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**L. Robert Shelton,**

*Associate Administrator for Safety  
Performance Standards.*

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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,**

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National Marine Fisheries Service.*

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