Economic Considerations

I. Overview of Economic Requirements

During the development and implementation of an MSA fishery management regulation, there are many applicable laws that require consideration of economic effects, such as EO 12866, RFA, CRA, NEPA, MSA, ESA, and UMRA. While most of these require only reasoned decisionmaking and consideration of certain factors without constraining the ultimate discretion, in some cases, a substantive determination is required. For example, EO 12866 requires a determination that the costs of regulation are justified by the expected benefits.

Even if they do not affect the ultimate decision-making discretion, many of these laws include specific procedural and timing requirements with which we must comply, such as EO 12866's listing and OMB review requirements, EO 13272's SBA notification requirement, and RFA's response to public comments requirement.

NMFS has developed guidance recommending an approach for consolidating the required economic considerations and infusing them into the decision-making process at the Council level. More details about the specific requirements and the NMFS guidance is provided below.

II. EO 12866 links to MSA Actions

A. In General

EO 12866 is intended to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. The EO promotes these goals through four main requirements:

Principles of Regulation. The EO sets forth "principles of regulation" that Federal agencies must follow to the extent allowed by law.

Regulatory Agenda. The EO requires all agencies to conduct internal planning and to publish a notice of planned upcoming rulemaking every 6 months in a "regulatory agenda."

OMB Review. The EO requires agencies to communicate with OMB in order for OMB to provide coordinated oversight of federal rulemaking activities. Agencies do this by submitting lists of planned actions, and for those that are "significant" providing for OMB review of up to 90 days.

Costs/Benefits. The EO also requires a substantive determination for each rule that the benefits will justify the costs.

B. Principles of Regulation

The EO sets forth 12 principles of regulation and mandates that agencies comply with them to the extent permitted by law. When promulgating a regulation, an agency must:

1. Identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
2. Examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.
3. Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.
4. In setting regulatory priorities, consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.
5. After determining that a regulation is the best available method of achieving the regulatory objective, design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.
6. Assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.
7. Base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.
8. Identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than the behavior or manner of compliance that regulated entities must adopt.
9. Wherever feasible, seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.
10. Avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.
11. Tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; and
12. Draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

C. Regulatory Agenda

The Executive Order requires that twice a year, agencies publish in the *Federal Register* a list of planned future regulatory actions.

NMFS publishes this list twice a year, and through the publication process, each planned action is assigned a "Regulatory Identification Number" (RIN). The RIN is used to track the action as it progresses from an idea, to a proposed rule, to final rule.

Actions that come up between the 6-month intervals can be assigned an RIN through the monthly process of submitting significance determinations to OMB as described in the next section, below.

D. OMB Review of "Significant" Actions
The Executive Order requires OMB review and clearance of "Significant" rules.

1. Determining "Significance."

NMFS makes the initial determination of whether a rule would meet the criteria for significance. If a proposed action is determined to be significant under E.O. 12866, the analysis undergoes further scrutiny by OMB to ensure that it meets the requirements of E.O. 12866.

The rule is determined to be significant if it is likely to:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Economically significant rules are those expected to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Both benefit-cost analysis and cost-effectiveness analysis provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices.

2. The Listing Process

Pursuant to the Executive Order, NMFS periodically submits a list of its planned regulatory actions to OMB indicating which ones are "significant." Those regulations that NMFS designate as "not significant" are not subject to OMB review unless, within 10 working days of receipt of the list, OMB notifies NMFS of disagreement with this conclusion. The process for communicating with OMB is to submit a monthly list of upcoming actions to OMB, providing a summary of the action, its RIN, expected schedule for implementation, and initial determination of significance. These submissions are called "Listing Documents."

If OMB concurs in a determination of "not significant," OMB will not need to review the rule. The classification section of the *Federal Register* notice of the proposed and final rule must reference that determination. If an action is "significant," then it must submitted as a draft of the rule and a cost-benefit analysis to OMB for review.

Since OMB may take up to 90 days to review and clear a "significant" rule, it is important to submit the listing document at least 3 months prior to submission of the proposed rule, if possible. In any case, the determination must be submitted and cleared as soon as possible, or delays in publishing the rule can result.

3. OMB Review Process and Timing

The amount of time that OMB may take to review an action varies depending on where the action is in the rulemaking process, and whether or not OMB has previously had an opportunity to review the materials. OMB must complete, or waive, its review within the following time periods:

- For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;
- For all other regulatory actions, within 90 calendar days after the date of submission of the required information, unless OIRA has previously reviewed the information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and
- The review process may be extended once by no more than 30 calendar days upon the written approval of the Director and at the request of the agency head.

Results of Review: If OMB finds the planned action to be inconsistent with the Executive Order, OMB may return it to the agency for further consideration.

Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA will be resolved by the President, or by the Vice President.

4. Benefits Must Justify Costs

A Regulatory Impact Review (RIR) is the document NMFS uses to assess costs and benefits of a regulation as required by EO 12866. The RIR provides a review of the problems and policy objectives prompting the regulatory proposals.

It can also be used to:

- Ensure that the agency systematically and comprehensively evaluates major alternatives to solve the problems, such that the public welfare can be enhanced in the most efficient and cost effective way, as implied by NS 5 and 7 of the Magnuson-Stevens Act.
- Support a determination regarding OY as required by NS 1.
- Provide a comprehensive review of the level and incidence of effects associated with a proposed or final regulatory action.
- Provide information on the expected economic effect of proposed regulations on the human environment, as required by NEPA.
- Serve as the basis for determining whether the proposed regulations will have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (RFA).

Each RIR should include:

- A description of the management objectives;
- A description of the fishery;
- A statement of the problem;
- A description of each selected alternative, including the "no action alternative"; and
- An economic analysis of the expected effects of each selected alternative relative to the baseline. The baseline is what is likely to occur in the absence of the proposed action (i.e., the "status quo").

If these elements are already included in another section of the analytical document, the appropriate section must be referred to under the RIR (see NMFS' Economic Guidelines for Fishery Management Actions for more detailed information on each of these criteria). In addition, OMB has issued guidance on what it expects to see in a good cost-benefit analysis (OMB Circular A-4, Sept. 17, 2003).

III. RFA links to MSA actions

The Regulatory Flexibility Act (RFA) is intended to encourage agencies to use innovative procedures when dealing with small entities that would be unnecessarily adversely affected by regulation. The RFA does not require that the alternative with the least cost or with the least effect on small entities be selected as the preferred alternative. Instead the purpose of the RFA is to inform the agency, as well as the public, of the expected economic effects of the various alternatives and to ensure that the agency considers alternatives that minimize the expected effects while meeting the goals and objectives of the FMP and applicable statutes.

A. Trigger

The analytical requirements of the RFA apply only to rules that are required to be published as proposed rules. Thus if the notice of proposed rulemaking is being waived for good cause under the APA, or if there is otherwise reason to assert that proposed rulemaking is not required, the analytical requirements of the RFA will not apply.

B. Requirement: Consider Impacts on Small Entities

The RFA requires an economic impact analysis with regards to anticipated impacts on "small entities." It requires this analysis to include specific content and to be subjected to public comments. The document required to be prepared in support of a proposed rule is called an "Initial Regulatory Flexibility Analysis" (IRFA). A summary of the IRFA must be published in the preamble to the proposed rule, and public comments solicited. At the final rule stage, a Final Regulatory Flexibility Analysis (FRFA) must be prepared, and must respond to the public comments received on the IRFA.

In cases where the agency does not expect that the proposed action will have a "significant economic impact on a substantial number of small entities," it may avoid the IRFA/FRFA requirements by making a "certification" of this finding. The certification is a fact-based determination that must be supported by facts in the record. The certification process is the only time NMFS must make a determination that a rule will not have a significant economic impact on a substantial number of small entities. For IRFAs and FRFAs, the analyst is not required to render a determination that a rule will have a significant impact on a substantial number of small entities if impacts of the selected alternatives are provided to the public.

1. Small Entity

In analyzing economic impacts on "small entities", there are three types of entities to consider: small businesses, small organizations, and small governmental jurisdictions.

The Small Business Administration (SBA) has published guidance on how to determine whether a particular type of entity is "small." Part 121 of Title 13, Code of Federal Regulations (CFR), sets forth, by NAICS (North American Industry Classification System) categories, the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity. Provision is made for an agency to develop industry-specific definitions. Under this provision, NMFS (with the approval of the Office of Advocacy at the U.S. Small Business Administration) may establish criteria for businesses in fishery related sectors to qualify as small entities.

According to current guidance, the following criteria apply:

- Commercial harvesting or hatchery business: Is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has annual receipts not in excess of: $19 million for businesses primarily involved in harvest of finfish (NAICS 114111), $5

million for businesses primarily involved in harvest of shellfish, and $7 million for businesses primarily involved in "other" marine fishing.

- Seafood processors (NAICS 311710): For related industries involved in canned and cured fish and seafood or prepared fish or frozen fish and seafood, a small business is one that employs 500 employees or fewer.
- Catcher/processors: Per Leedy memo, the applicable standard for these businesses is based on the harvesting component of their activities. Thus, the standard is either $5.0 mil or $19 mil annually depending on whether they are primarily involved in harvest of shellfish or finfish.
- Wholesalers, dealers/first receivers (NAICS 424460): A small business is one that employs 100 or fewer.
- Marinas (NAICS 713930) and for-hire (charter, party, and headboats) businesses (NAICS 487210): A small business is one with annual receipts not in excess of $7.0 million.
- A small organization: Is any not-for-profit enterprise that is independently owned and operated and not dominant in its field.
- A small government jurisdiction: Is any government or district with a population of less than 50,000.

SBA's size standards can be viewed on their website: http://www.sba.gov/content/small-business-size-standards. SBA is reviewing their size standards for each of the various NAICS sectors every five 5 years per requirements in the Small Business Jobs Act of 2010. However, the reviews are being conducted in different years for different sectors rather than simultaneously. Thus, these standards are expected to change on a more regular basis in the future than in the past.

2. Which impacts?

It can be challenging to decide where to draw the line in analyzing the trail of impacts that may be generated by an action. RFA case law seems to indicate that, for purposes of the RFA, the impacts that matter are the impacts on the "directly regulated" entity. This means that, if NMFS is analyzing a proposed action that would limit the number of permits in a fishery, for RFA purposes, then it would be interested in the impacts on the permitees and those who would be excluded. NMFS would probably not need to analyze impacts on hotels in the area of the fishery that may depend on the fishery for attracting guests. *However, it is important to note that these indirect impacts would be analyzed under other legal provisions, such as the MSA's NS 1 and 8, NEPA, and EO 12886.

A recent case involving NMFS demonstrates this point. The case *Idaho County v. Evans* involved a challenge to Amendment 14 to the Pacific Salmon FMP, which implemented its EFH definitions. NMFS approved the EFH amendment in September 2000, designating as EFH "all those streams, lakes, ponds, wetlands and other currently viable water bodies and most of the habitat historically accessible in salmon" in California, Idaho, Oregon and Washington. With the final rule, NMFS "certified" under the RFA that there would be no significant economic effect on a substantial number of small entities. Plaintiffs, two rural Idaho counties and a rural Washington county, a national association of home builders, and two forest industry trade associations sued alleging violation of the RFA (among other things). Plaintiffs argued that "the net effect of this designation is to subject all manner of upland, non-fishing activities in most of Washington and Oregon, and major portions of Alaska, California and Idaho to EFH consultation."

The Court found that the rule would in fact have a real impact on the non-fishing entities, which include small businesses, small organizations and small governmental jurisdictions. However, because Plaintiffs were not being directly "regulated," they were not entitled to the protections of the RFA. The Court accepted this argument and ultimately concluded that despite the cursory certification, the final rule was not subject to the RFA because the final rule did not "directly regulate" the small entities affected by this action. The Court held also that RFA analysis is not required for indirect regulation (*Idaho County v. Evans*, Case No. CV02-80-C-EJL (D. Idaho Sept. 30, 2003)).

3. Documentation

IRFA

The IRFA must describe the impact of the proposed rule on small entities and contain the following components:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.
- A description of "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."

NMFS recommends that an IRFA also include a description of, and an explanation of the basis for, assumptions used. This should describe the data sources and analytical methods used in the analyses, variability, and uncertainty in the cost and revenue estimates, explain the assumptions used, and indicate the extent to which the results were affected by those assumptions.

Alternatives: Consistent with the stated objectives of applicable statutes, the IRFA must discuss significant alternatives such as:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- The use of performance rather than design standards; and
- An exemption from coverage of the rule, or any part thereof, for such small entities.

NMFS recommends that the IRFA should estimate the costs associated with each of the selected alternatives and identify the classes of small entities that will be subjected to the costs. The relevant costs include both direct compliance costs, reporting, record-keeping, and other administrative costs. Note that compliance costs are broadly defined to include the value of forgone fishing opportunities, increased operating costs, and costs associated with higher levels of debt servicing. The IRFA should compare the costs of compliance for small and large entities to determine whether any small entities are disproportionately affected. If all entities in the industry are small entities, the costs imposed on the typical, representative, median, or average entity in a particular segment of the industry should be analyzed. The resulting effects of business closures on production and employment should be estimated.

The agency must publish a summary of the IRFA in the *Federal Register* in the preamble to the proposed rule. As a practical matter, in order to meaningfully consider alternatives to a Council-developed recommendation, in light of the MSA's restrictions on Secretarial review, an analysis of impacts and alternatives for small entities should be available during Council deliberations. NMFS guidance, discussed at the end of this section, suggests an approach for meaningful consideration of alternatives at the Council level.

FRFA

At the time of the Final rule, a second document is required: the FRFA. The FRFA basically includes the same information as required in the IRFA, but is expanded to include a summary of significant issues raised in public comment and a statement of any changes the agency made as a result, and a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

A FRFA must contain:

- A succinct statement of the need for, and objectives of, the rule;
- A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Certification

If there is a factual basis for asserting that the action is not likely to have a significant economic impact on a substantial number of small entities, the requirements may be waived for doing an IRFA and FRFA by preparing and publishing a "certification." While it is preferable for this factual basis to be based on a quantitative analysis, a qualitative analysis may be sufficient in certain cases. In general, the lack of quantitative data means we should exercise caution before choosing a certification over an IRFA. However, in some situations, a qualitative analysis may warrant a certification either because the change is a minor administrative change or, based on logic and accepted theory, the impacts on small businesses are known to be positive.

NMFS has provided guidance on determining what constitutes a "significant economic impact" and "substantial number."

Significant Economic Impact: The NMFS guidelines suggest two criteria to consider in determining the significance of regulatory impacts, namely, "disproportionality" and "profitability." These criteria relate to the basic purpose of the RFA, i.e., to consider the effect of regulations on small businesses and other small entities, recognizing that regulations are frequently unable to provide short-term cash reserves to finance operations through several months or years until their positive effects start paying off. If either criterion is met for a substantial number of small entities, the rule should not be certified.

Substantial Number: The term "substantial number" has no specific statutory definition and the criterion does not lend itself to objective standards applicable across all regulatory actions. Rather, "substantial number" depends upon the context of the action, the problem to be addressed, and the structure of the regulated industry. The SBA casts "substantial" within the context of "more than just a few" or *De Minimis* ("too few to care about") criteria. In some cases consideration of "substantial number" may go beyond merely counting the number of regulated small entities that are impacted significantly. A fishery may have a large number of participants, but only a few of them may account for the majority of landings. In such cases, a substantial number of small entities may be adjudged to be significantly impacted, even though there may be a large number of insignificantly impacted small entities. Generally, a rule is determined to affect a substantial number of entities if it impacts more than just a few small entities. In a borderline case, the rule's effect on the structure of the regulated industry or the controversiality of the rule might tip the balance in favor of determining that a substantial number of entities would be affected.

Ultimately, the question the RFA analysis needs to answer is whether, in the short and medium-term, the costs (or reduction in revenues) imposed by the regulation can be absorbed by the firm (due to higher than average profitability) or passed on to its customers. If these costs (or reductions in revenues) cannot be absorbed so that either profits are reduced significantly or the solvency (ability to meet long term debt payments) of a substantial number of small entities is clearly threatened, then the impact of the rule is significant and the agency should not certify.

C. Lessons Learned

Several valuable lessons from case law challenging RFA compliance can be learned. In two litigation losses, case law has reinforced that a certification is a substantive determination that must be supported by facts in the record. In two litigation wins, case law has reinforced the importance of a good record, the fact that RFA is not outcome determinative, and that economic impacts analysis can be combined with other agency documentation.

1. SOFA: Response to Comments, Dilution of impacts analysis

In an early RFA challenge involving management of the shark fishery, NMFS observed the importance the Court attached to the public comments on agency analysis. The Court also highlighted a technical difficulty in proceeding from certification to FRFA with no IRFA, and criticized the approach that was taken at determining the significance of impacts.

This case unfolded in the midst of scientific uncertainty surrounding the status of the shark fishery and the agency's efforts to be reasonably protective in light of current knowledge. The agency proposed a rule to implement 50% reductions in the shark quota and to reduce recreational bag limits. With the proposed rule, we published a certification, pursuant to the Regulatory Flexibility Act (RFA), stating that the proposed quota cuts would not have a significant economic impact on a substantial number of small entities. The basis for this conclusion was our estimate that directed shark fishermen earn at most $26,426 per year from the directed shark fishery, supplement their income from other sources, and are easily able to adapt to other fisheries. During the public comment period, NMFS received comments from commercial shark fishermen who disagreed with the certification, asserted their economic dependence on the fishery, and explained the costliness of adapting to other fisheries.

In response to these comments, at the final rule stage, NMFS prepared a FRFA which supplemented the certification with additional analysis, but maintained the conclusion that the reductions would not result in a significant economic impact on a substantial number of small entities. Plaintiffs challenged the rule on a variety of MSA, APA, and RFA grounds. Notably, despite the scientific uncertainty, there is a strong record on the science aspects, evincing healthy scientific debate, and the Court found in favor of the agency on the MSA challenges.

With respect to the RFA claims, however, the Court found that the FRFA "added little substance" to the information provided in the certification. Citing "lapses and inconsistencies in the record," the Court concluded that the agency's conclusions regarding economic impacts were not reasonable and violated the APA and RFA. While stopping short of stating than a FRFA cannot be valid if an IRFA is not first prepared, the Court did identify practical problems that may afflict a record when new information comes to light after publication of a certification. The Court noted the following issues:

- The record strongly indicated that the quotas would significantly injure fishermen.
- An IRFA would have required a careful and meaningful study of the problem from the beginning and allowed for an informed and detailed public discussion.
- The Court questioned how we could have complied with the RFA's requirements for an FRFA to summarize and consider comments on an IRFA, when no IRFA had been prepared.

The RFA requires a "reasonable, good-faith effort" to inform the public about effects and alternatives PRIOR to the final rule.

On remand, the agency re-examined the economic impacts, and concluded that the action may have had a significant economic impact on a substantial number of small entities. Although the Court concurred with NMFS' conclusion, the Court criticized NMFS for its analytical approach. Specifically, the Court found that NMFS erred by considering the impacts of the quotas on all permit holders, three-fourths of whom had not recently used their permits or who caught only small amounts of shark. The Court concluded that this approach diluted the analysis of impacts on a smaller group of high-level participants in the commercial shark fishery.

In fact, shortly after this ruling and the summer flounder ruling also described in this section, the agency undertook major revisions to our internal guidance for RFA compliance and revised the approach for determining the universe of affected small entities to prevent the possibility of the "dilution" effect. (*Southern Offshore Fishing Association v. Daley*, 995 F.Supp. 1411; 1998 U.S. Dist. LEXIS 3478; 28 ELR 21183 (D.D.C. 1998); and 55_F.Supp.2d_1336.)

2. North Carolina Fisheries: "Status quo" rationale -- not sufficient on its own

The summer flounder cases demonstrate the power of the RFA and its procedural requirements. In these cases, the agency's decision to "certify" no significant economic impacts instead of preparing an IRFA/FRFA led to court ordered "sanctions" effectively raising the 1997 quota by almost 400,000 lbs.

Background: Due to overlapping state and federal fisheries, and time-lags in calculating how many fish had been caught the year before, the federal summer flounder fishery's annual quotas were set at the beginning of each calendar year, then subsequently modified to account for the amount by which each state had exceeded or failed to meet its quota from the previous year. In 1996, NMFS published final reductions to North Carolina's 1996 quota in December 1996 and a week later published the proposed 1997 quota which was to be the same amount as the final 1996 quota. When publishing the proposed rule for the 1997 quota, NMFS certified, pursuant to the RFA, that the proposed quotas would not have a "significant economic impact on a substantial number of small entities" because "the recommended 1997 quota is no different from the 1996 coast-wide harvest limit..." These measures may impact the fishing industry negatively for the short term, but will prove beneficial in the future."

NMFS received comments on proposed rule contesting the certification: (1) a Senator from North Carolina expressed concern about the effect of overage deductions on North Carolina; (2) other commenters disagreed with NMFS's rationale for determining the economic impacts; (3) one commenter noted that the 1997 quota would be only 42% of North Carolina's historic harvests since 1989, and argued that such a reduction was significant under the RFA; (4) another comment suggested that the RFA required NMFS to look at cumulative impacts of all the fishery regulations. None of the comments caused NMFS to change the certification; no RFA analysis was prepared.

The District Court held that simply asserting that this year's quota is the same as last year's quota does not provide a factual basis for determining whether there is an economic impact. There must be a showing that the quotas have been examined in light of this year's conditions. The Court remanded the action to the agency for further analysis. In the remanded analysis, NMFS again concluded that the 1997 quotas would not have a significant economic impact on a substantial number of small entities, and concluded that the requirements of National Standard eight had been satisfied. The Court found the remanded analyses were arbitrary and capricious because they were simply post hoc rationalizations of the previous decision.

The Court "sanctioned" the Secretary and set aside the 1997 commercial flounder quota by 399, 740 pounds as arbitrary and capricious, writing:

> "In imposing this sanction, the Court notes that as a corrective measure, it could have sanctioned the Secretary by up to 762, 397.2 pounds without impacting the Secretary's regulations concerning a stock assessment goal of F=.23 for 1997. Yet for the time being, the Court only will set aside 399, 740 pounds as a sanction, the total amount of which represents the penalty adjustment that the Secretary applied for 1997 overages.... [Further,] the Court ORDERS the Secretary and his subordinates not to utilize that figure as "overfishing" for any subsequent years in setting a summer flounder quota..." *(North Carolina Fisheries, Inc. v. Daley*, 16 F. Supp. 2d 647 (E.D.Va. 1997); and *North Carolina Fisheries Association v. Daley*, 27 F.Supp. 2d 650, Sept. 28, 1998 (E.D.Va.)).

3. National Coalition for Marine Conservation: RFA not outcome determinative

Remember that the RFA's main requirement is for an agency to develop and consider analytical documents. It does not require a particular outcome, or modification of a decision on an action. By thoroughly analyzing effects and discussing all the issues on the record, we can best protect ourselves from adverse results in litigation.

For example, in this case a variety of litigants challenged NMFS's 1999 Highly Migratory Species FMP for Atlantic Tunas, Swordfish and Sharks (HMS FMP). One of the challenges was that NMFS violated the RFA by: failing to consider and analyze the economic, social and environmental effects of the rule; failing to consider alternatives to reduce bycatch that would minimize the harmful impacts upon Florida's fishing communities; failing to fully consider certain specific alternatives including partial-year, monthly closures, gear restrictions and different closure locations; failing to explain its rationale for basing its closure regulations on only swordfish bycatch information; and performing "flawed and superficial" analyses.

The Court reviewed the record and found that it satisfied the RFA. Specifically, the Court held:

- The RFA requirements cannot override the MSA's mandate.
- "NMFS considered alternatives, including the "no action" or "status quo" alternative to determine which combination of regulations would best achieve the agency's conservation goals, minimize the economic impact on fishing communities and fulfill its obligations under the Magnuson-Stevens Act and the RFA." NMFS also considered part-year closure alternatives.
- NMFS rejected and delayed the implementation of some alternatives which would have had negative economic impacts on fishermen (i.e. rejected the western Gulf of Mexico proposed closure; delayed the effective dates of the Florida Closure and the Charleston Bump closure; and rejected the extension of the Charleston Bump closure).
- Nothing in the record indicated that NMFS' analyses were "flawed" or "superficial". NMFS prepared and IRFA and a FRFA and there was no evidence in the record to suggest that NMFS "consciously ignored its own data or selected a flawed methodology for analyzing bycatch."
- The record reveals that NMFS gave explicit consideration to a number of alternatives that were less onerous and more onerous than the final Closure rule (*National Coalition for Marine Conservation, et al., v. Evans*, 2002 WL 31492281 (D.D.C. October 31, 2002).

4. Associated Fisheries of Maine: RFA is intended to spur "consideration" of alternatives

This was one of the first cases brought after the amendments making the RFA judicially reviewable. NMFS implemented amendments to the Northeast Multispecies FMP that were designed to avoid further depletion of groundfish stocks, and place tougher restrictions on fishing vessels. A stated goal was to reduce groundfish mortality to almost zero. Plaintiffs claimed that the amendments were disastrous for small fishing boats - particularly in the trawling industry. They alleged RFA violations including that the Secretary failed to examine the effect of Amendment 7 on small businesses, and failed to identify and examine alternatives that would reduce the burden on these entities. One issue was the format of the FRFA. NMFS did not prepare a standalone document entitled FRFA, but rather designated materials contained in the IRFA and the responses to comments in the preamble of the final rule as the FRFA.

Finding for the agency, the Court held that the format was acceptable and adequate alternatives had been considered. The Court wrote:

> "...the final rule issued listed the comments and responses the Secretary received and explained why alternatives that would reduce the burden on small entities were rejected. The RFA only requires examination of "significant alternatives". Many of the 18 pages that are the comments and responses portion of the final rule are directed to a discussion of alternatives. In addition, the agency describes many alternatives and public discussions of these alternatives in the Final SEIS for Amendment 7.

On appeal, the appellate Court further stated that:

> The intent of the RFA is for administrative agencies to explain the bases for their actions and to ensure that alternative proposals receive serious consideration at the agency level.
>
> The RFA does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options: "[T]his provision does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative."

"...judicial review of challenges under the RFA should be focused on a "rule of reason" and whether the Secretary made a good-faith effort."

"...an agency "may incorporate in a regulatory flexibility analysis any data or analysis contained in any other impact statement or analysis required by law." An agency can comply as long as it compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product -- whatever form it reasonably may take -- readily available to the public."

"...RFA does not require that an FRFA address every alternative, but only that it address significant ones." (*Associated Fisheries of Maine, Inc. v. Daley*, 954 F. Supp. 383 (D. Maine 1997)).

D. Small Entity Compliance Guide

For each rule or group of related rules for which an agency is required to prepare an FRFA, the agency must publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides ". The guides must explain the actions a small entity is required to take to comply with a rule or group of rules. The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities, and may cooperate with associations of small entities to develop and distribute such guides.

Form: These guides are produced in a variety of forms ranging from brochures, to laminated reference cards, to a question and answer section in the preamble to the final rule.

Enforcement: In enforcement actions, the small entity compliance guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages.

IV. EO 13272

The EO 13272 requires communication with SBA on actions subject to the RFA.

The primary purpose of EO 13272 is to ensure that Federal agencies establish procedures and policies to promote compliance with the Regulatory Flexibility Act and review draft rules to assess and take appropriate account of the potential impact of such rules on small entities. Under EO 13272, NMFS must do the following:

- Issue written procedures and policies, consistent with the Regulatory Flexibility Act, to ensure that the potential impacts of agencies' draft rules on small entities are properly considered during the rulemaking process (Guidelines for Economic Analysis of Fishery Management Actions, August 16, 2000).
- Advise the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) of any draft rules that may have a significant economic impact on a substantial number of small entities under the RFA.
- Notify Advocacy at either of two stages: (1) if required, when NMFS submits a draft rule to the Office of Information and Regulatory Affairs (OIRA) under EO 12866; or (2) if no submission to OIRA is required, NMFS shall inform Advocacy at a reasonable time prior to publication of the rule.
- Consider any comments provided by Advocacy regarding a draft rule and respond to such comments in its final rule (EO 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 FR 53461, August 16, 2002)).

V. CRA

The Congressional Review Act (CRA) requires agencies to notify Congress of rules prior to the effective date, and to indicate whether the rule is "major."

"Major" means: OMB determines that it will have an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

For most agencies the "major" determination has a big effect on rulemaking because it triggers at least a 60-day delay in effectiveness and allows for Congressional disapproval of the rule altogether. However, section 808 of the CRA specifically exempts fisheries management rules from this delay provision.

Compliance with the identification of "major rules" requirement is part of the monthly EO 12866 submissions and should include a line-item on the listing document for an indication of whether or not the rule is major.

VI. NMFS' integrated approach for analyzing economic effects

NMFS has issued guidance on integrating required economic analyses into the Council process. The guidance emphasizes the need for the Councils and NMFS to have planning documents such as draft economic analyses at their disposal prior to identifying the preferred alternative. These documents should provide information on the economic effects of the selected alternatives, including effects on small entities. Also, these documents would be a source of information for solicitation of early public comments on the expected effects of the selected alternatives.

The Guidance establishes a stepwise approach, recommending the development of a preliminary assessment document at a very early planning stage to be available for distribution at public hearings prior to the Council's selection of a preferred alternative. The economic analysis of each alternative's direct and indirect effects, which is conducted for NEPA purposes, often constitutes this preliminary analysis and can serve as the basis for the RIR and RFA analyses.

The primary intent for this recommended analysis is to provide early consideration of economic effects of regulatory action, not to delay or put up roadblocks to action.

In addition, such preliminary economic analyses could be used to solicit early public comments on the expected economic effects of the alternatives proposed and a platform from which information could be obtained to address the requirements of various applicable laws (e.g., EO 12866 and the RFA).

As the planned approach becomes more refined, e.g., by the time of identifying a preferred alternative, a draft RIR can be developed.

At the time of submitting a proposed rule package, the IRFA should be developed based on the information in the NEPA analysis and/or RIR, or this information may provide the factual basis for an RFA certification.