

## Economic Effects Considerations

- I. Overview of Economic Requirements
  - A. Many sources of required considerations of economics
    - 1. List sources: EO 12866, RFA, CRA, NEPA, MSA, ESA, UMRA
    - 2. Most do not require substantive determination
    - 3. EO 12866 costs justified by benefits
  - B. Many sources of procedural and timing requirements related to consideration of economic effects
    - 1. EO 12866 – listing and OMB review
    - 2. EO 13272 – SBA notification
    - 3. CRA – Congressional review
  - C. NOAA Fisheries’ integrated approach for analyzing economic effects
    - 1. PREE (Draft preliminary economic analysis.)
      - a. Would appear in a draft NEPA document (public hearing document)
      - b. Recommended approach for early consideration of economic effects (prior to identification of preferred alternative)
      - c. Can serve as basis for draft RIR, and inform decision as to which RFA document to prepare
    - 2. RIR
      - a. The document NMFS uses to review and describe net benefits (benefits minus costs) of an action.
      - b. Contents
        - i. Management goals and objectives
        - ii. Description of the fishery and/or other affected entities
        - iii. Statement of the problem
        - iv. Description of alternatives (includes “no action”)(does not include alternatives eliminated from analysis).
        - v. Economic analysis of each alternative’s effects
    - 3. RFA documents: RFA contains specific documentation requirements beyond the RIR
      - a. Certification
      - b. IRFA/FRFA
- II. EO 12866 links to MSA Actions
  - A. Applies at rulemaking stage: intended to improve planning and accountability.
  - B. Principles of Regulation
    - 1. Identify problem
    - 2. Examine existing rules
    - 3. Assess alternatives to regulation
    - 4. Assess risks
    - 5. Cost-effectiveness
    - 6. Benefits justify costs
    - 7. Reasonably obtainable information
    - 8. Assess alternative forms of regulation (e.g., performance measures)
    - 9. Seek views/Effects on other government entities

*Overview of the Fishery Management Process*

- 10. Avoid inconsistencies
- 11. Least burden on society
- 12. Simple and easily understood
- C. Regulatory Agenda
  - 1. Agencies must publish list of planned future regulatory actions
  - 2. Twice a year
  - 3. Each action is assigned an RIN
- D. OMB Review of “Significant” Actions
  - 1. Trigger: What is “significant”?
    - a. \$100 million in impacts or “materially adverse” (economic significance)
    - b. Inconsistencies
    - c. Budgetary impacts
    - d. Novel legal or policy issues
  - 2. Listing Process
    - a. Agency makes initial determination as to significance and submits to OMB
    - b. Monthly submission process
    - c. 10 days or concurrence inferred
  - 3. OMB Review Process and Timing
    - a. Submit RIR
    - b. 90 days from submission to OMB
    - c. Reviews for consistency with EO
    - d. Result of review
      - i. May return action to the agency for further consideration
      - ii. Conflicts elevated to the President
- E. Costs must justify benefits in the long term
  - 1. As required by principles of regulation
  - 2. Record must support this finding (RIR)
  - 3. Based on RIR
- III. RFA links to MSA actions
  - A. Trigger
    - 1. Applies to agency rulemaking
    - 2. Published through proposed and final rulemaking
      - a. If a proposed rule is not required, or a good cause waiver asserted, RFA does not apply
      - b. No per se exemption for MSA emergency rules – refer to APA
  - B. Requirement
    - 1. Consider economic Effects on small entities and alternatives, AND
      - a. Define small entities (per NAICS code)
        - i. Small businesses
          - a) Commercialharvesting: ≤\$19.0 mil for finfish, \$5 mil for shellfish, and \$7 mil for other marine, annually
          - b) Seafood processing: ≤500 employees
          - c) Wholesalers/dealers/first receivers: ≤100 employees
          - d) Marina/party/charter boats: ≤\$7 mil. annually

- e) Catcher/processor: ≤\$19.0 mil or \$5 mil annually depending on whether harvesting component is primarily finfish or shellfish
    - ii. Small organizations:
      - a) Independent
      - b) Not dominant in field
    - iii. Small governmental jurisdictions: ≤50,000 population
  - b. Which Effects on “directly regulated entities”
    - a) Case law: Idaho County
- 2. Document
  - a. IRFA (with proposed rule)
    - i. Contents
      - a) Describe economic Effects of all selected alternatives on profitability (gross receipts) of small entities as described and estimated in and any disproportionate economic Effects between large and small entities or within groups of small entities (i.e., gear, homeport, vessel size, etc.)
      - b) Reason for doing
      - c) Objectives and legal basis
      - d) Description and estimate of small entities to which it applies or explanation why none is available
      - e) Identify duplicative requirements
      - f) Record keeping/reporting requirements
  - b. FRFA (with final rule)
    - i. Contents
      - a) Need and objectives
      - b) Summary of comment and response
      - c) Description and estimate of small entities, or explanation why none is available
      - d) Record keeping and reporting requirements
      - e) Statement of steps taken to minimize Effects
      - f) Rationale for selected alternative versus other identified alternatives that meet objectives and have less adverse Effects (TIP: if this is done in the IRFA, then there is no need to repeat it in the FRFA)
- 3. OR certify (at either proposed rule or final rule stage)
  - a. Significant economic Effect
    - i. Disproportionality
    - ii. Profitability (gross receipts)
  - b. Substantial number of small entities
    - i. Depends on context
    - ii. More than “just a few”
    - iii. May be a small number of all those affected if levels of effect vary (e.g., a fishery with many permittees, but only a few highliners)
      - a) Case law: SOFA
  - c. Substantive determination must be supported by facts in the record (can use facts in the preliminary analysis/NEPA analysis and/or RIR)

- d. "Status quo" rationale – not sufficient on its own
  - i. \*Case law: North Carolina fisheries (two parts – not accounting for an "overage-adjusted quota" and only analyzed "overall" quota ignoring Effect to individual states /communities)
- 4. Small Entity Compliance Guide
  - a. Must prepare if an FRFA was required
  - b. Plain language guide to requirements
  - c. Format and form can vary
  - d. A factor in calculating enforcement penalties
  - e.
- 5. Does not require selection of most economically preferable alternative for small entities
  - a. \*Case law: NCMC – NMFS wins! and Associated Fisheries of Maine
- 6. Section 610 Review of actions for which an FRFA was prepared.

IV. EO 13272

- A. Intended to improve compliance with RFA
- B. Requires agencies to develop policies and procedures
- C. Requires notification of SBA
  - 1. Trigger: Rules that may have a significant economic Effect on a substantial number of small entities
  - 2. Timing
    - a. When submitting draft rule package to OIRA (if applicable)
    - b. Otherwise, reasonably in advance of publication of proposed rule

V. CRA

- A. Requirement: Notify Congress of "major rules":
  - 1. Define major
    - a. Annual effect on the economy of \$100 million
    - b. Major increase in costs/prices
      - i. For consumers
      - ii. Industries
      - iii. Government agencies
      - iv. Or geographic regions
    - c. Significant adverse effects
      - i. On competition
      - ii. Employment
      - iii. Investment
      - iv. Productivity
      - v. Innovation
      - vi. Ability of U.S. enterprises to compete internationally
  - 2. OMB determines which rules are "major"
  - 3. Process: Use the EO 12866 listing process to make initial determination for OMB
- B. Timing
  - 1. CRA provides for 60-day delay in effectiveness and Congressional disapproval
  - 2. Fishery management actions are exempted from the delay