

Regulatory Environment Outline

- I. Overview
 - A. Constitutional Basis for rulemaking
 - 1. Legislative Branch (Congress) makes laws
 - 2. Has delegated implementation discretion to agencies.
 - B. Public concerns about accountability of agencies (non-elected positions).
 - C. Applicable Laws: Accountability and Public Access
 - 1. APA
 - a. History
 - i. 1946
 - ii. Focus on accountability
 - b. Key Components
 - i. Procedure/timing
 - ii. Public comment
 - iii. Reasonableness
 - c. The Administrative Record
 - 2. FOIA - public access
 - 3. IQA - addresses quality of data relied upon
- II. APA links to MSA actions
 - A. Allows discretion within limits: Ct. shall set aside actions that are:
 - 1. Arbitrary and Capricious, abuse of discretion, not in accordance with law
 - a. APA requires review of the record
 - b. Reasonableness: decision must be supported by facts
 - i. Allows discretion
 - ii. Allows balancing of competing priorities and uncertainties
 - iii. Stretching common sense is not OK
 - c. Not in accordance with law:
 - i. Includes mandates of other laws
 - ii. Even if decision strikes a reasonable balance, it will be struck down if conflicts with other law
 - 2. Contrary to Constitutional right
 - 3. In excess of statutory jurisdiction
 - 4. Without observance of procedure required by law
 - B. Procedure
 - 1. Requires notice and comment
 - a. Trigger: "rules"
 - b. Exceptions
 - i. Interpretive rules, policy statements, internal organization
 - ii. Good cause
 - a) Impracticable
 - i) More than just "difficult"
 - ii) Cannot be due to agency-caused delay
 - b) Unnecessary
 - i) No public interest because
 - ii) No agency discretion, or
 - iii) No effect on public
 - c) Contrary to Public Interest
 - i) Effectiveness of the rule would be undermined
 - ii) Not a stand- alone reason for waiving (use to supplement impracticable or unnecessary)

- d) Waiver rationale must be published in classification section
 - iii. Note that MSA emergency actions are not necessarily exempt. fact-based inquiry.
 - C. Timing: 30 day delay
 - 1. Trigger: Substantive Rules
 - 2. Exceptions
 - a. Relieves a restriction
 - b. Interpretive rules/statements of policy
 - c. Good cause waiver
 - i. Inescapable/unavoidable limitations of time
 - ii. AND demonstrable urgency
- III. FOIA links to MSA
- A. Provides for public access to almost all agency records
 - 1. What is a record
 - a. All “records” regardless of format
 - i. Electronic
 - ii. Audio, video tapes
 - iii. Photographs, etc.
 - b. No obligation to create a new “record” (e.g., to produce a report from raw materials), but may and if so may charge user fee.
 - B. Exemptions
 - 1. Classified secrets/national defense or foreign policy
 - 2. Internal personnel rules
 - 3. Information confidential under other statutes (such as MSA confidential information)
 - 4. Trade Secrets
 - 5. Privileged Interagency correspondence
 - 6. Personal Information affecting privacy
 - 7. Investigatory records compiled for law enforcement purposes
 - 8. Records of financial institutions
 - 9. Geographical/geophysical info concerning wells
 - C. Upon Request
 - 1. What is a “FOIA Request”
 - a. In writing
 - b. Identifies the information sought
 - c. Does not need to refer to FOIA
 - 2. What to do if you get one
 - a. Immediately notify your FOIA contact
 - b. Be aware of time constraints (aggressive timeline for responding)
- IV. IQA links to MSA
- A. Purpose
 - 1. “For ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies”
 - B. Trigger
 - 1. Agency-sponsored dissemination of information
 - a. Define “Information”
 - i. Any communication or representation
 - ii. In any form, e.g., including:
 - a) Text
 - b) Numbers
 - c) Maps
 - d) Audio-visual
 - e) Materials on a webpage
 - f) DOES NOT include hyperlinks
 - g) DOES NOT include opinions when clearly presented as opinion and not fact and not the agency’s views

- h) DOES include 3rd party information when incorporated
 - i) Into a NOAA product
 - iii. Examples: biological surveys, catch statistics, model output, websites, speeches, outreach materials. Includes FMPs, regulations, NEPA documents, etc.
 - b. Define "Dissemination"
 - i. Sponsored or initiated by the agency
 - ii. To the public
 - a) Does not include internal distribution to agency employees
 - b) Does not include inter-agency sharing of info
 - c) Does not include responses to FOIA requests
 - d) Does not include correspondence with individuals.
 - c. Define "Quality": includes:
 - i. Utility
 - a) Useful
 - b) Transparent
 - ii. Integrity: safeguarded from improper access and use
 - iii. Objectivity
 - a) Varies by type of information
 - b) Complies with standards for applicable type of information
- C. Requirement: Assure Quality of Disseminated Information
 - 1. Assure Integrity
 - 2. Assure Utility
 - 3. Adhere to stated Objectivity Standards for each Type of Information
 - a. Original data
 - i. Includes: data that have not been summarized or analyzed
 - ii. Objectivity Standards:
 - a) Collected according to documented procedure/standard practice
 - b) QC prior to dissemination
 - c) There is an ongoing process to continually improve quality
 - d) Transparency in collection, level of quality, and limitations
 - b. Synthesized product
 - i. Includes: developed through analysis of original data, e.g.: summaries of landings statistics, and model outputs
 - ii. Objectivity Standards:
 - a) Identify data sources
 - b) Data of known quality
 - c) Use published, documented, or generally accepted methods
 - d) NOAA reviews the products or procedures
 - e) Disclose method of creating the products
 - c. Interpreted products
 - i. Includes: puts original and synthesized data into spatial, temporal, and issue contexts. Involves scientific interpretation, evaluation, and judgment, e.g.: journal articles, technical reports, and scientific papers.
 - ii. Objectivity Standards:
 - a) Reference to data sources
 - b) Produced through documented or generally accepted methods
 - c) Puts interpreted products into context

- d) Review
 - e) Methods of production are identified
 - d. Forecasts and advisories (hydrometeorological, weather, etc.)
 - e. Experimental products
 - f. Natural Resource plans
 - i. Includes: documents prescribed by law with content, structure, and public review processes prescribed by law, e.g.: FMPs.
 - ii. Objectivity Standards:
 - a) Developed according to published standards
 - b) Based on best information available
 - c) Clear, complete, and unbiased
 - d) Periodic review
 - g. Corporate/General information
 - 4. Documentation: Keep a file on how the information has been developed and maintained
 - 5. Pre-dissemination Review
 - a. Prior to dissemination
 - b. A "reviewing official"
 - c. Reviews file./ completes form explaining compliance with
 - i. Utility
 - ii. Integrity
 - iii. Objectivity
 - a) State type of product
 - b) Explain how it meets appropriate standards
- D. Special Requirements for "Influential Information."
 - 1. Define "Influential"
 - a. Clear and substantial impact on major public policy and private sector decisions
 - b. Relates to human health, safety, and environment
 - 2. Objectivity Standards
 - a. Best scientific information available
 - b. Best available or accepted methodologies
 - c. Presented clearly
 - 3. If it's a "Quantitative Risk Assessment," SPECIFY
 - a. Ecosystem components addressed by risk estimates
 - b. The risk estimates
 - c. Appropriate upper and lower bound estimates of risk uncertainties
 - d. Additional studies that were not used, and why
- E. Request for Correction
 - 1. "Any affected person"
 - 2. May request correction of information, on the grounds that:
 - a. The info does not comply with our guidelines, or
 - b. Is incorrect
 - 3. NOAA Fisheries Correspondence Control will handle such requests
 - 4. The AA is the appeal official
 - 5. Appeal decisions will be made based on information in the file