Case Summaries
RFA and PRA

1. Massachusetts v. Pritzker, 10 F.Supp.3d 208 (2014)(44 ELR 20084. No. 13-11301)(No. 13-11301, (D. Mass., 04/08/2014) (Stearns, J.))
(MSA and RFA)

Background: In 2009, NMFS implemented the NEFMC's Amendment 16 to the FMP for the groundfish fishery. Amendment 16 established a mechanism for setting ACLs via Framework Adjustments (FWs). In 2013, NMFS implemented FWs 48 and 50. FW 48 included various management actions with mixed impacts on plaintiffs, including listing GOM cod as overfished. FW 50 set OFLs, ABCs, and ACLs for groundfish for FYs 2013-15 and included "severe cutbacks in catch limits," which were "the lowest ever set for many of the stocks – including GOM and GB cod – in some cases representing an almost eighty percent reduction from 2012 levels (including the GOM cod stock)."

Plaintiffs (Massachusetts and New Hampshire) challenged, alleging violations of National Standards 1, 2, and 8.

NS 1: State alleged: National Standard 1: (1) the failure to consider the optimum yield of overfished stocks; and (2) the failure to evaluate how measures undertaken to protect imperiled cod stocks would impede the achievement of optimum yield of healthier stocks.

The First Circuit has previously found (in Lovgren) that Amendment 16's formulas of stock-by-stock catch limits (in lieu of aggregate limits for the entire fishery) complied with the MSA even if limits on overfished stocks would depress those of healthy stocks that are unavoidably caught with the [other] species. Because the formulas were established in the amendment, and the FW merely implemented the formulas, that challenge was inappropriate to raise against the FW. Further the specific question had already been answered when the First Circuit upheld Amendment 16. Therefor the NS 1 challenge is moot.

NS 2 challenge:

> Thus, the Commonwealth's position that the proxy underestimates stock size (which appears to rest largely on a single study advocating the use of "actual" or "production-model" statistics) does not appear to be derived from available "superior" data. See A.M.L Int'l v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000) ("[T]he use of a proxy for MSY is scientifically acceptable and specifically allowed under the guidelines." (citing 50 C.F.R. § 600.310(c)(3), (d)(3)(I)) (emphasis in original)).

NS 8 challenge: (RFA/NEPA issue)(RFA/NEPA relationship to NS 8)

Although neither alleged violations of NEPA or the RFA, Massachusetts claimed that NMFS violated NS 8 because the EA did not analyze alternatives other than the proposed action and the status quo.

The court found that NS 8 does not require this of NMFS, stating that that while NMFS can use the NEPA document to encompass requirements of other statutes, that doesn't mean the statues all contain the same requirements.

Massachusetts alleged NS 8 to incorporate the full requirements of NEPA and the RFA. Specifically, it claimed that NMFS committed a "per se" violation of National Standard 8 because of its failure to consider any less-restrictive viable alternatives to its proposed and ultimately implemented Annual Catch Limits. This contention is premised on the NEFMC's Environmental Assessment (EA) of Framework 50, in which the Council compared the socioeconomic impact of its "preferred alternative" (the ACLs that were adopted in FW 50) with a "no-action alternative."

Mass argued: "NMFS's obligation under National Standard 8 tracks its obligations under NEPA and the RFA." Mass.' Br. at 15."

The court found that Massachusetts was conflating requirements of RFA and NEPA, with those of NS 8. The court clarified that NS requirements are not coextensive with RFA and NEPA. "Massachusetts' position that NMFS did not fulfill its obligations under National Standard 8 is based on Congressional mandates set out in the National Environmental Policy Act (NEPA) and Regulatory Flexibility Act (RFA)."

The court wrote:

> "But while NMFS may cite to an Environmental Assessment – which may also be used to satisfy NEPA and RFA requirements – to demonstrate compliance with National Standard 8, it does not follow that the obligations imposed by National Standard 8 are identical to those mandated by the NEPA and the RFA. See Little Bay Lobster, 352 F.3d at 470 (the RFA "creates procedural obligations" and is thus a "quite different statute" than National Standard 8); see also Ace Lobster Co., Inc. v. Evans, 165 F. Supp. 2d 148, 183 (D.R.I. 2001) ("[N]either the standards set in national standard 8 and the RFA, nor the requisite legal analysis for each, are the same."). For this reason, the First Circuit's reference to a single environmental impact statement to dispose of claims under both National Standard 8 and the RFA does not carry the argument that the statutes' requirements are co-extensive. See Little Bay Lobster, 352 F.3d at 469-470."

2. City of New Bedford v. Locke, (D. Mass, 2011, WL 263863, 2011) – Civil Action No. 10-10789-RWZ.
https://casetext.com/case/city-of-new-bedford-v-honorable-gary-locke
June 30, 2011

In 2009, the Department of Commerce introduced a trio of rules and regulations, Amendment 16, Framework 44, and the sector operations rule (collectively "A16"), that regulate fishing off the coast of New England and the mid-Atlantic states. A key part of this amendment, and a focal point of contention in this lawsuit, is an expansion and revision of the "sector" program introduced in A13. Sectors are an alternative to days-at-sea effort controls, whereby a group of fishermen jointly form a sector and are collectively assigned a catch limit, an "Annual Catch Entitlement" ("ACE").

RFA: This holding reinforces that fact that the RFA is a procedural statute that does not require a particular outcome.

Plaintiffs argue that the Agency violated the Regulatory Flexibility Act ("RFA") and the Paperwork Reduction Act ("PRA") because the costs of sector monitoring are excessive. The RFA requires an agency to prepare an Initial Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis after, respectively, proposing and promulgating a new rule. 5 U.S.C. §§ 603, 604. The Agency did prepare an IRFA and RFA for all three components of A16. AR 773 at 48616-23 (A16 IRFA); AR 997 at 56529-32 (A16 FRFA); AR 882 at 51287-90 (IRFA for FW 44); AR 1001 at 56727-30 (FRFA for FW 44); see

AR 863 at 50414 (IRFA for sector operations rule); AR 996 at 56482-84 (FRFA for sector operations rule). Arguments about the substantive merits of a new rule are beyond the scope of these procedural requirements.

PRA: This case shows that the PRA has no private cause of action.

The PRA directs agencies to "reduce information collection burdens on the public." 44 U.S.C. § 3506(b)(1). It does not create a private cause of action to enforce this mandate. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 844 (9th Cir. 1999); Ass'n of Am. Physicians Surgeons, Inc. v. U.S. Dep't of Health Human Servs., 224 F. Supp.2d 1115, 1128-29 (S.D. Tex. 2002).

3. Coastal Conservation Ass'n v. Locke (Gulf Council Reef Fish FMP Amendment 29) Case No. 2:09-cv-641-FtM-29SPC, Case No. 2:10-cv-95-FtM-29SPC. (M.D. Fla. Sept. 29, 2011)
https://casetext.com/case/coastal-conservation-association-v-blank

RFA win: In this case, NMFS won an RFA challenge. However, the reported case does not explain the claim or the rationale. It merely adopts a underlying magistrates report. (decision sept. 29, 2011)

Plaintiffs challenged the Final Rule implementing Amendment 29 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico ("Reef Fish FMP"). 74 Fed. Reg. 44,732 (Aug. 31, 2009)(to be codified at 50 C.F.R. pt. 622). Amendment 29 is mainly concerned with the grouper and tilefish fisheries, and establishes a system of individual fishing quotas (IFQs) for the commercial sector of the Reef Fish Fishery for the Gulf of Mexico Exclusive Economic Zone (the Reef Fish Fishery). Recreational fishing in the Reef Fish Fishery is not included in the Amendment 29 IFQ system, and therefore Amendment 29 does not limit or otherwise regulate recreational fishing.

Older RFA Case Law

NC Fisheries Assn v. Daley - LOSS
Background: In December 1996, NMFS published final reductions to North Carolina's 1996 quota. A week later, NMFS published the proposed 1997 quota which was to be the same amount as the final 1996 quota. With the proposed rule for the 1997 quota, we certified, 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 coastwide 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 percent 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 judge remanded the action to the agency for further analysis. In our remanded analysis, we again concluded that the 1997 quotas would not have a significant economic impact on a substantial number of small entities. 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.

Southern Offshore Fishing Alliance v. Daley - LOSS

Background: This case involved a proposed rule to reduce the shark quota by 50% and to reduce recreational bag limits. With the proposed rule, NMFS published a certification that the quota cuts would not have a significant economic impact on a substantial number of small entities based on estimates of what fishermen earned from the directed shark fishery, and their ability to supplement their income from other sources and 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 an FRFA which included new 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.

With respect to the RFA claims, 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 an 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 that:

- The record strongly indicated that the quotas would significantly injure fishermen.
-An IRFA would have required a careful and meaningful study and allowed for an informed and detailed public discussion.
- Questions as to how to comply with the RFA's mandate that an FRFA summarize comments on an IRFA, when no IRFA had been prepared, and
- The RFA requirement for 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 concluded that the action may have had a significant economic impact on a substantial number of small entities. Although the judge concurred with our conclusion, he criticized our analytical approach**.** Specifically, he found that we 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 judge 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 the summer flounder and shark RFA rulings, we undertook major revisions to our internal guidance for RFA compliance and revised our approach for determining the universe of affected small entities to prevent the possibility of the "dilution" effect.

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 impacts and discussing all the issues on the record, we can best protect ourselves from adverse results in litigation.

National Coalition for Marine Conservation, et al., v. Evans, 2002 WL 31492281 (D.D.C. October 31, 2002). - WIN

Background: 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 the economic, social and environmental effects of the rule; failing to consider alternatives that would minimize the harmful impacts on communities; failing to fully consider certain

specific alternatives including partial-year, monthly closures, gear restrictions and different closure locations; 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 Magnuson-Stevens Act'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.

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 impacts and discussing all the issues on the record, we can best protect ourselves from adverse results in litigation.

Associated Fisheries of Maine v. Daley - WIN
This was one of the first cases brought after the amendments making the RFA judicially reviewable. NOAA Fisheries 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. NOAA Fisheries 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.

Legacy Fishing Co. v. Gutierrez, D.D.C. Mar, 20, 2007, 2007 U.S. Dist. LEXIS 19460, p. 33-34 (rev’d on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).
Background: What to do when there are no applicable size standards.
When in doubt, do the IRFA/FRFA. • The Small Business Association's classification standards "do not include a size standard for vessels that both harvest and process fish," such as those in the H&G CP sector. In determining whether the businesses in this sector qualified as "small business," NMFS had to choose between using the standard for "floating factory ships" and the standard for "fish harvesters." SBA's Office of Advocacy opined that NMFS should use the standard for "floating factory ships," but NMFS chose to use the standard for "fish harvesters." As a result NMFS concluded that none of the affected entities were “small”. However, due to the uncertainty of which standards to apply, NMFS conducted an IRFA/FRFA as if all affected entities were small. **The court found this satisfied the RFA**.