

Department of Commerce • National Oceanic & Atmospheric Administration • National
Marine Fisheries Service

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 01-101-07
EFFECTIVE DATE***

Fisheries Management

Policy Guidelines for the Use of Emergency Rules

NOTICE: This publication is available at: <http://www.nmfs.noaa.gov/directives/>.

OPR: F/SF

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Type of Issuance: Revision

SUMMARY OF REVISIONS:

This revision simply puts the original guidance in the required directive format. This policy will take the place of 01-101-07 and 30-111.

Signed Emily Menashes

MAR 31 2008

[Approving Authority name]

Date

[Approving Authority title]

Introduction

The preparation or approval of management actions under the emergency provisions of section 305 (c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) should be limited to extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures. An emergency action may not be based on Administrative inaction to solve a long-recognized problem. In order to approve an emergency rule, the Secretary of Commerce (Secretary) must have an administrative record justifying emergency regulatory action and demonstrating its compliance with the national standards. The only legal prerequisite for the use of the Secretary's emergency authority is that an emergency must exist. Congress intended that emergency authority be available to address conservation, biological, economic, social, and health emergencies. In addition, emergency regulations may make direct allocations among user groups, if strong justification and administrative record demonstrates that, absent emergency regulation, substantial harm will occur to one or more segments of the fishing industry. Controversial actions with serious economic effects, except under extraordinary circumstances, should be done through normal notice-and-comment rulemaking.

The process of implementing emergency regulations limits the public participation in rulemaking that Congress intended under the Magnuson-Stevens Act and the Administrative procedures act. The Councils and Secretary must, whenever possible, afford the full scope of public participation in rulemaking. In addition, an emergency rule may delay the review of non-emergency rules, because the emergency rules take precedence. Emergency actions should not be routine events.

Rational for Emergency Action

1. The Secretary may promulgate emergency regulations to address an emergency if the Secretary finds that an emergency or overfishing exists, without regard to whether a fishery management plan exists for that fishery;
2. The Secretary shall promulgate emergency regulations to address the emergency or overfishing if the Council, by a unanimous vote of the voting members, requests the Secretary to take such action¹;
3. The Secretary may promulgate emergency regulations to address the emergency or overfishing if the Council, by less than a unanimous vote of its voting members, requests the Secretary to take such action; and
4. The Secretary may promulgate emergency regulations that respond to a public health emergency or an oil spill. Such emergency regulations may remain in effect until the circumstance that created the emergency no longer exist, provided that the public has had an opportunity to comment on the regulation after it has been published, and in the case of a public health emergency, the Secretary of Health and Human Services concurs with the Secretary's action.

¹ The NOAA Office of General Counsel has defined the phrase "unanimous vote," to mean the unanimous vote of a quorum voting members of the Council only. An abstention has no effect on the unanimity of the quorum vote.

Emergency Criteria

The phrase “an emergency exists involving any fishery” is defined as a situation that:

1. Results from recent, unforeseen events or recently discovered circumstances; and
2. Presents serious conservation or management problems in the fishery; and
3. Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

Emergency Justification

If the time it would take to complete notice-and-comment rulemaking or complete a fishery management plan or amendment would result in substantial damage or loss to a living marine resource, habitat, fishery, industry participants or communities, or substantial adverse impacts to the public health, emergency action might be justified under one or more of the following situations:

1. Ecological- (A)to prevent overfishing as defined in a Fishery Management Plan (FMP), or as defined by the Secretary in the absence of an FMP, or (B) to prevent other serious damage to the fishery resource or habitat; or
2. Economic- to prevent significant direct economic loss or preserve a significant economic opportunity that otherwise might be foregone; or
3. Social- to prevent significant community impacts or conflict between user groups; or
4. Public Health- to prevent significant adverse effects to health of participants in a fishery or to the consumers of seafood products.

Attachment 1

Policy - Emergency Rules

Federal Register / Vol. 62, No. 162 / Thursday, August 21, 1997 / Rules and Regulations 44421

THEFT RATES OF MODEL YEAR 1995 PASSENGER MOTOR VEHICLES STOLEN IN CALENDAR YEAR 1995—Continued

Manufacturer	Make/model (line)	Thefts 1995	Production (mfg's) 1995	1995 (per 1,000 vehicles produced) theft rate
205 ROLLS-ROYCE	SIL SPIRIT/SPURMULS	0	132	0.0000
206 ROLLS-ROYCE	TURBO R	0	19	0.0000
207 VOLKSWAGEN	EUROVAN	0	1,814	0.0000
208 VOLVO	LIMOUSINE	0	6	0.0000

Issued on: August 18, 1997.
L. Robert Shelton,
Associate Administrator for Safety
Performance Standards.
[FR Doc. 97-22263 Filed 8-20-97; 8:45 am]
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**DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric
Administration**

50 CFR Chapter VI
[Docket No. 970728184-7184-01; I.D.
060997C]

**Policy Guidelines for the Use of
Emergency Rules**

AGENCY: National Marine Fisheries
Service (NMFS), National Oceanic and
Atmospheric Administration (NOAA),
Commerce.

ACTION: Policy guidelines for the use of
emergency rules.

SUMMARY: NMFS is issuing revised
guidelines for the Regional Fishery
Management Councils (Councils) in
determining whether the use of an
emergency rule is justified under the
authority of the Magnuson-Stevens
Fishery Conservation and Management
Act (Magnuson-Stevens Act). The
guidelines were also developed to
provide the NMFS Regional
Administrators guidance in the
development and approval of
regulations to address events or
problems that require immediate action.
These revisions make the guidelines
consistent with the requirements of
section 305(c) of the Magnuson-Stevens
Act, as amended by the Sustainable
Fisheries Act.

DATES: Effective August 21, 1997.

FOR FURTHER INFORMATION CONTACT:
Paula N. Evans, NMFS, 301/713-2341.

SUPPLEMENTARY INFORMATION:

Background

On February 5, 1992, NMFS issued
policy guidelines for the use of
emergency rules that were published in

the **Federal Register** on January 6, 1992
(57 FR 375). These guidelines were
consistent with the requirements of
section 305(c) of the Magnuson Fishery
Conservation and Management Act. On
October 11, 1996, President Clinton
signed into law the Sustainable
Fisheries Act (Public Law 104-297),
which made numerous amendments to
the Magnuson-Stevens Act. The
amendments significantly changed the
process under which fishery
management plans (FMPs), FMP
amendments, and most regulations are
reviewed and implemented. Because of
these changes, NMFS is revising the
policy guidelines for the preparation
and approval of emergency regulations.
Another change to section 305(c),
concerning interim measures to reduce
overfishing, will be addressed in
revisions to the national standards
guidelines.

Rationale for Emergency Action

Section 305(c) of the Magnuson-
Stevens Act provides for taking
emergency action with regard to any
fishery, but does not define the
circumstances that would justify such
emergency action. Section 305(c)
provides that:

1. The Secretary of Commerce
(Secretary) may promulgate emergency
regulations to address an emergency if
the Secretary finds that an emergency
exists, without regard to whether a
fishery management plan exists for that
fishery;
2. The Secretary shall promulgate
emergency regulations to address the
emergency if the Council, by a
unanimous vote of the voting members,
requests the Secretary to take such
action;
3. The Secretary may promulgate
emergency regulations to address the
emergency if the Council, by less than
a unanimous vote of its voting members,
requests the Secretary to take such
action; and
4. The Secretary may promulgate
emergency regulations that respond to a
public health emergency or an oil spill.
Such emergency regulations may remain
in effect until the circumstances that

created the emergency no longer exist,
provided that the public has had an
opportunity to comment on the
regulation after it has been published,
and in the case of a public health
emergency, the Secretary of Health and
Human Services concurs with the
Secretary's action.

Policy

The NOAA Office of General Counsel
has defined the phrase "unanimous
vote," in paragraphs 2 and 3 above, to
mean the unanimous vote of a quorum
of the voting members of the Council
only. An abstention has no effect on the
unanimity of the quorum vote. The only
legal prerequisite for use of the
Secretary's emergency authority is that
an emergency must exist. Congress
intended that emergency authority be
available to address conservation,
biological, economic, social, and health
emergencies. In addition, emergency
regulations may make direct allocations
among user groups, if strong
justification and the administrative
record demonstrate that, absent
emergency regulations, substantial harm
will occur to one or more segments of
the fishing industry. Controversial
actions with serious economic effects,
except under extraordinary
circumstances, should be done through
normal notice-and-comment
rulemaking.

The preparation or approval of
management actions under the
emergency provisions of section 305(c)
of the Magnuson-Stevens Act should be
limited to extremely urgent, special
circumstances where substantial harm
to or disruption of the resource, fishery,
or community would be caused in the
time it would take to follow standard
rulemaking procedures. An emergency
action may not be based on
administrative inaction to solve a long-
recognized problem. In order to approve
an emergency rule, the Secretary must
have an administrative record justifying
emergency regulatory action and
demonstrating its compliance with the
national standards. In addition, the
preamble to the emergency rule should
indicate what measures could be taken

or what alternative measures will be considered to effect a permanent solution to the problem addressed by the emergency rule.

The process of implementing emergency regulations limits substantially the public participation in rulemaking that Congress intended under the Magnuson-Stevens Act and the Administrative Procedure Act. The Councils and the Secretary must, whenever possible, afford the full scope of public participation in rulemaking. In addition, an emergency rule may delay the review of non-emergency rules, because the emergency rule takes precedence. Clearly, an emergency action should not be a routine event.

Guidelines

NMFS provides the following guidelines for the Councils to use in determining whether an emergency exists:

Emergency Criteria

For the purpose of section 305(c) of the Magnuson-Stevens Act, the phrase "an emergency exists involving any fishery" is defined as a situation that:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

Emergency Justification

If the time it would take to complete notice-and-comment rulemaking would result in substantial damage or loss to a living marine resource, habitat, fishery, industry participants or communities, or substantial adverse effect to the public health, emergency action might be justified under one or more of the following situations:

- (1) Ecological—(A) to prevent overfishing as defined in an FMP, or as defined by the Secretary in the absence of an FMP, or (B) to prevent other serious damage to the fishery resource or habitat; or
- (2) Economic—to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be foregone; or
- (3) Social—to prevent significant community impacts or conflict between user groups; or

(4) Public health—to prevent significant adverse effects to health of participants in a fishery or to the consumers of seafood products.

Dated: August 14, 1997.

Gary C. Matlock,
Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.
[FR Doc. 97-22094 Filed 8-20-97; 8:45 am]
BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[Docket No. 970702161-7197-02; I.D. 041097C]

RIN 0648-AJ93

Atlantic Highly Migratory Species Fisheries; Import Restrictions

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS amends the regulations governing the Atlantic highly migratory species fisheries to prohibit importation of Atlantic bluefin tuna (ABT) and its products in any form harvested by vessels of Panama, Honduras, and Belize. The amendments are necessary to implement International Commission for the Conservation of Atlantic Tunas (ICCAT) recommendations designed to help achieve the conservation and management objectives for ABT fisheries.

DATES: Effective August 20, 1997. Restrictions on Honduras and Belize are applicable August 20, 1997; restrictions on Panama are applicable January 1, 1998.

ADDRESSES: Copies of the supporting documentation are available from Rebecca Lent, Chief, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3282.

FOR FURTHER INFORMATION CONTACT: Chris Rogers or Jill Stevenson, 301-713-2347.

SUPPLEMENTARY INFORMATION: The Atlantic tuna fisheries are managed under the authority of the Atlantic Tunas Convention Act (ATCA). Section 971d(c)(1) of the ATCA authorizes the Secretary of Commerce (Secretary) to issue regulations as may be necessary to carry out the recommendations of the

ICCAT. The authority to issue regulations has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background information about the need to implement trade restrictions and the related ICCAT recommendation was provided in the preamble to the proposed rule (62 FR 38246, July 17, 1997) and is not repeated here. These regulatory changes will further NMFS' management objectives for the Atlantic tuna fisheries.

Proposed Import Restrictions

In order to conserve and manage North Atlantic bluefin tuna, ICCAT adopted two recommendations at its 1996 meeting requiring its Contracting Parties to take the appropriate measures to prohibit the import of ABT and its products in any form from Belize, Honduras, and Panama. The first recommendation was that its Contracting Parties take appropriate steps to prohibit the import of ABT and its products in any form harvested by vessels of Belize and Honduras as soon as possible following the entry into force of the ICCAT recommendation. Accordingly, the prohibition with respect to these countries is effective August 20, 1997. The second recommendation was that the Contracting Parties take appropriate steps to prohibit such imports harvested by vessels of Panama effective January 1, 1998. This would allow Panama an opportunity to present documentary evidence to ICCAT, at its 1997 meeting or before, that Panama has brought its fishing practices for ABT into consistency with ICCAT conservation and management measures. Accordingly, the prohibition with respect to Panama will become effective January 1, 1998.

Under current regulations, all ABT shipments imported into the United States are required to be accompanied by a Bluefin Statistical Document (BSD). Under this final rule, United States Customs officials, using the BSD, will deny entry into the customs territory of the United States of shipments of ABT harvested by vessels of Panama, Honduras, and Belize and exported after the effective dates of the trade restrictions. Entry will not be denied for any shipment in transit prior to the effective date of trade restrictions.

Upon determination by ICCAT that Panama, Honduras, and/or Belize has brought its fishing practices into consistency with ICCAT conservation and management measures, NMFS will publish a final rule in the Federal Register that will remove import restrictions for the relevant party. In