

REGULATORY FLEXIBILITY ANALYSIS AND REGULATORY IMPACT REVIEW
(EXECUTIVE ORDER 12866) FOR THE CALIFORNIA DRIFT GILLNET (DGN) HARD CAPS
ACTION

Council staff report

Introduction

For any rule subject to notice and comment rulemaking, the Regulatory Flexibility Act (RFA) requires Federal agencies to prepare, and make available for public comment, both an initial and final regulatory flexibility analysis, unless the agency can certify that the proposed and/or final rule would not have a “significant economic impact on a substantial number of small entities.” These analyses describe the impact on small businesses, non-profit enterprises, local governments, and other small entities as defined by the RFA (5 U.S.C. § 603). This analysis is to inform the agency and the public of the expected economic effects of the alternatives and aid the agency in considering any significant regulatory alternatives that would accomplish the applicable objectives and minimize the economic impact on affected small entities. The RFA does not require the alternative with the least cost or with the least adverse effect on small entities to be chosen as the preferred alternative. However, an RFA analysis should identify the least cost alternative and describe the rationale for selection of a preferred alternative that is not the least cost alternative.

Executive Order 12866, Regulatory Planning and Review, along with other E.O.s, supplements and expands on the requirements of the RFA.¹ E.O. 12866 stresses that in deciding whether and how to regulate, agencies should assess all the costs and benefits of available regulatory alternatives. Based on this analysis, they should choose those approaches that maximize net benefits to the Nation, unless a statute requires another regulatory approach. NMFS satisfies the requirements of E.O. 12866 through the preparation of a Regulatory Impact Review (RIR). This reviews the potential economic effects of a proposed regulatory action to gauge the net benefits to the Nation associated with the proposed action. E.O. 12866 defines what qualifies as a “significant regulatory action”; NMFS’s evaluation of the Council’s 2015 action (Alternative 2) found that these thresholds were not met and concluded that the 2015 proposed action was not significant in that context. Because of the similarity of the current proposed action to the 2015 action the RIR for that action will inform the RIR for the current action.

The analytical mandates and resulting findings under the RFA and E.O. 12866 have particular salience for the proposed action, because of National Marine Fisheries Service’s (NMFS’s) findings about the Council’s 2015 hard caps proposal, which bears a close resemblance to the current proposed action (noting that Alternative 2 is the Council’s 2015 final preferred alternative). NMFS found that the 2015 proposal would have a significant adverse impact on a substantial number of small entities. However, as noted above, such a finding does not by itself prevent the agency from pursuing the proposal. It was not the regulatory flexibility analysis alone that led to

¹ “For major rules that require the preparation of a regulatory impact analysis (RIA) under Executive Orders 12,866 and 13,563, agencies may prepare the RIA and the regulatory flexibility analyses together.” (Small Business Administration Office of Advocacy 2017)

NMFS's decision not to implement the Council's 2015 proposal. As explained in its [June 19, 2017, letter](#) to the Council, its reasons for not implementing the regulations ultimately rested on Magnuson-Stevenson Act (MSA) National Standard 7. National Standard 7 guidelines at 50 CFR 600.340 state that "[m]anagement measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments." Supporting analysis should "demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance." The analysis should weigh the burdens imposed on fishermen by management measures against the benefits to society resulting from such measures. It was an evaluation of that tradeoff that led to NMFS's decision on the 2015 proposal. Thus, whatever conclusion is reached pursuant to the RFA for the current action, these MSA considerations could factor into NMFS's decision on whether to move forward with the Council's regulatory proposal.

Regulatory Flexibility Act – Initial Regulatory Flexibility Analysis

Procedurally, the first step in the RFA decision process is to determine whether a substantial number of small entities will be affected by the regulatory action. Since only direct effects are considered, for this proposed action the relevant entities are participants in the DGN fishery. While the Small Business Administration has established general guidelines for defining small entities, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing ([80 FR 81194](#), December 29, 2015), which for commercial fishing is \$11 million in annual gross receipts. Under this standard all DGN fishery participants are small entities. "Substantial number" is considered in relation to the mix of small and large entities within the affected industry sector, not the absolute number of entities affected. Given that criterion, since all DGN fishery participants are small entities, and all would be affected by the proposed action, it would be reasonable to conclude that a substantial number would be affected by the current proposed action.

With that threshold determination, an Initial Regulatory Flexibility Analysis (IRFA) is prepared. A draft IRFA may be prepared before an agency has selected its regulatory proposal; the IRFA would then be completed once the specific proposal is in hand. In the Council decision making process, selection of a preliminary preferred alternative can aid in the preparation of the IRFA by allowing it to focus on the likely final action and help inform that decision. In this case the Council is proceeding directly from a range of alternatives to a final preferred alternative (or final action), so a draft IRFA would be prepared evaluating all three action alternatives under consideration.

The required elements of the IRFA share many commonalities with those included in analyses mandated by NEPA. In "integrated" analytical documents prepared for Council actions the IRFA may reference sections in the Environmental Assessment (EA) or Environmental Impact Statement (EIS) that overlap these required elements. These are:

- The reasons the agency is considering regulatory action (the proposed rule) and the objectives of the proposed rule. The purpose and need statement in the EA mostly addresses this element. Additional context may be provided about statutory authorities for the proposed action.
- Description and estimate of the number of small entities affected by the proposed rule. The

EA description of the affected environment should contain this information, although additional context may be necessary to demonstrate they are small entities under RFA criteria.

- An explanation of the criteria used to evaluate whether the rule would impose “significant” economic effects. These criteria should consider both disproportionality and profitability. Disproportionality means placing small entities at a significant competitive disadvantage to large entities. (Since this industrial sector only includes small entities, this criterion does not apply.) Profitability may be assessed in terms of 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. For some actions effects may include the cost of reporting and recordkeeping requirements.
- Identification of relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule. In its evaluation of the Council’s 2015 proposal NMFS identified regulations pursuant to the Endangered Species Act and Marine Mammal Protection Act that the Council’s proposal would overlap with, although hard caps may reduce impacts below levels set pursuant to those statutes.
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities. “Analyzing alternatives establishes a process for the agency to evaluate proposals that achieve the regulatory goals efficiently and effectively without unduly burdening small entities, erecting barriers to competition, or stifling innovation” (Small Business Administration Office of Advocacy 2017). Since a range of alternatives must be specified in an EA or EIS, in an integrated analytical document the RFA section may reference and evaluate the range specified in the EA or EIS. For the RFA, alternatives are considered to determine whether the regulatory proposal achieves the objectives set for it at the lowest cost to affected small entities.

To finalize the IRFA, the responsible official in NMFS must certify the findings on whether the proposed rule would have a significant economic impact on a substantial number of small entities. SBA guidance (Small Business Administration Office of Advocacy 2017) suggests that this would be an “initial assessment” and that a final regulatory flexibility analysis is completed in conjunction with the publication of the final rule “unless the agency finds that the final rule will not have a significant economic impact on a substantial number of small entities.”

Executive Order 12866, Regulatory Planning and Review

As discussed above, E.O. 12866 supplements the evaluation of the impact of regulations on small entities mandated by the Regulatory Flexibility Act. It covers a variety of regulatory policy considerations and establishes procedural requirements for analysis of the benefits and costs of regulatory actions. Based on this analysis, agencies should choose those approaches that maximize net benefits to the Nation, unless a statute requires another regulatory approach. NMFS satisfies the requirements of E.O. 12866 through the preparation of a regulatory impact review (RIR). Like the RFA, the RIR also provides a review of the problem and policy objectives prompting the regulatory proposal and an evaluation of the available alternatives that could be used to solve the problem. As previously noted, in an integrated analytical document it is often possible to simply reference the relevant portions of the EA/EIS that contain comparable information (statement of the problem, description of the management goals and objectives, and description of fisheries and

other affected entities). The alternatives used for the EA/EIS evaluation can also serve the purpose of considering potentially effective and reasonably feasible alternatives under E.O. 12,866. E.O. 12866 sets a relatively high threshold of what constitutes a significant regulatory action based on the following criteria:

- 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;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Given the similarities between the proposed action and the Council's 2015 hard caps proposal, the conclusions from the RIR for that proposal (NMFS 2016) likely apply to the current proposal, no matter which of the action alternatives is ultimately chosen. That RIR found that the proposed rule to implement the Council's final action would not trigger any of the criteria for a significant regulatory action described above. Further rationale for that finding is as follows:

Because fishery closures resulting from hard caps on HPPS are not guaranteed, and would be temporary in nature, it is not evident that the proposed action would 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. Despite the use of other federal authorities to manage populations of marine mammals and endangered or threatened species (e.g., MMPA and ESA), the proposed action does not create a serious inconsistency or otherwise interfere with actions taken or planned by other agencies or under other authorities. Lastly, the proposed action is not expected to materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO.

Information Necessary to Satisfy RFA and RIR Analyses

Description and estimate of the number of small entities affected by the proposed rule

Because there is uncertainty about the number of future participants in the DGN fishery, for the purpose of analyzing the proposed action the HMSMT identified a range from 3 to 30 participants with a most likely level of 11 participants, based on the number of Federal limited entry permits that could remain after the California Transition Program was completed and patterns of recent fishery participation. (The Council subsequently directed the HMSMT to only consider a scenario where 11 vessels would participate in the fishery.) Passage of the Federal Driftnet Modernization and Bycatch Reduction Act in December 2022 sunsets the use of the gear by December 2027 and includes a transition program that would be implemented in the interim. This could further reduce fishery participation in the years that hard cap regulations would apply (potentially three to four fishing seasons). Participation in recent fishing seasons (2016-2017 to 2021-2022) has declined

from 19 vessels to 6 vessels, which suggests that the actual level of participation in future fishing seasons up to 2027 will be less than 11 vessels.

The bootstrap simulation analysis producing estimates of economic metrics and HPPS M/I would use a fleet size of 11 vessels, as directed by the Council motion in November of 2022. The IRFA prepared for the 2015 action evaluated the characteristics of particular vessels likely to participate in the fishery (at that time 30 vessels were assumed). For the current analysis it would be necessary to determine which vessels that have recently participated in the fishery would be assumed to continue participation at the 11-vessel level. Table 1 shows the number of vessels by the number of fishing seasons they participated in over the 2016-2017 to 2021-2022 seasons. To illustrate, eight vessels participated in at least five of the last six fishing seasons, 13 in at least four seasons, etc. Another metric that could be used would be the sum of annual vessel ex-vessel revenue weighted towards more recent seasons, if it is assumed that more recent participation is the best predictor of future participation. As might be expected, this weighted sum tracks closely with how many of the past six fishing seasons the vessel participated in. It would be necessary to further screen vessels based on Federal limited entry permit holders that use these vessels.

Table 1. Number of vessels by number of fishing seasons participated in (based on landings), 2016-2017 to 2021-2022 fishing seasons.

| No. of Seasons vessel participated in | No. of vessels | Cumulative no. of vessels |
|---------------------------------------|----------------|---------------------------|
| 6 | 4 | 4 |
| 5 | 4 | 8 |
| 4 | 5 | 13 |
| 3 | 1 | 14 |
| 2 | 5 | 19 |
| 1 | 7 | 26 |

Once the population of vessels is identified, the characteristics of the 11 vessels most likely to continue in the fishery can be summarized. A key consideration in the IRFA for the 2015 action was the ability of affected vessels to participate in other fisheries during hard cap closure periods. The previous IRFA looked at permit portfolios for the affected vessels (or owners/operators) to make that assessment. A complementary approach would be to look at the affected vessels' historical catch and revenue in other fisheries during the DGN fishing season.² However, if we assume these vessels prefer to participate in the DGN fishery as opposed to other fisheries during the DGN fishing season, historical catch and revenue would not accurately reflect the incentive to participate in other fisheries when a closure would apply under the proposed action.

Criteria used to evaluate whether the rule would impose “significant” economic effects

“The RFA does not define ‘significant’ or ‘substantial.’ In the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated”

² The bulk of catch and revenues in the DGN fishery occurs from November to January so alternative fishing opportunities during that portion of the season are especially relevant.

(Small Business Administration Office of Advocacy 2017). The Compliance Guide suggests that measures of the impact of the regulatory proposal on gross revenues or profits may be used to assess significant impact. The bootstrap model produces estimates of the change in total ex-vessel revenues and profits and average vessel profits across simulation replicates. One challenge in interpreting the results is that hard cap closures only produce a reduction in revenues/profits for a small proportion of simulated seasons. Since the Driftnet Act directs fishing with DGN to be phased out within 5 years of enactment, it is possible that, at the assumed level of fishery participation, reductions in revenues/profits triggered by hard cap closures would not occur. Furthermore, the impact of a short-term loss of all revenue from DGN fishery would have to be considered, as opposed to long-term average per-season revenue loss.

Additional Analyses that may be Necessary for the RIR

Although the RIR for the Council's 2015 proposal found that that proposal would not have a significant impact, there may be a need to address the cost-benefit (net benefit to the Nation) calculation that is the focus of E.O. 12866. Bootstrap simulation results provide estimates of cost, expressed in the reduction in revenues/profits. Contingent valuation or willingness to pay studies could be a source of information to quantify benefits. Lew (2015) surveys willingness to pay studies for threatened and endangered marine species. Estimates include some HPPS (e.g., humpback whale) and could be considered in an assessment of benefits. However, it would be necessary to carefully consider the benefit survey that respondents expressed a willingness to pay for. For example, in terms of species recovery, bootstrap results suggest that hard caps would have a marginal impact, so that value would not be fully covered by the proposed action.

References

- Lew, D. K. 2015. Willingness to pay for threatened and endangered marine species: a review of the literature and prospects for policy use. *Frontiers in Marine Science* 2. DOI: 10.3389/fmars.2015.00096.
- NMFS (National Marine Fisheries Service West Coast Region). 2016. Regulatory Impact Review and Initial Regulatory Flexibility Analysis for the Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery Proposed Rule, RIN 0648-BG23. August 2016. <https://www.regulations.gov/document/NOAA-NMFS-2016-0123-0003>.
- Small Business Administration Office of Advocacy. 2017. *A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act*. August 2017.