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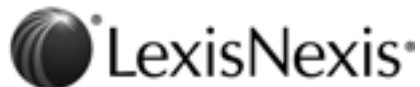
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*** CURRENT THROUGH PL 111-10, APPROVED 3/20/2009 ***
*** WITH A GAP OF PL 111-8 ***

TITLE 16. CONSERVATION
CHAPTER 38. FISHERY CONSERVATION AND MANAGEMENT
NATIONAL FISHERY MANAGEMENT PROGRAM

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16 USCS § 1854

§ 1854. Action by Secretary [Caution: See prospective amendment note below.]

(a) Review of plans.

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall--

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6) [*16 USCS § 1853(a)(6)*].

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b), the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan amendment, or proposed

regulation that the Council characterizes as final.

(b) Review of regulations.

(1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c) [16 USCS § 1853(c)], the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and--

(A) if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register, with such technical changes as may be necessary for clarity and an explanation of those changes, for a public comment period of 15 to 60 days; or

(B) if that determination is negative, the Secretary shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, this Act, and other applicable law.

(2) Upon receiving a notification under paragraph (1)(B), the Council may revise the proposed regulations and submit them to the Secretary for reevaluation under paragraph (1).

(3) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (1)(A). The Secretary shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations.

(c) Preparation and review of secretarial plans.

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if--

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment; or

(C) the Secretary is given authority to prepare such plan or amendment under this section.

(2) In preparing any plan or amendment under this subsection, the Secretary shall--

(A) conduct public hearings, at appropriate times and locations in the geographical areas concerned, so as to allow interested persons an opportunity to be heard in the preparation and amendment of the plan and any regulations implementing the plan; and

(B) consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(3) Notwithstanding paragraph (1) for a fishery under the authority of a Council, the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system, including any limited access privilege program, unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(4) Whenever the Secretary prepares a fishery management plan or plan amendment under this section, the Secretary shall immediately--

(A) for a plan or amendment for a fishery under the authority of a Council, submit such plan or amendment to the appropriate Council for consideration and comment; and

(B) publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(5) Whenever a plan or amendment is submitted under paragraph (4)(A), the appropriate Council must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 60-day period referred to in paragraph (4)(B). After the close of such 60-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, information, or comments submitted under paragraph (4)(B), may adopt such plan or amendment.

(6) The Secretary may propose regulations in the Federal Register to implement any plan or amendment prepared by the Secretary. In the case of a plan or amendment to which paragraph (4)(A) applies, such regulations shall be submitted to the Council with such plan or amendment. The comment period on proposed regulations shall be 60 days, except that the Secretary may shorten the comment period on minor revisions to existing regulations.

(7) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (6). The Secretary must publish in the Federal Register an explanation of any substantive differences between the proposed and final rules. All final regulations must be consistent with the fishery management plan, with the national standards and other provisions of this Act, and with any other applicable law.

(d) Establishment of fees.

(1) The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1) [16 USCS § 1853(b)(1)]. The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

(2) (A) Notwithstanding paragraph (1), the Secretary is authorized and shall collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any--

(i) limited access privilege program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

(B) Such fee shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

(C) (i) Fees collected under this paragraph shall be in addition to any other fees charged under this Act and shall be deposited in the Limited Access System Administration Fund established under section 305(h)(5)(B) [16 USCS § 1855(h)(5)(B)].

(ii) Upon application by a State, the Secretary shall transfer to such State up to 33 percent of any fee collected pursuant to subparagraph (A) under a community development quota program and deposited in the Limited Access System Administration Fund in order to reimburse such State for actual costs directly incurred in the management and enforcement of such program.

(e) Rebuilding overfished fisheries.

(1) The Secretary shall report annually to the Congress and the Councils on the status of fisheries within each Council's geographical area of authority and identify those fisheries that are overfished or are approaching a condition of being overfished. For those fisheries managed under a fishery management plan or international agreement, the status shall be determined using the criteria for overfishing specified in such plan or agreement. A fishery shall be classified as approaching a condition of being overfished if, based on trends in fishing effort, fishery resource size, and other appropriate factors, the Secretary estimates that the fishery will become overfished within two years.

(2) If the Secretary determines at any time that a fishery is overfished, the Secretary shall immediately notify the appropriate Council and request that action be taken to end overfishing in the fishery and to implement conservation and management measures to rebuild affected stocks of fish. The Secretary shall publish each notice under this paragraph in the Federal Register.

(3) Within one year of an identification under paragraph (1) or notification under paragraphs (2) or (7), the appropriate Council (or the Secretary, for fisheries under section 302(a)(3) [16 USCS § 1853(a)(3)]) shall prepare a fishery management plan, plan amendment, or proposed regulations for the fishery to which the identification or notice applies--

(A) to end overfishing in the fishery and to rebuild affected stocks of fish; or

(B) to prevent overfishing from occurring in the fishery whenever such fishery is identified as approaching an overfished condition.

(4) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations prepared

pursuant to paragraph (3) or paragraph (5) for such fishery shall--

(A) specify a time period for ending overfishing and rebuilding the fishery that shall--

(i) be as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;

(B) allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery; and

(C) for fisheries managed under an international agreement, reflect traditional participation in the fishery, relative to other nations, by fishermen of the United States.

(5) If, within the one-year period beginning on the date of identification or notification that a fishery is overfished, the Council does not submit to the Secretary a fishery management plan, plan amendment, or proposed regulations required by paragraph (3)(A), the Secretary shall prepare a fishery management plan or plan amendment and any accompanying regulations to stop overfishing and rebuild affected stocks of fish within 9 months under subsection (c).

(6) During the development of a fishery management plan, a plan amendment, or proposed regulations required by this subsection, the Council may request the Secretary to implement interim measures to reduce overfishing under section 305(c) [16 USCS § 1855(c)] until such measures can be replaced by such plan, amendment, or regulations. Such measures, if otherwise in compliance with the provisions of this Act, may be implemented even though they are not sufficient by themselves to stop overfishing of a fishery.

(7) The Secretary shall review any fishery management plan, plan amendment, or regulations required by this subsection at routine intervals that may not exceed two years. If the Secretary finds as a result of the review that such plan, amendment, or regulations have not resulted in adequate progress toward ending overfishing and rebuilding affected fish stocks, the Secretary shall--

(A) in the case of a fishery to which section 302(a)(3) [16 USCS § 1852(a)(3)] applies, immediately make revisions necessary to achieve adequate progress; or

(B) for all other fisheries, immediately notify the appropriate Council. Such notification shall recommend further conservation and management measures which the Council should consider under paragraph (3) to achieve adequate progress.

(f) Fisheries under authority of more than one Council.

(1) Except as provided in paragraph (3), if any fishery extends beyond the geographical area of authority of any one Council, the Secretary may--

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

(g) Atlantic highly migratory species.

(1) Preparation and implementation of plan or plan amendment. The Secretary shall prepare a fishery management plan or plan amendment under subsection (c) with respect to any highly migratory species fishery to which section 302(a)(3) [16 USCS § 1852(a)(3)] applies. In preparing and implementing any such plan or amendment, the Secretary shall--

(A) consult with and consider the comments and views of affected Councils, commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to highly migratory species, and the advisory panel established under section 302(g) [16 USCS § 1852(g)];

(B) establish an advisory panel under section 302(g) [16 USCS § 1852(g)] for each fishery management plan to be prepared under this paragraph;

(C) evaluate the likely effects, if any, of conservation and management measures on participants in the affected

fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors;

(D) with respect to a highly migratory species for which the United States is authorized to harvest an allocation, quota, or at a fishing mortality level under a relevant international fishery agreement, provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation, quota, or at such fishing mortality level;

(E) review, on a continuing basis (and promptly whenever a recommendation pertaining to fishing for highly migratory species has been made under a relevant international fishery agreement), and revise as appropriate, the conservation and management measures included in the plan;

(F) diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), comparable international fishery management measures with respect to fishing for highly migratory species; and

(G) ensure that conservation and management measures under this subsection--

(i) promote international conservation of the affected fishery;

(ii) take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries;

(iii) are fair and equitable in allocating fishing privileges among United States fishermen and do not have economic allocation as the sole purpose; and

(iv) promote, to the extent practicable, implementation of scientific research programs that include the tagging and release of Atlantic highly migratory species.

(2) Certain fish excluded from "bycatch" definition. Notwithstanding section 3(2) [16 USCS § 1802(2)], fish harvested in a commercial fishery managed by the Secretary under this subsection or the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971d), or highly migratory species harvested in a commercial fishery managed by a Council under this Act or the Western and Central Pacific Fisheries Convention Implementation Act [16 USCS §§ 6901 et seq.], that are not regulatory discards and that are tagged and released alive under a scientific tagging and release program established by the Secretary shall not be considered bycatch for purposes of this Act.

(h) Repeal or revocation of a fishery management plan. The Secretary may repeal or revoke a fishery management plan for a fishery under the authority of a Council only if the Council approves the repeal or revocation by a three-quarters majority of the voting members of the Council.

(i) Environmental review process.

(1) Procedures. The Secretary shall, in consultation with the Councils and the Council on Environmental Quality, revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.). The procedures shall--

(A) conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and

(B) integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act in order to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork, and effectively involve the public.

(2) Usage. The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this Act.

(3) Schedule for promulgation of final procedures. The Secretary shall--

(A) propose revised procedures within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 [enacted Jan. 12, 2007];

(B) provide 90 days for public review and comments; and

(C) promulgate final procedures no later than 12 months after the date of enactment of that Act.

(4) Public participation. The Secretary is authorized and directed, in cooperation with the Council on Environmental Quality and the Councils, to involve the affected public in the development of revised procedures, including workshops

or other appropriate means of public involvement.

[(j)](i) International overfishing. The provisions of this subsection shall apply in lieu of subsection (e) to a fishery that the Secretary determines is overfished or approaching a condition of being overfished due to excessive international fishing pressure, and for which there are no management measures to end overfishing under an international agreement to which the United States is a party. For such fisheries--

(1) the Secretary, in cooperation with the Secretary of State, immediately take appropriate action at the international level to end the overfishing; and

(2) within 1 year after the Secretary's determination, the appropriate Council, or Secretary, for fisheries under section 302(a)(3) [*16 USCS § 1852(a)(3)*] shall--

(A) develop recommendations for domestic regulations to address the relative impact of fishing vessels of the United States on the stock and, if developed by a Council, the Council shall submit such recommendations to the Secretary; and

(B) develop and submit recommendations to the Secretary of State, and to the Congress, for international actions that will end overfishing in the fishery and rebuild the affected stocks, taking into account the relative impact of vessels of other nations and vessels of the United States on the relevant stock.

HISTORY:

(April 13, 1976, P.L. 94-265, Title III, § 304, 90 Stat. 352; Jan. 12, 1983, P.L. 97-453, § 7(a), 96 Stat. 2487; Nov. 14, 1986, P.L. 99-659, Title I, § 106, 100 Stat. 3714; Nov. 28, 1990, P.L. 101-627, Title I, §§ 110(a), (b)(1), (c), 111(a)(2), 120(d), 104 Stat. 4449, 4451, 4452, 4459; Oct. 29, 1992, P.L. 102-567, Title III, § 303, 106 Stat. 4283; Dec. 20, 1993, P.L. 103-206, Title VII, § 702, 107 Stat. 2446; Oct. 11, 1996, P.L. 104-297, Title I, § 109(a)-(c), (e)-(g), (i), 110 Stat. 3581, 3584, 3587.)

(As amended Jan. 12, 2007, P.L. 109-479, § 3(d)(2), Title I, §§ 104(c), 106(b), (d), 107, Title IV, § 406, 120 Stat. 3578, 3584, 3593, 3594, 3633.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 13, 1976, P.L. 94-265, 90 Stat. 331, which appears generally as *16 USCS §§ 1801 et seq.* For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed subsection designator "(j)" has been inserted in order to maintain alphabetical continuity.

Prospective amendment:

Amendment of subsec. (e), effective July 12, 2009. Act Jan. 12, 2007, P.L. 109-479, Title I, § 104(c), 120 Stat. 3584 (effective 30 months after enactment, as provided by § 104(d) of such Act, which appears as a note to this section), provides:

"Section 304(e) (*16 U.S.C. 1854(e)*) is amended--

"(1) by striking 'one year of' in paragraph (3) and inserting '2 years after';

"(2) by inserting 'and implement' after 'prepare' in paragraph (3);

"(3) by inserting 'immediately' after 'overfishing' in paragraph (3)(A);

"(4) by striking 'ending overfishing and' in paragraph (4)(A); and

"(5) by striking 'one-year' in paragraph (5) and inserting '2-year'."

Amendments:

1983. Act Jan. 12, 1983, substituted subsections (a) and (b) for ones which read:

"(a) Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall--

"(1) review such plan or amendment pursuant to subsection (b); and

"(2) notify such Council in writing of his approval, disapproval, or partial disapproval of such plan or amendment.

In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons therefor, suggestions for improvement, a request to such Council to change such plan or amendment to satisfy the objections, and a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

"(b) The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law. In carrying out such review, the Secretary shall consult with--

"(1) the Secretary of State with respect to foreign fishing; and

"(2) the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.";

in subsec. (c), in para. (1), substituted subpara. (B) for one which read: "the Secretary disapproves or partially disapproves any such plan or amendment, and the Council involved fails to change such plan or amendment in accordance with the notification made under subsection (a)(2).", and, in the concluding matter, added the sentence beginning "The Secretary shall also . . .", and substituted para. (2) for one which read: "Whenever, pursuant to paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall promptly transmit such plan or amendment to the appropriate Council for consideration and comment. Within 45 days after the date of receipt of such plan or amendment, the appropriate Council may recommend, to the Secretary, changes in such plan or amendment, consistent with the national standards, the other provisions of this Act, and any other applicable law. After the expiration of such 45-day period, the Secretary may implement such plan or amendment pursuant to section 305."; and, in subsec. (d), substituted "The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits." for "Such level shall not exceed the administrative costs incurred by the Secretary in issuing such permits."

1986. Act Nov. 14, 1986, in subsec. (a), in para. (1), in the introductory matter, deleted "(the date of receipt of which is hereafter in this section referred to as the 'receipt date') following "Council", redesignated subparas. (A)-(C) as subparas. (B)-(D), added a new subpara. (A), in subpara. (C), as redesignated, substituted "60-day" for "75-day", in subpara. (D), as redesignated, substituted "15th day" for "30th day"; in para. (2), in the introductory matter, substituted "(1)(B)" for "(1)(A)", and in subpara. (C), substituted "and to fishery access adjustments referred to in section 303(a)(6)." for a period, and added para. (3); in subsec. (b), in para. (1), substituted subpara. (A) for one which read: "the Secretary does not notify the Council in writing of his disapproval, or partial disapproval, under paragraph (2), of the plan or amendment before the close of the 95th day after the receipt date; or", in subpara. (B), substituted "60th day" for "75th day", in para. (2), in the introductory matter, substituted "paragraph (1)(B)" for "paragraph (1)(A)", and in para. (3), in subpara. (A), in the introductory matter, substituted "If the Secretary disapproves a proposed plan or amendment under subsection (a)(1)(A)(ii), or" for "If the Secretary", and in subparas. (B)(i) and (C)(1), substituted "(a)(1)(B)" for "(a)(1)(A)"; in subsec. (c), in para. (2), in subpara. (A), in clause (ii), substituted "60-day" for "75-day", and in clause (iii), substituted "15th day" for "30th day", in subpara. (B), substituted "60-day" for "75-day" wherever appearing; and in subsec. (e), inserted ", in cooperation with the Councils," and substituted "management and on the economics of the fisheries," for "management,", and added the sentence beginning "The Secretary shall annually . . .".

1990. Act Nov. 28, 1990, in subsec. (b), in paras. (1) and (3)(D), substituted "305(a)" for "305(c)"; in subsec. (c)(2)(B), substituted "305(a)" for "305(c)", and substituted "appropriate Council" for "appropriate council"; substituted a new subsec. (e) for one which read: "The Secretary shall initiate and maintain, in cooperation with the Councils, a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this Act. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management and on the economics of the fisheries, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish. The Secretary shall annually review and update the comprehensive program and make the results of the review and update available to the Councils."; in subsec. (f), substituted the catchline "Fisheries under authority of more than one Council" for "Miscellaneous duties", in para. (1), introductory matter, substituted "Except as provided in paragraph (3), if" for "If", and added para. (3); and added subsec. (g).

1992. Act Oct. 29, 1992, in subsec. (e), redesignated paras. (1)-(3) as paras. (2)-(4), respectively, and added a new para. (1).

1993. Act Dec. 20, 1993, in subsec. (g)(6)(B), substituted "April 1, 1994" for "January 1, 1994".

1996. Act Oct. 11, 1996, substituted subsections (a) and (b) for ones which read:

"(a) Action by the Secretary after receipt of plan.

(1) After the Secretary receives a fishery management plan, or amendment to a plan, which was prepared by a Council, the Secretary shall--

"(A) immediately make a preliminary evaluation of the management plan or amendment for purposes of deciding if it is consistent with the national standards and sufficient in scope and substance to warrant review under this subsection and--

"(i) if that decision is affirmative, implement subparagraphs (B), (C), and (D) with respect to the plan or amendment, or

"(ii) if that decision is negative--

"(I) disapprove the plan or amendment, and

"(II) notify the Council, in writing, of the disapproval and of those matters specified in subsection (b)(2)(A), (B) and (C) as they relate to the plan or amendment;

"(B) immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law;

"(C) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the receipt date; and

"(D) by the 15th day after the receipt date--

"(i) make such changes in the proposed regulations submitted for the plan or amendment under section 303(c) as may be necessary for the implementation of the plan, and

"(ii) publish such proposed regulations, including any changes made thereto under clause (i), in the Federal Register together with an explanation of those changes which are substantive.

"(2) In undertaking the review required under paragraph (1)(B), the Secretary shall--

"(A) take into account the data, views, and comments received from interested persons;

"(B) consult with the Secretary of State with respect to foreign fishing; and

"(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

"(3)

(A) The Secretary shall take action under this section on any fishery management plan or amendment to a plan which the Council characterizes as being a final plan or amendment.

"(B) For purposes of this section, the term 'receipt date' means the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, or an amendment to a plan, that it characterizes as a final plan or amendment.

"(b) Review by Secretary.

(1) A plan or amendment shall take effect and be implemented in accordance with section 305(a) if--

"(A) the Secretary does not notify the Council in writing of--

"(i) his disapproval under subsection (a)(1)(A)(ii), or

"(ii) his disapproval, or partial disapproval, under paragraph (2), of the plan or amendment before the close of the 95th day after the receipt date; or

"(B) at any time subsequent to the 60th day after the receipt date and before such 95th day, the Secretary notifies the Council in writing that he does not intend to disapprove, or partially disapprove, the plan or amendment.

"(2) If after review under subsection (a) the Secretary determines that the plan or amendment is not consistent with the criteria set forth in paragraph (1)(B) of that subsection, the Secretary shall notify the Council in writing of his disapproval or partial disapproval of the plan or amendment. Such notice shall specify--

"(A) the applicable law with which the plan or amendment is inconsistent;

"(B) the nature of such inconsistency; and

"(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

"(3)

(A) If the Secretary disapproves a proposed plan or amendment under subsection (a)(1)(A)(ii), or disapproves, or partially disapproves, a proposed plan or amendment under paragraph (2), the Council may submit a revised plan or amendment, accompanied by appropriately revised proposed regulations, to the Secretary.

"(B) After the Secretary receives a revised plan or amendment under subparagraph (A) or (C)(ii), the Secretary shall immediately--

"(i) commence a review of the plan or amendment to determine whether it complies with the criteria set forth in subsection (a)(1)(B);

"(ii) publish in the Federal Register a notice stating that the revised plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 30-day period beginning on the date (hereinafter in this paragraph referred to as the 'revised receipt date') the plan or amendment was submitted to the Secretary under subparagraph (A) or (C)(ii); and

"(iii) review the revised proposed regulations, if any, submitted by the Council and make such changes to them as may be necessary for the implementation of the plan, and thereafter publish such revised proposed regulations (as so changed) in the Federal Register together with an explanation of each of such changes that is substantive.

"(C)

(i) Before the close of the 60th day after the revised receipt date, the Secretary, after taking into account any data, views, or comments received under subparagraph (B)(ii), shall complete the review required under subparagraph (B)(i) and determine whether the plan or amendment complies with the criteria set forth in subsection (a)(1)(B). If the Secretary determines that a plan or amendment is not in compliance with such criteria, he shall immediately notify the Council of his disapproval of the plan or amendment.

"(ii) After notifying a Council of disapproval under clause (i), the Secretary shall promptly provide to the Council a written statement of the reasons on which the disapproval was based and advise the Council that it may submit a further revised plan or amendment, together with appropriately revised proposed regulations, for review and determination under this paragraph.

"(D) A revised plan or amendment shall take effect and be implemented in accordance with section 305(a) if the Secretary does not notify the Council, in writing, by the close of the 60th day after the revised receipt date of his disapproval of the plan or amendment.";

in subsec. (c), substituted the heading for one which read: "Preparation by Secretary", in para. (1), in subpara. (A),

deleted "or" following the concluding semicolon, in subpara. (B), substituted "or amendment; or" for "or amendment, as the case may be.", added subpara. (C), and deleted the concluding matter, which read: "In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea. The Secretary shall also prepare such proposed regulations as he deems necessary or appropriate to carry out each plan or amendment prepared by him under this paragraph.", substituted para. (2) for one which read:

"(2)

(A) Whenever, under paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall immediately--

"(i) submit such plan or amendment, and proposed regulations to implement such plan or amendment, to the appropriate Council for consideration and comment;

"(ii) publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the plan or amendment was submitted under clause (i); and

"(iii) by the 15th day after the date of submission under clause (i), submit for publication in the Federal Register the proposed regulations to implement the plan or amendment.

"(B) The appropriate Council must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 60-day period referred to in subparagraph (A)(ii). After the close of such 60-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, data, or comments submitted under subparagraph (A)(ii), may implement such plan or amendment under section 305(a).",

in para. (3), inserted "for a fishery under the authority of a Council" and substituted "system, including any individual fishing quota program" for system described in section 303(b)(6)", and added paras. (4)-(7); in subsec. (d), designated the existing provisions as para. (1), and added para. (2); substituted subsec. (e) for one which read:

"(e) Fisheries research.

(1) The Secretary shall initiate and maintain, in cooperation with the Councils, a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this Act. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management and on the economics of the fisheries.

"(2) Within one year after the date of enactment of the Fishery Conservation Amendments of 1990, and at least every three years thereafter, the Secretary shall develop and publish in the Federal Register a strategic plan for fisheries research for the five years immediately following such publication. The plan shall--

"(A) identify and describe a comprehensive program with a limited number of priority objectives for research in each of the areas specified in paragraph (2);

"(B) indicate the goals and timetables for the program described in subparagraph (A); and

"(C) provide a role for affected commercial fishermen in such research, including involvement in field testing.

"(3) The areas of research referred to in paragraph (1) are as follows:

"(A) Research to support fishery conservation and management, including research on the economics of fisheries and biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish populations, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

"(B) Conservation engineering research, including the study of fish behavior and the development and testing of new gear technology and fishing techniques to minimize the harvest of nontarget species and promote efficient harvest of target species.

"(C) Information management research, including the development of a fishery information base and an information management system that will permit the full use of data in the support of effective fishery conservation and management.

"(4) In developing the plan required under paragraph (1), the Secretary shall consult with relevant Federal agencies, scientific and technical experts, and other interested persons, public and private, and shall publish a proposed plan in the Federal Register for the purpose of receiving public comment on the plan. The Secretary shall ensure that affected

commercial fishermen are actively involved in the development of the portion of the plan pertaining to conservation engineering research. Upon final publication in the Federal Register, the plan shall be submitted by the Secretary to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.";

in subsec. (f), deleted para. (3) which read:

"(3)

(A) The Secretary shall have authority over any highly migratory species fishery that is within the geographical area of authority of more than one of the following Councils: New England Council, Mid-Atlantic Council, South Atlantic Council, Gulf Council, and Caribbean Council.

"(B) In accordance with the provisions of this Act and any other applicable law, the Secretary shall--

"(i) identify research and information priorities, including observer requirements and necessary data collection and analysis for the conservation and management of highly migratory species;

"(ii) prepare and amend fishery management plans with respect to highly migratory species fisheries to which this paragraph applies; and

"(iii) diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), international fishery management measures with respect to fishing for highly migratory species.

"(C) In preparing or amending any fishery management plan under this paragraph, the Secretary shall--

"(i) conduct public hearings, at appropriate times and in appropriate locations in the geographical areas concerned, so as to allow interested persons an opportunity to be heard in the preparation and amendment of the plan;

"(ii) consult with and consider the comments and views of commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to highly migratory species;

"(iii) consult with and consider the comments and views of affected Councils;

"(iv) evaluate the likely effects, if any, of conservation and management measures on participants in the fisheries affected by the plan and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors; and

"(v) review, on a continuing basis (and promptly whenever a recommendation pertaining to fishing for highly migratory species has been made under a relevant international fishery agreement), and revise as appropriate, the conservation and management measures included in the plan.

"(D) Conservation and management measures contained in any fishery management plan under this paragraph shall--

"(i) take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries;

"(ii) be fair and equitable in allocating fishing privileges among United States fishermen and not have economic allocation as the sole purpose; and

"(iii) promote international conservation.

"(E) With respect to a highly migratory species for which the United States is authorized to harvest an allocation or quota under a relevant international fishery agreement, the Secretary shall provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation or quota.

"(F) In implementing the provisions of this paragraph, the Secretary shall consult with--

"(i) the Secretary of State;

"(ii) commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to highly migratory species; and

"(iii) appropriate Councils.";

substituted subsec. (g) for one which read:

"(g) Incidental harvest research.

(1) Within 9 months after the date of enactment of the Fishery Conservation Amendments of 1990, the Secretary shall, after consultation with the Gulf of Mexico Fishery Management Council and South Atlantic Fishery Management Council, establish by regulation a 3-year program to assess the impact on fishery resources of incidental harvest by the shrimp trawl fishery within the authority of such Councils.

"(2) The program established pursuant to paragraph (1) shall provide for the identification of stocks of fish which

are subject to significant incidental harvest in the course of normal shrimp trawl fishing activity.

"(3) For stocks of fish identified pursuant to paragraph (2), with priority given to stocks which (based upon the best available scientific information) are considered to be overfished, the Secretary shall conduct--

"(A) a program to collect and evaluate data on the nature and extent (including the spatial and temporal distribution) of incidental mortality of such stocks as a direct result of shrimp trawl fishing activities;

"(B) an assessment of the status and condition of such stocks, including collection of information which would allow the estimation of life history parameters with sufficient accuracy and precision to support sound scientific evaluation of the effects of various management alternatives on the status of such stocks; and

"(C) a program of data collection and evaluation for such stocks on the magnitude and distribution of fishing mortality and fishing effort by sources of fishing mortality other than shrimp trawl fishing activity.

"(4) The Secretary shall, in cooperation with affected interests, commence a program to design, and evaluate the efficacy of, technological devices and other changes in fishing technology for the reduction of incidental mortality of nontarget fishery resources in the course of shrimp trawl fishing activity. Such program shall take into account local conditions and include evaluation of any reduction in incidental mortality, as well as any reduction or increase in the retention of shrimp in the course of normal fishing activity.

"(5) The Secretary shall, upon completion of the programs required by this subsection, submit a detailed report on the results of such programs to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

"(6)

(A) Except as provided in this paragraph, the Secretary may not implement any measures under this Act to reduce incidental mortality of nontarget fishery resources in the course of shrimp trawl fishing which would restrict the period during which shrimp are harvested or would require the use of any technological device or other change in fishing technology.

"(B) The prohibition contained in subparagraph (A) shall cease on April 1, 1994.

"(C) This paragraph does not apply to any law or regulation in effect on the date of enactment of this paragraph, nor does it limit in any way the Secretary's authority to take action, including any limitation on entry permitted by this Act, for the conservation and management of the shrimp fishery resource.";

and added subsec. (h).

2007. Act Jan. 12, 2007, in subsec. (c)(3) substituted "limited access privilege" for "individual fishing quota"; in subsec. (d), in para. (2), in subpara. (A), in the introductory matter, inserted ", data collection,", and in cl. (i), substituted "limited access privilege" for "individual fishing quota", and, in subpara. (C)(i), deleted ", except that the portion of any such fees reserved under section 303(d)(4)(A) [*16 USCS § 1853(d)(4)(A)*] shall be deposited in the Treasury and available, subject to annual appropriations, to cover the costs of new direct loan obligations and new loan guarantee commitments as required by section 504(b)(1) of the Federal Credit Reform Act (*2 U.S.C. 661c(b)(1)*)" following "305(h)(5)(B)"; in subsec. (g)(2), inserted ", or highly migratory species harvested in a commercial fishery managed by a Council under this Act or the Western and C50.0 (Council) -nc 0.0 (.) -250.mdollection,"(Act) -250.0 (fe.0 (of) p.0 (to) -250u0 (fe.0 (of)

of this Act for action under section 304 [this section]."

Interim management of highly migratory species fisheries. Act Nov. 28, 1990, P.L. 101-627, Title I, § 108(k), 104 Stat. 4447; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title II, § 211(b)], 110 Stat. 3009-41 (effective 15 days after enactment of Act Oct. 11, 1996, P.L. 104-297), provides:

"Notwithstanding the amendments made by subsections (a) and (g) [amending *16 USCS § 1852*], any fishery management plan or amendment which--

"(1) addresses a highly migratory species fishery to which section 304(f)(3) of the Magnuson-Stevens Fishery Conservation and Management Act [subsec. (f)(3) of this section] (as amended by this Act) applies,

"(2) was prepared by one or more Regional Fishery Management Councils, and

"(3) was in force and effect on January 1, 1990, shall remain in force and effect until superseded by a fishery management plan prepared by the Secretary, and regulations implementing that plan."

Delay in collection of fees. Act Oct. 11, 1996, P.L. 104-297, Title I, § 109(d), 110 Stat. 3584; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title II, § 211(b)], 110 Stat. 3009-41 (effective 15 days after enactment of Act Oct. 11, 1996, P.L. 104-297), provides: "Notwithstanding any other provision of law, the Secretary shall not begin the collection of fees under section 304(d)(2) of the Magnuson-Stevens Fishery Conservation and Management Act [*16 USCS § 1854(d)(2)*], as amended by this Act, in the surf clam and ocean (including mahogany) quahog fishery or in the wreckfish fishery until after January 1, 2000."

Comprehensive management system for Atlantic pelagic longline fishery. Act Oct. 11, 1996, P.L. 104-297, Title I, § 109(h), 110 Stat. 3585; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title II, § 211(b)], 110 Stat. 3009-41 (effective 15 days after enactment of Act Oct. 11, 1996, P.L. 104-297), provides:

"(1) The Secretary of Commerce shall--

"(A) establish an advisory panel under section 302(g)(4) of the Magnuson-Stevens Fishery Conservation and Management Act [*16 USCS § 1852(g)(4)*], as amended by this Act, for pelagic longline fishing vessels that participate in fisheries for Atlantic highly migratory species;

"(B) conduct surveys and workshops with affected fishery participants to provide information and identify options for future management programs;

"(C) to the extent practicable and necessary for the evaluation of options for a comprehensive management system, recover vessel production records; and

"(D) complete by January 1, 1998, a comprehensive study on the feasibility of implementing a comprehensive management system for pelagic longline fishing vessels that participate in fisheries for Atlantic highly migratory species, including, but not limited to, individual fishing quota programs and other limited access systems.

"(2) Based on the study under paragraph (1)(D) and consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (*16 U.S.C. 1801* et seq.), in cooperation with affected participants in the fishery, the United States Commissioners on the International Commission for the Conservation of Atlantic Tunas, and the advisory panel established under paragraph (1)(A), the Secretary of Commerce may, after October 1, 1998, implement a comprehensive management system pursuant to section 304 of such Act (*16 U.S.C. 1854*) for pelagic longline fishing vessels that participate in fisheries for Atlantic highly migratory species. Such a system may not implement an individual fishing quota program until after October 1, 2000."

American Lobster Fishery Management Plan; inapplicability of subsec. (h). Act Oct. 11, 1996, P.L. 104-297, Title I, § 109(j), 110 Stat. 3587; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title II, § 211(b)], 110 Stat. 3009-41 (effective 15 days after enactment of Act Oct. 11, 1996, P.L. 104-297), provides: "Section 304(h) of the Magnuson-Stevens Fishery Conservation and Management Act [*16 USCS § 1854(h)*], as amended by this Act, shall not apply to the American Lobster Fishery Management Plan."

Effective date of amendments made by § 104(c) of Act Jan. 12, 2007. Act Jan. 12, 2007, P.L. 109-479, Title I, § 104(d), 120 Stat. 3585, provides: "The amendments made by subsection (c) [amending subsec. (e) of this section] shall take effect 30 months after the date of enactment of this Act."

NOTES:

Related Statutes & Rules:

This section is referred to in *16 USCS §§ 1852, 1853, 1855*.

Research Guide:**Texts:**

Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 18, Hunting, Fishing, and Gathering Rights § 18.04.
4 Environmental Law Practice Guide (Matthew Bender), ch 24, Wildlife and Habitat Protection § 24.03.

Law Review Articles:

Burke. Recapture of Economic Rent Under the FCMA: Sections 303-304 on Permits and Fees. *52 Wash L Rev* 681.

Interpretive Notes and Decisions:

1. Generally
2. Validity of particular actions

1. Generally

Secretary of Commerce, in exercise of conservation and management authority under National Fishery Conservation and Management Act of 1976 (*16 USCS §§ 1801 et seq.*) has substantial discretion in selecting appropriate quota for given fishery; reviewing court may decide only whether discretion exercised under *16 USCS § 1854* was exercised rationally and consistently with standards set by Congress and may not substitute its own judgment as to values and priorities for that of Secretary. *Maine v Kreps (1977, CA1 Me) 563 F2d 1043, 7 ELR 20762*.

Although *16 USCS § 1854(c)(1)(B)* does not expressly include phrase "after a reasonable time" as in § 1854(c)(1)(A), such condition is implicit; without it, statute fails to indicate who decides when state fishery council has failed to act. *Conservation Law Found. of New England, Inc. v Franklin (1993, CA1 Mass) 989 F2d 54, 23 ELR 20873*.

Natural reading of *16 USCS § 1854(e)(4)(A)(i)*, part of Magnuson-Stevens Fishery Conservation and Management Act, *16 USCS § 1801 et seq.*, is that Congress intended to ensure that over-fished species are rebuilt as quickly as possible while leaving some leeway to avoid disastrous short-term consequences for fishing communities and, in this light, it is apparent that Congress intended *16 USCS § 1854(e)(4)(A)(ii)* as limit on discretion of National Marine Fisheries Service; Service may consider short-term economic needs of fishing communities in establishing rebuilding periods, but may not use those needs to go beyond 10-year cap set by § 1854(e)(4)(A)(ii) because, in order to breach this cap, Service may only consider circumstances that "dictate" doing so; one such circumstance would be international agreement, and another is biology of stock of fish; in such cases, § 1854(e)(4)(A)(ii) recognizes that presumptive 10-year cap cannot apply, but it is manifestly unreasonable to conclude that Congress intended in such circumstances to relieve Service of its continuing obligation to rebuild species in time frame that is "as short as possible." *NRDC v Nat'l Marine Fisheries Serv. (2005, CA9 Cal) 421 F3d 872*.

Environmental groups' lawsuit was dismissed as untimely because groups' challenges were directed to regulations that reopened swordfish fishery through implementation of Fishery Management Plan amendment; therefore, 30-day time limit under *16 USCS § 1855(f)*, part of Magnuson-Stevens Fishery Conservation and Management Act of 1976, applied. *Turtle Island Restoration Network v United States DOC (2006, CA9 Hawaii) 438 F3d 937*.

Magnuson-Stevens Act, in particular *16 USCS § 1854(e)*, gives Secretary of Commerce power to force regional

fishery management council to remedy any overfishing that he finds to be occurring. *Associated Fisheries of Me., Inc. v Evans* (2004, DC Me) 350 F Supp 2d 247.

2. Validity of particular actions

National Oceanic and Atmospheric Administration did not act arbitrarily and capriciously or in abuse of its discretion in enacting vessel incentive plan designed to regulate bycatches of halibut and crab by fishing vessels fishing for groundfish, nor was there any constitutional infirmity in the imposition, by Secretary of Commerce, of substantial penalties for violation of regulatory limits. *Fishing Co. v United States* (2002, WD Wash) 195 F Supp 2d 1239, affd (2003, CA9 Wash) 333 F3d 1045, 2003 CDOS 5483.

National Marine Fisheries Service's closure of area to pelagic longline fishing was lawful under 18 USCS §§ 1851(a)(8) and 1854(g)(1)(C) where mandatory consultation with United States Office of Protected Resources under Endangered Species Act, 16 USCS § 1531 et seq., returned verdict that agency was required to close area, agency selected more economically favorable option of closing just one area rather than scuttling entire highly migratory species fishery management plan, and agency offered pelagic longline fishermen opportunity to participate in experimental fishery in area. *Blue Water Fishermen's Ass'n v Nat'l Marine Fisheries Serv.* (2002, DC Mass) 226 F Supp 2d 330.

Defendants were entitled to summary judgment on claim of organization challenging defendants' actions relating to management of large coastal shark stocks in Atlantic Ocean and Gulf of Mexico because, although organizations argued that impending deadline for opening of new fishing season did not justify defendants' failure to comply with statutory notice and comment requirements, defendants had demonstrated impracticability of affording notice and comment and properly invoked good cause exception. *Ocean Conservancy v Evans* (2003, MD Fla) 17 FLW Fed D 762.

Where fishery agencies violated Magnuson-Stevens Act and failed to comply with court's previous remand orders, environmental councils' motion for order on remedy was denied in order to allow agencies to slowly comply with previous orders. *NRDC v Evans* (2003, ND Cal) 243 F Supp 2d 1046.

National Marine Fisheries Service did not violate Magnuson-Stevens Fishery Conservation and Management Act, 16 USCS § 1801 et seq., or Administrative Procedure Act, 5 USCS § 551 et seq., by failing to provide notice and opportunity for comment on its decision, published via emergency rule, to set shark fishing quotas and to continue suspension of non-quota management measures. *Ocean Conservancy v Evans* (2003, MD Fla) 260 F Supp 2d 1162.

Non-profit organizations contended that National Marine Fisheries Service (NMFS) violated Magnuson-Stevens Act (MSA) by increasing annual harvest limit for darkblotched rockfish, but because 2002 rockfish harvest level was set in accordance with rebuilding plan that NMFS developed pursuant to reasonable interpretation of Sustainable Fisheries Act, increase in harvest level in 2002 did not violate MSA; thus, agencies' motion for summary judgment, *Fed. R. Civ. P. 56(c)*

National Oceanic and Atmospheric Administration, which proposed to conduct drawings and make cash payments to encourage fishermen to return fish tags used by National Marine Fisheries Service for research on history and migration rate of particular fish (*16 USCS § 1854(e)*), could use appropriated funds to make such cash payments to winners of drawings, because rewards would facilitate agency's acquisition of needed information. *Cash Prize Drawing by National Oceanic and Atmospheric Administration (1991) 70 Comp Gen 720.*

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