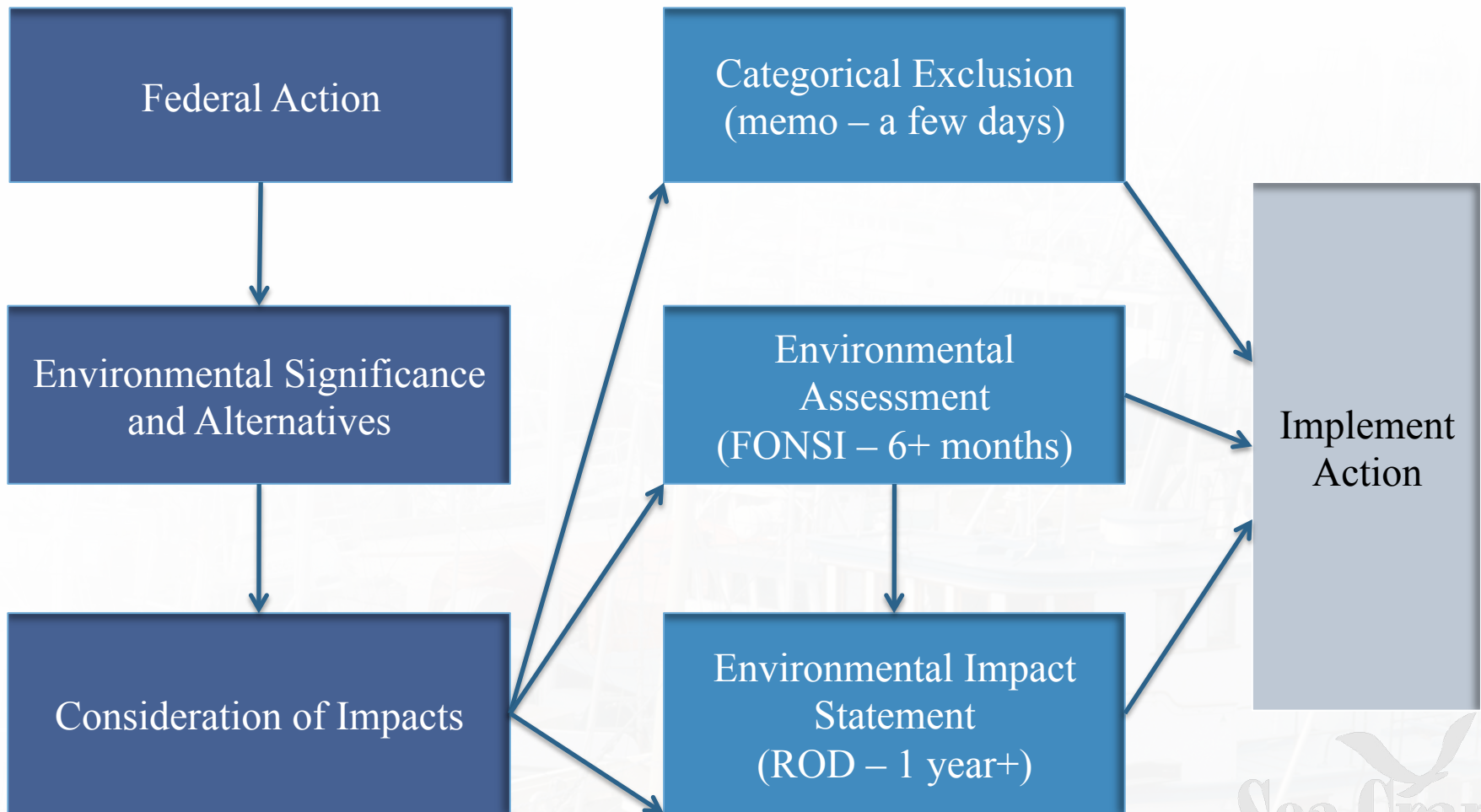
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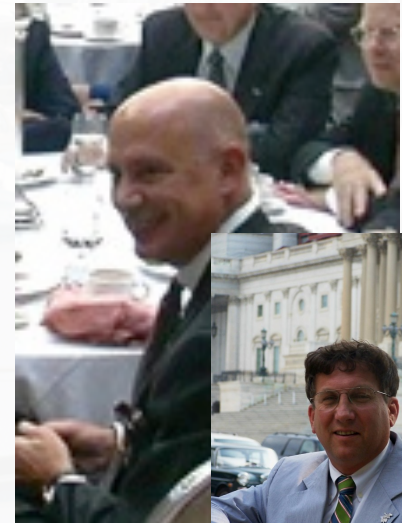
# National Environmental Policy Act Decision Matrix



# 2000 Kammer Report

An Independent Assessment of the Resource Requirements for the National Marine Fisheries Service:

- Before 1997, 16 open court cases – over 110 in 2000
- 100+ laws and executive orders governing agency activities whose requirements all had to be reconciled
- 11 levels of review for each regulatory decision
- Environmental impact statements for 70% of FMPs over 5 years old
- 5% of ESA listings complete – recovery plan, critical habitat designation, delisting criteria
- Funding shortfall of \$186 million



# Lessons Learned?

- Full range of missions and legal mandates must be identified and roles comprehensively defined – Councils, NOAA Fisheries, States, other agencies
- Engage constituents in setting priorities
- Be willing to make a good case for budget needed to achieve those priorities and to address the unexpected
- Plan for future workforce needs and invest in people
- Fund transparent science



# Thank You!

