NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 12/16/2010

Department of Commerce
National Oceanic and Atmospheric Administration
FOR CERTIFYING OFFICIAL: Simon Szykman
FOR CLEARANCE OFFICER: Diana Hynek

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 09/17/2010

ACTION REQUESTED: New collection (Request for a new OMB Control Number)
TYPE OF REVIEW REQUESTED: Regular
ICR REFERENCE NUMBER: 201008-0648-005
AGENCY ICR TRACKING NUMBER:
TITLE: Socio-Economic Assessment of Gulf of Mexico Fisheries Under the Limited Access Privilege Program
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved with change
OMB CONTROL NUMBER: 0648-0622
The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 12/31/2013 DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	0	0	0
New	400	400	0
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	400	400	0
Change due to Agency Adjustment	0	0	0
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE: OMB approves this one-time collection of data. In the event that the response rate falls substantially below 80% as asserted by NOAA, the usefulness of the data may be limited due to the lack of non-response bias analysis plan. If this is the case, the agency should not claim generalizability to the population of interest when disseminating the relevant information.

OMB Authorizing Official: Kevin F. Neyland
Deputy Administrator,
Office Of Information And Regulatory Affairs

List of ICs			
IC Title	Form No.	Form Name	CFR Citation
GOM Fisheries LAPP survey	NA	Red Snapper Participant IFQ Survey	

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request
DOC/NOAA/NMFS

2. OMB control number b. [✔] None
a. 0648 -

3. Type of information collection (*check one*)
a. [✔] New Collection
b. [ ] Revision of a currently approved collection
c. [ ] Extension of a currently approved collection
d. [ ] Reinstatement, without change, of a previously approved collection for which approval has expired
e. [ ] Reinstatement, with change, of a previously approved collection for which approval has expired
f. [ ] Existing collection in use without an OMB control number
For b-f, note Item A2 of Supporting Statement instructions

4. Type of review requested (*check one*)
a. [✔] Regular submission
b. [ ] Emergency - Approval requested by ____/____/____
c. [ ] Delegated

5. Small entities
Will this information collection have a significant economic impact on a substantial number of small entities? [ ] Yes [✔] No

6. Requested expiration date
a. [✔] Three years from approval date b. [ ] Other Specify:____/____

7. Title Socio-Economic Assessment of Gulf of Mexico Fisheries Under the Limited Access Privilege Program

8. Agency form number(s) (*if applicable*)

9. Keywords "Fishery" "Fishing" "Fishing Vessels"

10. Abstract

The National Marine Fisheries Service (NMFS) proposes a one-time data collection of demographic, economic and social information about the Gulf of Mexico red snapper fishery under the individual fishing quota (IFQ) program. The proposed data collection also intends to inquire about the industry's perceptions, attitudes and beliefs about the performance of the IFQ.

11. Affected public (*Mark primary with "P" and all others that apply with "x"*)
a. ___ Individuals or households d. ___ Farms
b. P Business or other for-profit e. ___ Federal Government
c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government

12. Obligation to respond (*check one*)
a. [✔] Voluntary
b. [ ] Required to obtain or retain benefits
c. [ ] Mandatory

13. Annual recordkeeping and reporting burden
a. Number of respondents 400
b. Total annual responses 400
1. Percentage of these responses collected electronically 0 %
c. Total annual hours requested 400
d. Current OMB inventory 0
e. Difference 400
f. Explanation of difference
1. Program change 400
2. Adjustment

14. Annual reporting and recordkeeping cost burden (*in thousands of dollars*)
a. Total annualized capital/startup costs 0
b. Total annual costs (O&M) 0
c. Total annualized cost requested 0
d. Current OMB inventory 0
e. Difference 0
f. Explanation of difference
1. Program change
2. Adjustment

15. Purpose of information collection (*Mark primary with "P" and all others that apply with "X"*)
a. ___ Application for benefits e. x Program planning or management
b. P Program evaluation f. x Research
c. ___ General purpose statistics g. ___ Regulatory or compliance
d. ___ Audit

16. Frequency of recordkeeping or reporting (*check all that apply*)
a. [✔] Recordkeeping b. [ ] Third party disclosure
c. [✔] Reporting
1. [✔] On occasion 2. [ ] Weekly 3. [ ] Monthly
4. [ ] Quarterly 5. [ ] Semi-annually 6. [ ] Annually
7. [ ] Biennially 8. [ ] Other (describe)

17. Statistical methods
Does this information collection employ statistical methods
[✔] Yes [ ] No

18. Agency Contact (person who can best answer questions regarding the content of this submission)
Name: Juan Agar
Phone: 305-361-4218

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

(a) It is necessary for the proper performance of agency functions;

(b) It avoids unnecessary duplication;

(c) It reduces burden on small entities;

(d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;

(e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;

(f) It indicates the retention period for recordkeeping requirements;

(g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):

- (i) Why the information is being collected;
- (ii) Use of information;
- (iii) Burden estimate;
- (iv) Nature of response (voluntary, required for a benefit, mandatory);
- (v) Nature and extent of confidentiality; and
- (vi) Need to display currently valid OMB control number;

(h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);

(i) It uses effective and efficient statistical survey methodology; and

(j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee	Date

Agency Certification (signature of Assistant Administrator, Deputy Assistant Administrator, Line Office Chief Information Officer, head of MB staff for L.O.s, or of the Director of a Program or StaffOffice)	
Signature signed by Emily Menashes	Date 08/09/2010
Signature of NOAA Clearance Officer	
Signature signed by Sarah Brabson	Date 08/13/2010

SUPPORTING STATEMENT

SOCIO-ECONOMIC ASSESSMENT OF THE GULF OF MEXICO FISHERIES UNDER THE LIMITED ACCESS PRIVILAGE PROGRAM
OMB CONTROL NO. 0648-xxxx

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA/NMFS) proposes a new one-time data collection of demographic, economic and social information about the Gulf of Mexico red snapper fishery under the individual fishing quota (IFQ) program.[1]

The proposed data collection also intends to inquire about the industry's perceptions, attitudes and beliefs about the performance of the IFQ. Specifically, the red snapper IFQ program sought to reduce overcapacity and, to the extent possible, mitigate the adverse impacts of derby fishing. Thus, the proposed data collection will inquire about the changes occurring after implementation of the IFQ program: in capital stock (i.e., investments and disinvestments in fishing vessels, gear and equipment), crew usage, remuneration arrangements and dynamics, and operating costs (e.g., fuel expenditures, bait costs, etc). This information collected will enable the development of quantitative economic models to investigate changes in excess and overcapacity and 'cost savings' and other efficiencies brought about the elimination of the 'derby' fishing.

According to the Magnuson-Stevens Fishery Conservation and Management Act as amended in 2006 (MSA) (16 U.S.C. 1853a *et seq.)*, IFQs fall under the umbrella of the Limited Access Privilege Programs (LAPPs). The data collection is necessary to satisfy MSA requirements, which states that LAPPs submitted by a Council or approved by the Secretary shall "*include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this Act, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program, and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years)*" .

Moreover, the MSA states that collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States. The nation's fisheries should be "conserved and maintained so as to provide optimal yield (OY) on a continuing basis". Furthermore, the MSA also requires that fishery management plans

1 IFQ programs provide fishers with an exclusive harvesting privilege, which permits them to land a share of the total allowable quota (TAC). Granting a secure harvesting privilege mitigates the race to fish because fishers no longer have to compete for a share of the stock. Thus, fishers can devote their efforts to maximizing profits by harvesting, processing, and marketing their catch more efficiently. Depending on the characteristics of the program, shares may be sold or leased among fishers. The presence of transferable privileges allows the creation of a market, where trading can take place. In well-behaved markets, privileges will gravitate towards the most efficient producers; thereby, allowing the less efficient producers to exit the fishery with some compensation.

must include a Fishery Impact Statement (FIS), which assesses, specifies, and describes the likely effects of the conservation and management measures on participants in the fisheries being managed, fishing communities dependent on these fisheries, and participants in fisheries in adjacent areas.

Additionally, Amendment 26 to the Gulf of Mexico Reef Fish Fishery Management Plan (FMP), which implemented the red snapper IFQ program to reduce overcapacity and mitigate to the extent possible the adverse impacts of derby fishing in 2007, mandates a 5-year review of the IFQ program. The Gulf of Mexico Fishery Management Council (GMFMC) is expected to conduct its 5-year review of the IFQ program in 2012 to meet the MSA requirements. The proposed data collection will provide valuable information to assess the economic and social effects of the IFQ program on individual fishing enterprises, fishing communities and the nation as a whole. The information gathered in the proposed data collection will be combined with catch, effort and IFQ data from on-going data collections to develop descriptive reports of the fishery and develop models to evaluate the socio-economic impacts of the IFQ program. These products are required to conduct the program review. The proposed data will also help improve quality of key variables collected in on-going data collections such as IFQ share and lease prices which in many instances are suspect given (a) the large percentage of zero transaction prices posted, and (b) the large percentage of transfers that are conducted at 'arms length.'[2]

In addition to the needs of the MSA and Amendment 26 to the Reef fish FMP, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601 *et seq.*), the National Environmental Policy Act (NEPA, 42 U.S.C. 4372 *et seq.*), and Executive Order (EO) 12866 also require socio-economic data collections. Under the RFA, the Small Business Administration needs a determination of whether a proposed rule has a significant impact on a substantial number of small entities that are to be directly regulated. For RFA purposes, one of the criteria to determine significant economic impact involves an assessment of the change in short-term accounting profits for small entities. The NEPA requires a determination of whether Federal actions significantly affect the human environment. This necessitates a number of economic analyses including the impact on entities that are directly regulated and those that are indirectly affected. Lastly, EO 12866 mandates an economic analysis of the benefits and costs to society of each regulatory alternative considered by the fishery management councils, and a determination of whether the rule is significant.

In addition to satisfying the needs of statutory requirements and pending regulations, fishery management councils' interest in expanding IFQs programs into other fisheries offers a unique opportunity to learn from the experience of the Gulf of Mexico red snapper IFQ fishery. For example, the GMFMC is interested in expanding their use into the shallow-water grouper complex fisheries and the South Atlantic Fishery Management Council (SAFMC) is considering their use in the snapper-grouper fisheries. Since most IFQs programs in the U.S. are relatively new and differ widely in their characteristics and impacts, a careful review of existing programs will assist in the adjustment of changing or unforeseen circumstances and will also aid in the planning and design new programs.

2 For example, 75% of the 2008 lease price entries posted on the IFQ database were zeros.

2. <u>Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines</u>.

Combined with catch and effort data from existing collections, the information sought will be utilized for descriptive and analytical purposes. Social scientists from NMFS will create descriptive reports of the fishery and develop models to evaluate the socio-economic impacts of the red snapper IFQ program. These products will be used to create a baseline to examine the changes brought about the program; thus facilitating the GMFMC's pending 5-year review. In addition, the information collected will be used for the development of natural resource plans. The survey will collect demographic, cultural, economic and social information, which otherwise would be unavailable. The data will also be used by the academic community studying the performance of LAPPs around the nation.

Dr. Walter Keithly from Louisiana State University has been contracted to conduct a one-time data collection. The proposed questionnaire will collect information on past and present shareholders and their experiences with IFQs. This data collection effort will use self-administered mailed surveys and follow up in-person interviews (if needed).

The instrument has four sections: 1) background, 2) attitudes and perceptions about the red snapper IFQ program; 3) socio-economic assessment of the red snapper IFQ program, and 4) other or miscellaneous.

Section 1: The 'background' section elicits information about of the value of fishers' quota holdings, commercial fishing experience, length of time that the fisher lived in the community, type of license holder (class 1 or 2), and main fishing grounds. This information is valuable to contextualize fishers' attitudes and perceptions about the performance of the IFQ program

Section 2: The 'attitudes and perceptions concerning the red snapper IFQ program' section inquires whether fishers' supported and currently support the IFQ program and whether they believe that the program achieved various expected biological and socio-economic outcomes set in the fishery management plan (e.g., reducing derby fishing, decreasing fishing capacity, increasing ex-vessel prices, reducing by-catch, etc.). This information is necessary to ascertain fishers' views about the effectiveness of the program, which may vary from community to community. This information will be coupled with landings and effort data to substantiate any reported changes in fishing practices brought about the new program, and to help evaluate the performance of the program.

Section 3: The 'socio-economic assessment of the red snapper IFQ program' section asks about the changes brought about the IFQ program in: a) capital stock (i.e., investments and disinvestments in fishing vessels, gear and equipment), b) crew usage, remuneration arrangements and dynamics, and c) operating costs (e.g., fuel expenditures, bait costs, etc). In addition, this section inquires about allocation and share leasing and sale arrangements, and reasons for expanding or limiting their participation in the fishery (e.g., reasons for buying or selling allocation and/or shares). This information will enable the development of quantitative economic models to investigate changes in excess and overcapacity and 'cost savings' and other efficiencies brought about the elimination of the 'derby' fishing. Similarly, the information of

leasing and sale arrangements will help us to understand better the reasons behind certain suspicious trades (i.e., "low" allocation and sale prices). It is believed that many of these low (i.e., below market levels) prices are due to the provision of unrecorded in-kind services such as fishing someone‘s allocation in exchange for some allocation; thus, the recorded price is not a true market price but rather a net price after deducting harvesting costs and/or cost recovery fees.

Section 4: 'Other or miscellaneous' section elicits information about fishers' future participation in the fishery and their satisfaction with the IFQ online trading system, customer service, and landings notification protocol. These questions seek to provide feedback on the quality of the day-to-day services provided by the Southeast Regional Office (SERO).

It is anticipated that the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the preceding paragraphs, the information gathered has utility. NOAA Fisheries Service will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response to Question 10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subject to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

This information does not make use of information technology. The proposed data collection will utilize both voluntary, self-administered mail surveys and follow-up in-person interviews (if necessary). Self-administered mail surveys will given to large, medium and smaller IFQ shareholders. In-person interviews will be primarily used on large IFQ shareholders who fail to respond to the self-administered survey. It is worthwhile noting that the top 30 shareholders (about 6% of the shareholder population) own almost 60% of the outstanding red snapper shares.

This proposed approach is as follows. Initially, all respondents will be contacted via an introductory letter to inform them of the upcoming data collection. Subsequently, large, medium and smaller shareholder groups will be provided with the self-administered survey instrument, and asked to return it completed using an enclosed postage pre-paid envelope. If no response is received, then three reminder letters will be sent (including additional surveys). Finally, the remaining non-respondents will be contacted by phone and urged to return the completed survey (if they are large shareholders then the contractor will attempt to set up in-person interviews at times and places convenient to them).

The contractor does not anticipate interviewers using laptops or other computers to directly enter the answers being provided since some of the questions are open ended. Thus, typing verbatim could extend the length of the interview, which would further burden the interviewees and result in incomplete surveys.

Analytical results of studies based on this data will be disseminated to management agencies and peer-reviewed publications. Some of these studies will likely be available online.

4. Describe efforts to identify duplication.

We are not aware of other federal or state efforts to collect similar socio-economic information from the Gulf of Mexico red snapper IFQ fishery. However, during the preparation of this package we became aware of a socio-economic data collection conducted by the University of South Florida (USF) examining fishers' perceptions about the likely performance of the upcoming Gulf of Mexico grouper and tilefish IFQ program. This collection consists of a 2-page self-administered survey instrument, which has a postage-paid return envelope. USF effort is expected to be completed by June 2010, which is prior to the anticipated starting date for the proposed data collection (if approved by OMB). As noted earlier, our proposed data collection focuses on a different fishery (red snapper) and is an ex-post evaluation of the program, which is required by MSA statues.

To minimize the potential of duplicate data collections, we informed experts on the red snapper fishery at NMFS, several universities in the Southeast region and the GMFMC about our upcoming data collection. The membership of the GMFMC is made up of representatives from all Gulf states resource management agencies. Moreover, Dr. Keithly offered a brief overview of the project to the Gulf of Mexico Reef Fish Shareholders' Alliance, an association in which most of the larger red snapper IFQ shareholders are members.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

Many commercial fishing operations are owner- or family-operated small businesses. We have taken several steps to minimize the burden to these small businesses. First, we designed the survey instrument so that only the minimum data requirements for present and future management needs are collected. Second, responses to the in-person survey and/or self-administered mailings will be voluntary. Third, in-person surveys will be conducted at times and places that are convenient to fishers. This will minimize any potential disruption to fishers' fishing practices. Last, fishers who receive the self-administered survey will be provided with postage-paid return envelopes

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If these data were collected less frequently or not at all, then the legal requirements set forth by the MSA, NEPA, and EO 12866 would not be met. For example, the MSA requires a formal and detailed review 5 years after the implementation of the IFQ program. The review to be conducted by the GMFMC and Secretary of Commerce must determine whether the program is satisfying the stated goals in the FMP. If current and accurate data are not available then social and economic assessments of management actions will be potentially inaccurate, thereby leading the GMFMC and NMFS to make poor management decisions. The MSA requires the establishment conservation and management measures to protect the resource, increase social and economic benefits and increase safety using the best available information.

Moreover, the GMFMC's interest in expanding IFQs programs into other fisheries managed under its authority offers a unique opportunity to learn from past design and implementation

mistakes and successes. The GMFMC is interested in expanding their use into the shallow-water grouper complex and mackerel fisheries. Similarly, the SAFMC is exploring their use in their snapper-grouper fisheries. Since most IFQs programs in the U.S. are relatively new and differ widely in their characteristics and impacts, a careful review of existing programs will assist in the adjustment of changing or unforeseen circumstances and will also aid in the planning and design new programs. Lastly, an unintended consequence of not having the appropriate socio-economic data could be court challenges on the grounds of inadequate analysis as it occurred in the South Atlantic summer flounder case (i.e., North Carolina Fisheries Association vs. Daley). In this court case, North Carolina fishers' argued that NMFS inappropriately set a low quota of summer flounder and did not fully take into account the economic effects on the fisher of this 'low' quota level.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

There are no special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

8. Provide information on the PRA Federal Register Notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

A Federal Register Notice published on Tuesday, March 31, 2009 (74 FR 14532) solicited public comments. A comment by Jane Public questioning the need and usefulness of the proposed data collection was received. No action was taken in response to this comment given that the proposed data collection is needed to comply with the 5 year formal review mandated by the MSA.

Results of consultations with persons outside the agency:

A series of exchanges were conducted between the Dr. Keithly (contractor) and members of the Gulf of Mexico Reef Fish Shareholders' Alliance, an association in which many of the largest red snapper IFQ shareholders are members, and GMFMC staff to describe need and content of the survey and to obtain their views on the clarity of the instructions and data elements to be recorded.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

No payments or gifts will be provided to questionnaire respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

Survey respondents will be advised that any information provided will be considered private and will be treated as confidential in accordance with NOAA Administrative Order 216-100, Confidential Fisheries Statistics and section 402(b) of the MSA (16 U.S.C. 1801, *et seq.*).

It is NMFS' policy not to release confidential data, other than in aggregate form, as the MSA protects (in perpetuity) the confidentiality of those submitting data. Whenever data are requested, the Agency will ensure that information identifying the pecuniary business activity of a particular individual is not identified. Only group averages or group totals will be presented in any reports, publications, or oral presentations of the study's results.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

NA.

12. Provide an estimate in hours of the burden of the collection of information.

It is estimated that the number of respondents will be no more than 400 (about 378 initial shareholders) and the time per response is about 1 hour, for a total annual burden of 400 hours. The one-hour per response burden includes the time for reading the instructions, reviewing the questions, and completing (and mailing, if necessary) the survey instrument. This estimate is based on the type of questions asked, length of the survey instrument, and the contractor's past experience conducting similar surveys.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in Question 12 above).

There will be no financial cost to the public to participate in this study.

14. Provide estimates of annualized cost to the Federal government.

A fixed price contract of $98,500 was awarded to Dr. Walter Keithly of Louisiana State University. The contractor is responsible for the development of survey instrument, training interviewers, printing of forms, data collection and processing, quality control, data entry and supervision. Additional federal costs include the time of NMFS staff. The NMFS staff will be responsible for developing and administering the contract and collaborating with the development of the survey. The cost of NMFS staff time is estimated at $16,500. Thus, the total annualized (for one year) cost to the federal government would be $115,000.

15. Explain the reasons for any program changes or adjustments.

This is a new information collection.

16. For collections whose results will be published, outline the plans for tabulation and publication.

Data collected will be used to assess the performance of the red snapper IFQ program. Descriptive and analytical reports will include summaries of data. Depending on the availability of funds, we anticipate that reports will be available January 2012. These reports will likely be available in *pdf* format on the NMFS Southeast Fisheries Science Center's web site.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

The OMB control number and expiration date will be displayed.

18. Explain each exception to the certification statement.

There are no exceptions to the certification statement.

SUPPORTING STATEMENT

Socio-Economic Assessment of Gulf of Mexico Fisheries
Under the Limited Access Privilege Program
OMB CONTROL NO. 0648-xxxx

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

1. Describe (including a numerical estimate) the potential respondent universe and any sampling or other respondent selection method to be used. Data on the number of entities (e.g. establishments, State and local governmental units, households, or persons) in the universe and the corresponding sample are to be provided in tabular form. The tabulation must also include expected response rates for the collection as a whole. If the collection has been conducted before, provide the actual response rate achieved.

The population of interest consists of 764 individuals. These individuals were the initial recipients of IFQ shares when the program started in 2007. Prior to the adoption of IFQs, there were 136 'Class I' permit holders, who could harvest up to 2,000 lbs of red snapper per trip, and 628 'Class II' permit holders, who could harvest up to 200 lbs of red snapper per trip. Class I permits were granted to those individuals who routinely targeted red snapper (i.e., dedicated fleet) whereas Class II permits were assigned to those individuals that incidentally caught red snapper (i.e., by-catch fleet). Following the adoption of IFQs, Class I permit holders were awarded more IFQ shares than Class II permit holders because the allocation of IFQ shares was based entirely on an individual's catch history.

The proposed sampling design calls for the census of the 764 individuals who were initially granted IFQ shares. Although we intend to sample the entire universe of present and past shareholders (764 individuals), we expect to complete 384 surveys. This figure assumes a 43% response rate for small and medium shareholders, which was observed in a similar study conducted by Knapp[1]. The study by Knapp surveyed 129 Alaska halibut IFQ shareholders to assess their perceptions about the performance of the program. We anticipate an 80% response rate for the large shareholders because of the contractor's earlier outreach work with Gulf of Mexico Reef Fish Shareholders' Alliance, to which the largest red snapper IFQ shareholders belong. Table 1 summarizes the key statistics about the proposed sampling strategy.

1 Knapp, G., 1997. Initial Effects of the Alaska Halibut IFQ Program: Survey Comments of Alaska Fishers. Marine Resource Economics, Volume 12, pp. 239–248

Table 1: Sampling strategy for red snapper IFQ shareholders.

Tier	Population Size	Target Sample	Expected Response Rate	Anticipated Sample*
Class I	136	136	0.80	108
Class II	628	628	0.43	270
Total	**764**	**764**		**378**

2. Describe the procedures for the collection, including: the statistical methodology for stratification and sample selection; the estimation procedure; the degree of accuracy needed for the purpose described in the justification; any unusual problems requiring specialized sampling procedures; and any use of periodic (less frequent than annual) data collection cycles to reduce burden.

One time, voluntary surveys will be used to elicit information on the performance of the red snapper IFQ program. The list of shareholders will be provided by NMFS to the contractor. The contractor will attempt to survey the universe of shareholders using a self-administered questionnaire and conducting in person interviews with non-respondent large shareholders (if necessary). The approach is needed because otherwise, the sampling strategy could inadvertently marginalize or exclude some of the user groups. Preliminary analyses suggest that the red snapper fishing industry is highly concentrated. It has been estimated that 6% of the shareholder population owns about 60% of the red snapper quota.

During the large shareholder interviews (again, if they are necessary), the contractor will go over the survey questions to ensure that their perceptions and beliefs about the performance of the IFQ program are adequately recorded. There will no script when discussing the survey questions given the familiarity of the contractor with many of these large shareholders. The contractor knows many of the shareholders from many years of working with them on various panels convened by the Gulf of Mexico Fishery Management Council.

The data collected will be used for descriptive and analytical purposes. Descriptive uses include the estimation of indexes of community dependence. The procedures for estimating these indexes will be based on the standard equations available in various statistical texts such as Thompson (1992)[2].

2 Thompson, Steven K., 1992. Sampling. John Wiley and Sons, Inc., New York, 343 p.

3. Describe the methods used to maximize response rates and to deal with nonresponse. The accuracy and reliability of the information collected must be shown to be adequate for the intended uses. For collections based on sampling, a special justification must be provided if they will not yield "reliable" data that can be generalized to the universe studied.

Following Dillman (2007)[3] we plan to adopt the following plan to achieve high response rates.

First, we plan to draft a respondent-friendly questionnaire. For example, several questions about the program's biological, economic and social performance can be simply answered using Lickert scale type responses (e.g., strongly agree, agree, neutral, disagree, strongly disagree), basic ranking responses (e.g., 0 to 10) and/or multiple choice type answers. In addition, the survey has few open-ended questions.

Second, we plan to make five contacts (if necessary) by first class mail. These contacts will include: a) a 'pre-notice letter' to alert the respondent about the impending questionnaire; b) a certified letter with the survey, c) a 'thank you postcard' sent to the respondent a few days after mailing the survey expressing appreciation for taking the time to respond to the survey and indicating that the completed instrument was not received; d) if the completed survey instrument was not received within a few weeks of the earlier mailing, then a letter and replacement questionnaire will be mailed to the respondents urging them to collaborate with the data collection; and e) a 'final letter' within a week of sending the replacement questionnaire asking the respondent to fill the survey form..

Third, respondents will be provided first class pre-paid envelopes so that they easily return their completed questionnaires. In addition, the contractor will personalize the correspondence the mailings. Dillman (2007) notes that personalized mailings increase responses rates by 5-11% in multiple-contact general public surveys.

Last, if the shareholder belongs to the largerst shareholder group (most likely former Class I fishers), then two telephone contacts will be made to solicit the opportunity to conduct an in-person interview at times and locations that are convenient to the fishers. If the shareholder belongs to the medium and smaller group (most likely Class II), then three telephone contacts will be made to impress the importance of their input in the evaluation of the program and to solicit their cooperation. The combination of the above described steps is intended to raise our anticipated non-response rate, particularly for those small and medium sized shareholders. If the fisher declines to participate in the survey effort, then the contractor will not attempt further contacts. However, the contractor will inquire about their reasons for not wanting to participate in order to identify potential non-response biases. If non-response biases are detected then standard methods described in standard textbooks such as Cochran[4] and Lohr's [5] will be employed. NMFS databases contain ancillary information on fishers operations that can be used to correct for non-response biases.

3 Dillman, D. A., 2007. Mail and Internet Surveys: The Tailored Design Method 2007 Update with New Internet, Visual, and Mixed-Mode Guide. 2nd Edition. John Wiley & Sons, Inc. Hoboken, NJ.

4 Cochran, W. 1977. Sampling Techniques. 3rd Edition. Toronto. John Wiley and Sons.

5 Lohr, S., 1998. Sampling: Design and Analysis. Duxbury Press.

4. Describe any tests of procedures or methods to be undertaken. Tests are encouraged as effective means to refine collections, but if ten or more test respondents are involved OMB must give prior approval.

In addition to sharing the survey instrument with NMFS and GMFMC staff, the contractor made it available to the leadership of the Gulf of Mexico Reef Fish Shareholders' Alliance, which concentrates the largest red snapper IFQ shareholders. Members of NMFS, GMFMC and the Shareholder Alliance provided suggestions to improve the content and clarity of the questions.

5. Provide the name and telephone number of individuals consulted on the statistical aspects of the design, and the name of the agency unit, contractor(s), grantee(s), or other person(s) who will actually collect and/or analyze the information for the agency.

Dr. Walter Keithly from Louisiana State University was hired to design a statistically sound data collection strategy, conduct the data collection and analyze the survey information for the NMFS. Dr. Keithly can be reached at 225-578-6296.

Drs. Jim Waters and Juan Agar, social scientists employed by the NMFS, were consulted on the statistical design. NMFS social scientists and GFMC staff will also use the data for regulatory analysis. Drs. Jim Waters and Juan Agar from the National Marine Fisheries Service can be reached at 252-728-8710 and 305-361-4218, respectively.

Pre-notification Letter

Dear Mr/Ms. XXX:

I have been hired by the National Marine Fisheries Service (NMFS) to conduct a survey that inquires about fishers' perceptions, attitudes and beliefs about the performance of the red snapper individual fishing quota (IFQ) program. The results of this survey will be used to assist with the review of the Gulf of Mexico red snapper IFQ program as mandated by the reauthorization of the Magnuson Stevens Act (MSA). To examine the socio-economic performance of the program, we need to collect data on the changes brought about the IFQ program particularly as they relate to your fishing and business practices.

You have been selected to participate in this survey. In the next couple of days, you will receive the survey in the mail. **We are requesting that you complete and return the survey in the postage pre-paid envelope to be enclosed.** We will be asking for your thoughts on the strengths and weaknesses of the program as well as economic information on expenditures for crew, fuel, bait, and other trip supplies for your main fishing vessel. Some further questions will inquire about quota and allocation holdings and future participation of the fishery. We have tried to limit the collection to a minimum. All individual information will be strictly confidential and your participation is voluntary.

The information provided will help us voice your opinions about the program and conduct socio-economic analyses to examine whether the program was able to reduce overcapacity and mitigate the adverse impacts of derby fishing. Obtaining this information will be valuable to the Gulf of Mexico Fishery Management Council since they will decide on the future of the program.

If you have any questions or do not receive the survey material in the next two weeks, please contact me at (225) 578-6296

Thank you in advance for your cooperation with this data collection.

Sincerely yours,

Walter Keithly

Red Snapper IFQ Participant Survey

Public reporting burden for this collection of information is estimated to average one hour per response including the time for reviewing the instructions, searching the existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this burden to Bob Walker, National Marine Fisheries Service, 75 Virginia Beach Drive, Miami, Florida 33149. Comments on the content of the survey should be addressed to Dr. Walter Keithly Center Natural Resource Economics & Policy, Department of Agricultural Economics, 242A Agricultural Administration Building, Louisiana State University Baton Rouge, LA 70803-5604.

This reporting is required under and is authorized under 50 CFR 622.5(a) (1) (v). Information submitted will be treated as confidential in accordance with NOAA Administrative Order 216-100. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection displays a currently valid OMB Control Number. The NMFS requires this information for the 5-year review of the Gulf of Mexico red snapper IFQ Program. These data will be used to assess the socio-economic performance of the IFQ program.

Participation in this survey is voluntary, and you do not need to answer any questions you do not wish to answer

Section 1: Background Information

1) You have been identified as being the registered owner of a **XXX** share of the red snapper IFQ as of December 31, 2010.

   What would you estimate the current market value of this share to be? $_____ market value

2) How many years of commercial fishing experience do you have? _____ years

3) How long have you lived in your community? _____ years

4) What was your relationship to the red snapper fishery prior to the introduction of the red snapper IFQ program?

   ☐ Class 1 license holder ☐ Class 2 license holder ☐ Other: _____

5) Which area of the Gulf has accounted for the largest portion of your red snapper harvest since implementation of the red snapper IFQ program?

   ☐ Eastern Gulf ☐ Northern Gulf ☐ Western Gulf

Section 2: Attitudes and Perceptions Concerning the Red Snapper IFQ Program

6) Did you support THE INTRODUCTION of the red snapper IFQ program in 2006?

   ☐ Yes ☐ No ☐ Undecided/Not applicable

7) Do you support the red snapper IFQ program NOW?

   ☐ Yes ☐ No ☐ Undecided

8) Overall, how satisfied are you with the red snapper IFQ program?

highly satisfied	satisfied	neutral	dissatisfied	highly dissatisfied	no opinion
☐	☐	☐	☐	☐	☐

What do you consider to be the most positive impacts of the red snapper IFQ program on your fishing operations when you compare it to the pre-IFQ fishery?

_____
_____
_____

What do you consider to be the most negative impacts of the red snapper IFQ program on your fishing operations compared to the pre-IFQ fishery?

_____
_____
_____

9) For each potential IFQ outcome below, please indicate your opinion by checking the appropriate box:

The red snapper IFQ program:	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	No Opinion
Improved my financial condition	☐	☐	☐	☐	☐	☐
Reduced derby fishing	☐	☐	☐	☐	☐	☐
Resulted in better on-the-water handling of harvested product	☐	☐	☐	☐	☐	☐
Increased red snapper prices	☐	☐	☐	☐	☐	☐
Reduced the variability in red snapper prices	☐	☐	☐	☐	☐	☐
Increased my ability to target the size desired in market	☐	☐	☐	☐	☐	☐
Reduced operating expenses for harvesting red snapper	☐	☐	☐	☐	☐	☐
Reduced the amount of capital used in the fishery (i.e., vessels and gear)	☐	☐	☐	☐	☐	☐
Reduced the loss of gear	☐	☐	☐	☐	☐	☐
Decreased crowding on fishing grounds	☐	☐	☐	☐	☐	☐

Increased the discarding of legal sized red snapper (13 inches)	☐	☐	☐	☐	☐	☐
Reduced incidental catch of non-targeted species	☐	☐	☐	☐	☐	☐
Improved safety at sea	☐	☐	☐	☐	☐	☐
Increased consolidation in the fishery	☐	☐	☐	☐	☐	☐
Made it harder for people to enter the fishery	☐	☐	☐	☐	☐	☐
Made crew members better off compared to the non-IFQs fishery	☐	☐	☐	☐	☐	☐
Improved compliance with regulations	☐	☐	☐	☐	☐	☐

<u>Section 3</u>: Socioeconomic Assessment of the Red Snapper IFQ program.

10) Have you made any major investments (or disinvestments) in capital (i.e., vessels and harvesting equipment) since the implementation of the red snapper IFQ program that you would consider to be the result of the program? ☐ Yes ☐ No

If Yes, please specify the following information:

Item:	Pre-IFQ Quantity	Post-IFQ Quantity	Purchased Price (investment)	Sales Price (disinvestment)
Number of Vessel(s)				
Engine(s)				
Fishing gear				
Electronics				
Other				

If you indicated that you made changes in capital investment, please briefly elaborate as to why you made these changes:

_____

11) What was the average number of crew members per trip (excluding captain):

Pre-IFQ _____ Post-IFQ _____

12) Please circle the number on the scale below that best indicates your crew experiences PRE- and POST-IFQ IMPLEMENTATION. If none apply, check the N/A box.

Ability to Maintain Skilled Crew

	Least Stable									Most Stable	N/A
Pre-IFQ	1	2	3	4	5	6	7	8	9	10	☐
Post-IFQ	1	2	3	4	5	6	7	8	9	10	☐

Ability to Find Skilled Replacement Crew

	Hard to Replace									Easy to Replace	N/A
Pre-IFQ	1	2	3	4	5	6	7	8	9	10	☐
Post-IFQ	1	2	3	4	5	6	7	8	9	10	☐

13) Which of the following best describes how the vessel owner, captain and crew were paid to harvest red snapper both before and after the implementation of the IFQ program? Please check the box that best applies in each column and then fill in the information about the distribution of payments for the indicated arrangement. (NOTE: Completer only the last column if you did not fish for red snapper prior to implementation of the IFQ program).

Vessel owner, captain and crew were paid according to a:	Before implementation of the IFQ program	After implementation of the IFQ program
Share of total revenues without any deductions	☐	☐
Share of total revenues, less a charge for IFQ value	N/A	☐
Share of total revenues, less the following trip expenses (**please circle**) – fuel, bait, food, vessel repairs, direct vessel owner payment, other	☐	☐
Share of total revenue, less a charge of IFQ value and less the following trip expenses (**please circle**) – fuel, bait, insurance costs, food, vessel repairs, direct vessel owner payment, other	N/A	☐

Flat rate per day, trip, or season ☐ ☐

Other (please explain) ☐ ☐

For the **BEFORE** implementation payment arrangement checked above, the distribution of payments was approximately

Vessel Owner _____% Captain _____% Crew _____%

For the **AFTER** implementation payment arrangement checked above, the distribution of payments was approximately

Vessel Owner _____% Captain _____% Crew _____%

14) Please check the boxes that best describe how you were paid for your fished IFQ shares.

- ☐ Included in the payment you received as captain
- ☐ Included in payment you received as vessel owner(s)
- ☐ Paid out of total earnings, before any deductions
- ☐ Paid out of total earnings , after some deductions
- ☐ Other _____

15) Describe the main expenses per trip for a TYPICAL trip in which you harvested red snapper.

	2006 Pre-IFQ	2010 Post-IFQ
Trip length (days)		
Total revenues ($/trip)		
Red snapper (lbs/trip)		
Revenues from red snapper ($/trip)		
Other reef fish species (lbs/trip)		
Revenues from other reef fish species ((4		
Other species (lbs/trip)		
Revenues from other species ($/trip)		
Total operating costs ($/trip)		
Fuel expenses ($/trip)		
Fuel quantity (gallons/trip)		
Bait costs ($/trip)		
Provisions ($/trip)		

Miscellaneous costs ($/trip)		
Crew payment ($/trip)		
Number of crew (excluding captain)		
IFQ allocation	N/A	

16) If you have leased red snapper allocation **TO** another person(s) or entity during the first four years of the IFQ program, please indicate your reason(s) for doing so (please check all that apply).

- ☐ I received a higher return from LEASING all/some of my allocation than from fishing it.
- ☐ While I may have received a lower return from LEASING all/some of my allocation than I would have received from fishing it, I LEASED all/some of my allocation as a means of reducing the amount of financial uncertainty associated with fishing it
- ☐ Illness, breakdowns, etc prevented me from fishing all/some of my allocation, so instead I LEASED all/some of my allocation
- ☐ A relatively small contribution to my operations is from my red snapper allocation and thus the impact from LEASING all/some of the allocation is minor
- ☐ The availability and size of my vessel(s) is insufficient to allow for the orderly harvest of all my allocation (therefore, I LEASED all/some of it).
- ☐ The availability of captains and/or crew is insufficient to allow for the orderly harvest of all my allocation (therefore, I LEASED all/some of it).
- ☐ Other (please elaborate) _____
  _____
- ☐ Not applicable since I have not leased **TO** another person or entity since the implementation of the program

Please indicate the LEASING arrangement between you and the lessee.

- ☐ I LEASED all/some of my allocation for an average of $_____ per pound with no other arrangements/restrictions being placed on the allocation that I leased.
- ☐ I LEASED all/some of my allocation for an average of $ _____per pound with an arrangement that the lessee deliver the catch to specified dealer; Please elaborate on the arrangement _____._____
  _____
- ☐ I LEASED all/some of my allocation for $_____ per pound with other arrangements; Please elaborate on these arrangements _____
  _____

17) If you have leased allocation **FROM** another IFQ shareholder during the first four years of the IFQ program, please identify the primary reasons for leasing (purchasing) that allocation (check all that apply).

☐ I do not have the financial resources at this time to purchase additional IFQ (permanent) shares

☐ I only need additional allocation for a relatively short period of time (e.g., a single fishing year)

☐ I am of the belief that buying allocation on an annual basis will be less expensive than purchasing an equivalent amount of additional (permanent) shares

☐ Purchasing annual allocation provides greater flexibility than owning IFQ (permanent) shares

☐ I consider buying additional IFQ (permanent) share as too risky due to any of the following (please circle) – uncertainty over the future price of red snapper, uncertainty over the poundage of the allocation due to changes in the stock assessment, uncertainty over future operating costs (e.g., fuel, bait, etc.), other uncertainty_____

☐ I bought allocation to give to other fishermen for their own use

☐ Other_____

☐ Not applicable since I have not leased **FROM** a shareholder since the implementation of the program

Please indicate the LEASING arrangement between you and the lessor.

☐ I LEASED all/some of my allocation for an average of $_____ per pound with no other arrangements/restrictions being placed on the allocation that I leased FROM the lessor;

☐ I LEASED all/some of my allocation for an average of $ _____per pound with an arrangement that I deliver my catch to specified dealer; Please elaborate on the arrangement: _____._____ _____

☐ I LEASED all/some of my allocation for $_____ per pound with other arrangements; Please elaborate on these arrangements _____ _____

18) **If you <u>BOUGHT quota share since the implementation of the IFQ program,</u>** how important were the following reasons for doing so? Please check the appropriate box for each statement.

	Very Important	Somewhat Important	Not Important
The asking price for the purchased share was in line the with expected future financial return anticipated from fishing the additional share	☐	☐	☐
The asking price for the purchased share was in line with what I anticipated I will be able to sell it for in the near future	☐	☐	☐

The asking price for the purchased share was in line with the return I anticipated from selling them as an annual allocation	☐	☐	☐
I believed that the additional share would allow me to fish at a more efficiently	☐	☐	☐
I needed additional share because I wanted to retain the red snapper I land as by-catch	☐	☐	☐
I anticipated that Total Allowable Catch (TAC) will increase after the next stock assessment	☐	☐	☐
Other _____	☐	☐	☐

19) **<u>If you SOLD quota share since the implementation of the IFQ program,</u>** what were your reasons for doing so?

	Very Important	Somewhat Important	Not Important
The current selling price for the share I sold was high relative to future financial returns I anticipated from fishing it	☐	☐	☐
The current selling price was higher than what I anticipated receiving for selling the share sometime in the future	☐	☐	☐
The current selling price for the share was in line with the return I anticipated from selling it as annual allocation	☐	☐	☐
I had more quota then was necessary for harvesting efficiently	☐	☐	☐
I anticipated that quota would decrease after the next stock assessment and that the share I sold might become less valuable	☐	☐	☐
I felt uncertain about the duration of the IFQ program so I sold my share	☐	☐	☐
Other _____	☐	☐	☐

20) Have you experienced any changes with dealers since the implementation of the red snapper IFQ program? Please check all that apply.

☐ I have experienced no significant changes in my relationship with dealers.

☐ I am no longer as loyal to a single dealer but instead sell to more dealers than before the implementation of the IFQ program.

☐ I am more loyal to a smaller number of dealers than before implementation of the IFQ program.

☐ I am more loyal to a smaller number of dealers because they provide me with allocation in return to me selling my catch to him.

☐ I am more loyal to a smaller number of dealers for other reasons: please explain.

_____.

21) What would you estimate to be the current market value of your vessels, gear, and equipment (excluding quota shares) used to harvest red snapper $ _____. In your opinion, has the IFQ program resulted in a change in the current market value? (☐ Yes ☐ No). If you answered yes, what would you estimate to be the change in the current market value that resulted from the IFQ program? $_____ . Is this change an increase or a decrease? (☐ Increase ☐ Decrease)

<u>Section 4</u>: Other Issues

22) What are your plans with respect to your activities in the red snapper fishery over the next five years? Please check only one.

☐ I plan to leave the fishery by selling (or giving away) my IFQ share.

☐ I plan to reduce my activities in the fishery by keeping my share but leasing annual allocation.

☐ I plan to keep my activities at approximately the same level.

☐ I plan to increase my financial investments in the fishery by leasing annual allocation but not additional share.

☐ I plan to increase my financial investments in the fishery by buying more IFQ share.

☐ Other; explain_____

With respect to activity that you checked above, would you please elaborate as to why you selected that item:
_____

23) Please circle the number on the scale below that best indicates your level of satisfaction with the associated question. If the question does not apply, please check the N/A box.

How satisfied are you with the IFQ online system for managing shares and allocation and completing landing transactions?

Highly Unsatisfied									Highly Satisfied	N/A
1	2	3	4	5	6	7	8	9	10	☐

What improvements would you suggest to the IFQ online system?

_____

How satisfied are you with the customer service you receive when contacting NOAA Fisheries Service regarding questions about the IFQ program?

Highly Unsatisfied									Highly Satisfied	N/A
1	2	3	4	5	6	7	8	9	10	

What improvements would you suggest to the IFQ customer service?

_____

How satisfied are you with the customer service you receive when making a landing notification via phone?

Highly Unsatisfied									Highly Satisfied	N/A
1	2	3	4	5	6	7	8	9	10	

Recognizing that the five-year review of the red snapper IFQ program could result in changes to the program, please use the spaces below to recommend how you would enhance each aspect of the program. A summary of the responses will be given to the Gulf of Mexico Fishery Management Council and to the National Marine Fisheries Service.

Regulations:

Monitoring and enforcement:

Other

What improvements would you suggest to the phone-based landing notification system?

_____

_____

Would you be willing to be contacted by phone if we have any additional questions concerning the IFQ program and your responses to this questionnaire? If yes, please list a phone number that we can use and a convenient times/days during the week that we can call.

Phone number:

Convenient time/day:

THANK YOU FOR THE TIME YOU TOOK TO COMPLETE THIS QUESTIONNAIRE.

CNREP
Center for
Natural Resource Economics
& Policy

Department of Agricultural Economics and Agribusiness
Louisiana State University Agricultural Center
101 Agricultural Administration Building
Baton Rouge, LA 70803-5604
(225) 578-2712
Fax: (225) 578-2716

December 17, 2010

Dear Red Snapper Fisherman,

You recently received a survey questionnaire that was designed to help us better understand whether the red snapper IFQ program is achieving it objectives and whether its performance can be enhanced.. If you have completed and returned the questionnaire to us, please accept our sincere thanks.

If you have not completed the questionnaire, please consider completing it today and send it back to us in the return envelope that was provided. We believe that your input to this research is extremely important because the information you provide will help us provide a more detailed assessment of the program which will allow us to identify both its strengths and its weaknesses.

If you did not receive a questionnaire, or if it was misplaced, please contact us using the email addresses or the phone numbers listed below and we will get another one out to you today.

Sincerely,

Walter R. Keithly, Jr.
Resource Economist
Dept. of Agricultural Economics & Agribusiness
Louisiana State University
walterk@lsu.edu
(225) 578-6296

THE LOUISIANA AGRICULTURAL EXPERIMENT STATION PROVIDES EQUAL OPPORTUNITIES IN PROGRAMS AND EMPLOYMENT

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(225) 578-2712
Fax: (225) 578-2716

December 17, 2010

Dear Red Snapper Fisherman,

In late January, I sent you a second copy of a survey questionnaire that was designed to help us better understand whether the red snapper IFQ program is achieving it objectives and whether its performance can be enhanced. Many red snapper fishermen have filled out and returned their questionnaires. But as of February 25, we haven't heard from you.

If you have not completed the questionnaire, please consider completing it today and send it back to us in the return envelope that was provided. We believe that your input to this research is extremely important because the information you provide will help us provide a more detailed assessment of the program which will allow us to identify both its strengths and its weaknesses. If you have completed and returned the questionnaire to us, please accept our sincere thanks.

If you did not receive a questionnaire, or if it was misplaced, please contact us using the email addresses or the phone numbers listed below and we will get another one out to you today.

Sincerely,

Walter R. Keithly, Jr.
Resource Economist
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(225) 578-2712
Fax: (225) 578-2716

December 17, 2010

Dear Red Snapper Fisherman:

We want to thank you for your participation in the socio-economic survey of the Gulf of Mexico red snapper IFQ program. The information provided will we used to conduct economic analyses to assess the performance of the IFQ program. We anticipate providing the salient results of this work to the Gulf of Mexico Fishery Management Council for their 5-year review of the program early in 2012.

Once again, thank you very much for your cooperation.

Sincerely,

Walter R. Keithly, Jr.
Resource Economist
Dept. of Agricultural Economics & Agribusiness
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Initial Effects of the Alaska Halibut IFQ Program: Survey Comments of Alaska Fishermen

GUNNAR KNAPP
University of Alaska, Anchorage

Introduction

In 1995 an Individual Fishing Quota (IFQ) management plan was implemented for the Alaska halibut fishery. With annual catches in the 1990s ranging from 34 to 53 million pounds, valued between $60 million and $99 million, the Alaska halibut fishery is the largest fishery for which the United States has adopted IFQ management.[1]

Halibut IFQs are area and vessel class specific.[2] Annual IFQ allocations are determined by multiplying total quotas for an area and vessel class by an individual's share of the total "quota share" for that area and vessel class. Quota share was originally allocated to individuals based on landings of vessels owned or leased by the individual during the years 1984–90. Although thousands of individuals received at least some quota share in the initial allocation, much of the total allocation was concentrated among a few hundred quota share holders.[3]

Quota share is transferable, although there are a variety of restrictions on transfers designed to limit consolidation in order "…to maintain, as much as possible, the current character of the fleet, to allow for new entrants and crew members, and to protect Alaskan coastal economies dependent on fishing" (National Marine Fisheries Service).[4] With certain exceptions, IFQ owners must be on board vessels fishing for halibut.

The IFQ program has dramatically changed the Alaska halibut fishery. For most of the decade prior to 1995, thousands of boats caught the entire Alaska halibut

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Gunnar Knapp is professor of economics with the Institute of Social and Economic Research, University of Alaska, Anchorage, 3211 Providence Dr., Anchorage, AK 99508; e-mail: afgpk@uaa.alaska.edu.

[1] Halibut (*Hippoglossus stenolepis*) is under the jurisdiction of the International Pacific Halibut Commission (IPHC), created in 1923 by a joint treaty between the U.S. and Canada. The commission establishes gear restrictions and area-specific fishing seasons and annual total allowable catches (TACs). The United States government, through the North Pacific Fishery Management Council, establishes additional regulations to meet the TACs and to allocate harvests in U.S. waters. See Knapp (1996) for a description of the Alaska Halibut IFQ program. A similar program was also adopted for the Alaska sablefish (black cod) fishery.

[2] There are eight halibut management areas and four vessel classes (freezer vessels of any length, catcher vessels 100 feet or longer, catcher vessels 35 to 65 feet in length, and catcher vessels under 35 feet).

[3] In November 1995, 3,048 persons (approximately 57% of quota share holders) owned less than 11% of the total quota share holdings (expressed in terms of 1995 IFQ lbs.); while 451 persons (or about 10% of quota share holders) owned 62% of total quota share holdings (Knapp 1996). These estimates were calculated after about 14% of halibut quota share (as measured by 1995 IFQ lbs.) had already been transferred, reducing the number of quota share holders from about 5,500 to 4,420 individuals.

[4] Restrictions limit the consolidation of small "blocked" holdings (those with less than approximately 20,000 lbs. of annual IFQ). Only original quota share recipients or crew members with more than 150 days experience in a U.S. fishery may purchase quota share.

quota in two or three 24-hour openings. With IFQ management, the halibut season is now open from March until November. Average crew sizes have declined. With a longer season, the share of Alaska halibut sold fresh has more than doubled, and ex-vessel and wholesale prices have increased. Coast Guard Search and Rescue cases and fatalities associated with the halibut fishery have declined sharply.[5]

The IFQ program has been the subject of intense debate by fishermen, both prior to and following adoption and implementation of the program. An earlier Thalassorama contribution reported on halibut captains' attitudes towards IFQs prior to the implementation of the program, based on responses to 391 telephone interviews conducted in 1994 (Knapp 1996). That study concluded that:

> Less than half of Alaska halibut captains preferred the IFQ system to the current system, and less than one-third named the IFQ system as their first choice for management of the fishery. Support for IFQs was clearly related to whether or not captains expected their financial situation to improve with IFQs—and the majority did not.

During the spring of 1996, the University of Alaska Institute of Social and Economic Research (ISER) conducted a mail survey of halibut quota share holders in order to gather information about the halibut fishery during the first year of the IFQ program. This survey also provided an opportunity to gather open-ended comments from quota share holders about positive and negative effects of the program. This paper reports on these comments. In addition to describing fishermen's perceptions of the most important effects of IFQ management, the comments also shed light on fishermen's attitudes towards the IFQ program after the first year.

Survey Administration and Design

The survey was conducted as part of a series of studies undertaken by federal and state agencies in 1995 and 1996 to gather information about initial effects of IFQ management of the Alaska halibut and sablefish fisheries (Smith and Parker). Four page survey questionnaires were mailed to a randomly selected stratified sample of 300 quota share (QS) holders. The purpose of the stratification was to be able to accurately characterize QS holders in large vessel classes or with large holdings (who constitute a small fraction of total quota share holders but a large share of total IFQ pounds). Survey responses were weighted to reflect the actual number of quota share holders represented by each respondent. The surveys were mailed in April 1996, with follow up mailings through June. As shown in table 1, completed surveys were received from 129 quota share holders for a response rate of 43%.[6]

Comparisons of survey estimates with information obtained from other sources suggest that the survey respondents were reasonably representative of halibut quota share holders. For example, estimated total 1995 halibut landings calculated from

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[5] A number of studies have examined initial effects of IFQ management on the halibut fishery. These include Commercial Fisheries Entry Commission (1996a,b); Gilroy and Sullivan (1996); Knapp and Hull (1996a,b,c); Knapp (1997a,b); and Smith and Parker (1996). Copies of most of these studies are available from the North Pacific Fishery Management Council, 605 West 4th Avenue, Suite 306, Anchorage, AK 99501-2252.

[6] A detailed description of the survey administration and results is available in a 133 page report on the survey (Knapp and Hull 1996a) available from the North Pacific Fishery Management Council at the address given in footnote 5. Surveys were also conducted of sablefish quota share holders (Knapp and Hull 1996c) and halibut and sablefish registered buyers (Knapp and Hull 1996b).

Table 1
Survey Strata, Sampling Fractions, and Response Rates

	Survey Strata						
	1	2	3	4	5	6	Total
Criteria used to assign QS holders to stratum:							
Vessel class of QS	A	B	B	C	C	D	
Total lbs. owned by QS holder	any amt.	>20,000	<20,000	>5,000	<5,000	any amt.	
Total IFQ pounds owned by QS holders in stratum (000 lbs)	829	11,040	1,078	16,995	1,987	3,198	35,127
Number of QS holders in stratum	40	155	150	1,016	1,059	1,983	4,403
Number of surveys mailed	40	52	52	52	52	52	300
Sampling fraction	100%	34%	35%	5%	5%	3%	7%
Number of completed surveys	12	26	16	25	27	23	129
Response rate	30%	50%	31%	48%	52%	44%	43%

weighted survey responses were 95% of total landings reported by the NMFS Restricted Access Management (RAM) Division.[7]

Survey Questions

The survey included twenty-six questions about quota share holders' participation in the 1995 halibut fishery. These questions gathered information such as IFQ volume harvested and not harvested, number of trips taken, number of IFQ holders on board, number of crew on board, how crew and IFQ holders were paid, and factors affecting when trips were taken and where halibut were landed.

Three open-ended questions at the end of the survey invited respondents to comment on effects of the IFQ program, and to provide recommendations or suggestions about the program:

> #27. What have been the most positive effects of the IFQ program on your fishing operation?
>
> #28. What have been the most negative effects of the IFQ program on your fishing operation?
>
> #29. Please use this space for any recommendations or suggestions you may have about the halibut and sablefish IFQ program. We will provide these comments and suggestions to the State of Alaska, the National Marine Fisheries Service, and the North Pacific Fishery Management Council.

Of the 129 respondents who returned completed surveys, 121 provided at least one comment in response to these open-ended questions.

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[7] The survey estimate of the share of IFQ that went unharvested was 9%, compared with 10% reported by the RAM Division. The survey estimate of the share of halibut landed outside Alaska was 12%, compared with 9% reported by the Alaska Commercial Fisheries Entry Commission.

Table 2
Number of Comments Expressed by Survey Respondents

Number of Separate Comments Made in Responding to Questions 27, 28, and 29	Number of Respondents (Unweighted)	Number of Comments (Unweighted)
1–2	31	51
3–4	44	150
5–6	26	141
7–8	14	103
9–11	6	62
Total	121	507

Grouping of Comments for Analysis

Survey respondents listed a wide variety of positive and negative effects of the program, as well as many different recommendations and suggestions. For purposes of analysis, we considered each separate effect or recommendation as a separate "comment." As shown in table 2, most survey respondents provided between 1 and 6 comments.

For purposes of presentation and analysis, we grouped comments into categories based on the nature of the comment. Table 3 summarizes the number of comments received in each category. The choice of categories and the grouping of comments into categories was a matter of judgment. It would have been possible to develop more specific or more general categories. Some categories, such as "increased safety," represent a specific effect or suggestion. Other categories, such as "administrative burden/problems," represent a wide variety of effects or suggestions.

The most frequently mentioned positive effects included "ability to choose when to fish," "increased safety," "better markets and prices," "uncrowded fishing grounds," and "less stress, more relaxed." The most frequently mentioned negative effects included "QS allocation too small/uneconomic," "administrative burden/problems," and "QS allocation unfair." The appendix provides examples of specific comments of survey respondents for these categories.

Note that in table 3 respondents are represented in proportion to the number of separate comments they made. For example, the experiences and opinions of a respondent who offered ten comments have a proportionally greater weight in table 3 than those of a respondent who offered only two comments. However, there did not appear to be any obvious difference between the number of comments offered by respondents with "favorable" or "unfavorable" attitudes towards the IFQ program.

The open-ended nature of the questions means that the number of responses in each category does not provide a scientific measure of the extent to which quota share holders experienced different effects or the extent to which they would support different suggestions. For example, the fact that only 12% of respondents (weighted) cited "uncrowded fishing grounds" as a positive effect of the IFQ program does not mean that the remaining 88% did not experience uncrowded fishing grounds. Similarly, the fact that only 7% (weighted) cited "reduced income" as a negative effect does not mean that only 7% of quota share holders experienced reduced income.

What the comments do represent are effects which quota share holders considered important enough to write down—what they considered the most positive or negative effects of the program.

Table 3
Summary of Comments Received About the IFQ Program

Nature of Comment	Number of Comments (Unweighted)	Percentage of Respondents*	
		Unweighted	Weighted
Positive Effects			
Ability to choose when to fish	46	38%	38%
Increased safety	44	36%	28%
Better markets and prices	29	24%	15%
Uncrowded fishing grounds	19	16%	12%
Less stress, more relaxed	14	12%	10%
Better for resource: less bycatch and waste	19	16%	8%
Stability and easier planning	13	11%	7%
Reduced gear loss	7	6%	5%
Lower costs	4	3%	4%
Better quality	14	12%	4%
Longer season	4	3%	3%
Better crew	5	4%	2%
Other positive effects	18	15%	18%
IFQ program has had no negative effects	21	17%	12%
Negative Effects			
QS allocation too small/uneconomic	32	26%	34%
Administrative burden/problems	18	15%	18%
QS allocation unfair	18	15%	11%
Reduced crew employment	10	8%	8%
Forced out of fishery	10	8%	8%
Reduced income	9	7%	7%
Cost of buying additional QS	6	5%	5%
Harvest limited by QS amount	6	5%	3%
Overzealous enforcement	5	4%	2%
Other negative effects	28	23%	19%
IFQ program has had no positive effects	23	19%	18%
Suggestions and Comments			
Simplify/change administration	7	6%	9%
Change block provisions	8	7%	5%
Change QS ownership limits	5	4%	4%
Change vessel size restrictions	3	2%	1%
Change observer regulations	4	3%	1%
Other suggestions/comments about the IFQ program	14	12%	11%
Other suggestions/comments	17	14%	9%
General positive comments about the IFQ program	10	8%	5%
General negative comments about the IFQ program	17	14%	13%

* Percentage of respondents who wrote comments or suggestions (121 unweighted, 4,144 weighted).

Quota Share Holders' Attitudes Towards the IFQ Program

The survey questionnaire was not designed for the purpose of assessing attitudes towards the IFQ program. However, it was clear from the comments that many respondents held either clearly negative or clearly positive attitudes towards the IFQ program. For example, 12% of respondents (weighted) answered question 27 about the

Table 4
Attitudes Towards IFQs Expressed by Survey Respondents

	Respondents' Attitudes Towards IFQs			
	Positive	Mixed	Negative	Total
Number of respondents (unweighted)	50	35	36	121
Percent respondents (unweighted)	41%	29%	30%	100%
Percent respondents (weighted)	29%	37%	34%	100%
Percent respondents, by total IFQ holdings*				
Less than 1,000 lbs.	18%	30%	52%	100%
1,000–4,999 lbs.	22%	43%	35%	100%
5,000–9,999 lbs.	22%	54%	25%	100%
10,000–19,999 lbs.	49%	39%	11%	100%
20,000–49,999 lbs.	78%	18%	4%	100%
More than 50,000 lbs.	85%	10%	5%	100%
Total	29%	37%	34%	100%

* Weighted responses.

"most positive effects of the IFQ program" using "phrases like "none," "there are none," "NONE!" and "zero, zip, nada, nothing, zilch." In complete contrast, a different 18% of respondents answered question 28 about "the most negative effects of the IFQ program" using terms like "none," "I can think of none," "zero—it's been good," and "none that I see."

The fact that many respondents held obviously positive or negative attitudes towards the IFQ program provided an opportunity to examine how these attitudes might be related to the size of total IFQ holdings. In order to do this, we coded attitudes as "positive" if the comments clearly indicated a generally positive attitude towards the IFQ program and its effects, and "negative" if the responses clearly indicated a generally negative attitude towards the IFQ program and its effects. In all other cases, we coded respondents' attitudes as "mixed."[8]

As shown in table 4 and figure 1, roughly equal percentages of survey respondents (weighted) held positive, mixed, and negative attitudes towards the IFQ program. Quota share holders' attitudes towards the IFQ program were clearly related to the size of their total IFQ holdings. The greater a quota share holder's IFQ holdings, the more likely he was to have a positive attitude towards the IFQ program. The smaller a quota share holder's IFQ holdings, the more likely he was to have a negative attitude towards the IFQ program.

Conclusions

The survey responses of halibut quota share holders to open-ended questions about the effects of the Alaska IFQ program provide an indication of fishermen's perceptions of the most important effects of the program. The positive effects mentioned by many fishermen suggest that they believe that the program is providing many of the benefits predicted by advocates of IFQ management, such as improved safety,

[8] Some respondents mentioned both positive and negative effects, while still conveying a strong overall positive or negative attitudes towards the program. We coded these respondents' attitudes as either "positive" or "negative." Others mentioned both positive and negative effects, or in some cases only positive or negative effects, but did not convey a strong overall attitude. We coded these respondents' attitudes as "mixed."

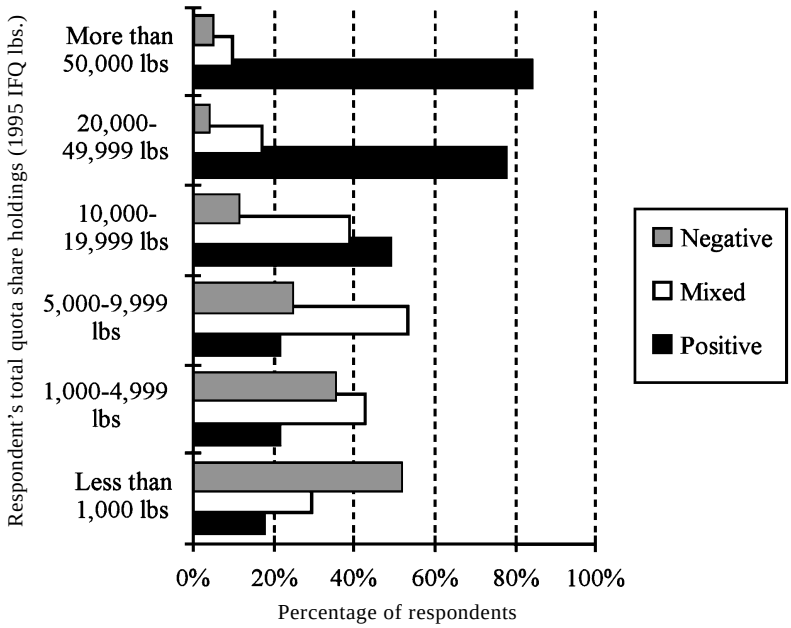

Figure 1. Survey Respondent's Attitudes Towards IFQs

better prices, and a more rational fishery. Other survey responses as well as other studies of initial effects of the program also support this conclusion.

However, the survey responses suggest that about one-third of all quota share holders had a clearly negative attitude towards IFQ management—about as many as had a clearly positive attitude. Attitudes towards the IFQ program were inversely correlated with the size of quota share holdings. Fishermen with large quota share holdings—which in the first year of the program reflected primarily initial allocations of quota share—tended to like the program; fishermen with small quota share holdings tended not to like the program. This result is consistent with the results of the survey of halibut captains prior to implementation of the IFQ program, in which those who expected their financial situation to improve were more likely to support IFQ management.

While not surprising, these results are instructive. They serve to remind us that management policies that may increase net benefits of fisheries do not necessarily make all fishermen—or even a majority of fishermen—better off. This can contribute to strikingly different perceptions of the same management policies among different fishermen.

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Appendix

Selected Examples of Survey Comments

Positive Effects of IFQ Program

Ability to Choose When to Fish

IFQs have brought a measure of stability to my small operation—I can plan my season now, and fish when it is best for myself and my crew.
Fish when the weather is good.
Can choose when to fish.
Pick and choose days.
Fishing when markets are good.
More flexibility.
Fish when weather is good.
Fish when I had the time to spare.
Somewhat relaxed fishing schedules, regulated mostly by what else is going on.
Flexibility.

Increased Safety

I will now be able to harvest during favorable, safe tides, and weather.
Increased safety.
I don't have to go out in bad weather.
Weather.

Safety. Not having to be out in inclement weather.
Being able to fish in good weather.
Being able to fish when weather is safe.
Safer for all.
Safety.
Safety. Being able to fish when weather is calm. Don't have to fish during storms.
Not having to fish when weather is bad.
Safer fishing! Freedom to pick your weather to fish in, as well as working it around other things. Less danger.

Better Markets and Prices

Fresh marketing.
Better market conditions.
Better quality product—better price.
Better care of fish—more money for the fish.
Higher ex-vessel price.
Better price—increased quality and steady supply make for a better price.
Getting a better price.
Price is usually higher. The halibut derbies flooded the market and quality was down. We can now compete with Canadians for fresh fish market throughout seasons.
We can fish when the market and processors actually want the fish.
Better price.
Seems to be more competitive among buyers for product—translates into higher price for product.

Uncrowded Fishing Grounds

Uncrowded fishing grounds.
No GEAR CONFLICTS. Less gear loss. Less expenses.
Less boats in area during season.
No other boats in the same area. No gear conflicts.
Fish where I want (not in a bunch of boats).
Fewer boats fishing at one time—gear tangles not a factor.
No crowding on grounds.
Not having crowded fishing conditions.
Not having to fight weather and congestion with other vessels on the grounds.
Less competition on grounds.
Gear conflicts are nil.
No crowds.

Less Stress, More Relaxed

Can take a slower pace.
Leisurely pace.
Not so STRESSFUL as before IFQ.
Reduced stress (safety factor, elimination of competitive factor).
Less stress about weather and time.
It saves hassle in fishing ground and time.
Less stress.
Much easier on my crew to have time to eat proper and sleep.
Less chaotic.
Also the fishery is more relaxed like it was in the '70s. My daughter and I can fish it ourselves and she gets more for college.
You can go fish—instead of a mad race!

Negative Effects of IFQ Program

QS Allocation too Small/Uneconomic

My quota share was too small to be practical and it will cost me several thousands of dollars to purchase a practical amount.
I cannot use my vessel to catch my IFQ due to IFQ's extremely small size.
Our quota was so small it's not worth fishing for, so now we don't halibut fish at all when before we could go out for a small catch when we needed some extra money.
Small quota!!
The shares allotted to me do not even make it worthwhile for me to go out fishing.
The small amount, additionally the moratorium on crab. I own the boat but received no share.
Too small of a poundage to survive in fishing.

QS Allocation Unfair

I crewed starting in 1974. Bought a boat in 1990 and ended up out of the fishery because of a small IFQ.
The skipper who leased my vessel received all of the quota shares. I received a few shares due to part ownership of a second vessel that made only one halibut trip.
It took away one-third of my total income. Now I have to rely on salmon to pay for my livelihood and salmon just doesn't do it alone. In 1994 I caught 15,000 lbs. of halibut.
Now my quota is 2,000 lbs. You figure it out!
Out of more than twenty-five years of halibut fishing, the comm. picked the seven very poorest years I fished. I therefore would end up receiving only about 12% of the quota I should have received.
In the 1970s I caught 0.5 million lbs. In the 1980s I tendered. In 1994 I fished two days caught $84,000. In 1995 IFQs limited us to 3,000 lbs.
Not enough IFQ. NMFS should have used qualifying years 1990–95 instead of 1985–90. All of the fishermen I know just got into the fishing business. With their halibut cut off, they don't have a future in fishing.
I get to catch about 60% of my average catch over the last twelve years. I never have caught less than 156,000 lbs. per year. I was issued 89,000. Call that taking a bad beating.

Administrative Burden/Problems

They refused to admit they made a mistake on my share type and turned down my request. I had to reappeal to the administrative office. Still no answer—except "Sorry, we won't get to it this YEAR!" This seems to be the typical "big government" BS—they don't care about the little guys.
Filling out paper work.
I have a small operation. Paperwork is tremendous!
Upon delivery must stay on boat until unloaded (very hard to understand).
Six-hour hailing time requirement before you can deliver fish.
This is a paperwork nightmare—with nine different card-permits needed.
I resent the law that confines crew to boat till catch is removed.
Three different steps and people just to sell the catch.
Philosophically oppose all the bureaucratic baloney.
Too many permits necessary to fish. Should consolidate requirements.
More red tape and BS.

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SEC. 402. INFORMATION COLLECTION **16 U.S.C. 1881a**

109-479
(a) COLLECTION PROGRAMS.—

(1) COUNCIL REQUESTS.—If a Council determines that additional information would be beneficial for developing, implementing, or revising a fishery management plan or for determining whether a fishery is in need of management, the Council may request that the Secretary implement an information collection program for the fishery which would provide the types of information specified by the Council. The Secretary shall undertake such an information collection program if he determines that the need is justified, and shall promulgate regulations to implement the program within 60 days after such determination is made. If the Secretary determines that the need for an information collection program is not justified, the Secretary shall inform the Council of the reasons for such determination in writing. The determinations of the Secretary under this paragraph regarding a Council request shall be made within a reasonable period of time after receipt of that request.

(2) SECRETARIAL INITIATION.—If the Secretary determines that additional information is necessary for developing, implementing, revising, or monitoring a fishery management plan, or for determining whether a fishery is in need of management, the Secretary may, by regulation, implement an information collection or observer program requiring submission of such additional information for the fishery.

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(b) CONFIDENTIALITY OF INFORMATION.—
(1) Any information submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this Act shall be confidential and shall not be disclosed except—
(A) to Federal employees and Council employees who are responsible for fishery management plan development, monitoring, or enforcement;
(B) to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity of business of any person;
(C) to State employees who are responsible for fishery management plan enforcement, if the States employing those employees have entered into a fishery enforcement agreement with the Secretary and the agreement is in effect;
(D) when required by court order;
(E) when such information is used by State, Council, or Marine Fisheries Commission employees to verify catch under a limited access program, but only to the extent that such use is consistent with subparagraph (B);
(F) when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act;
(G) when such information is required to be submitted to the Secretary for any determination under a limited access program; or

(H) in support of homeland and national security activities, including the Coast Guard's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)).

(2) Any observer information shall be confidential and shall not be disclosed, except in accordance with the requirements of subparagraphs (A) through (H) of paragraph (1), or—

(A) as authorized by a fishery management plan or regulations under the authority of the North Pacific Council to allow disclosure to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification;

(B) when such information is necessary in proceedings to adjudicate observer certifications; or

(C) as authorized by any regulations issued under paragraph (3) allowing the collection of observer information, pursuant to a confidentiality agreement between the observers, observer employers, and the Secretary prohibiting disclosure of the information by the observers or observer employers, in order—

(i) to allow the sharing of observer information among observers and between observers and observer employers as necessary to train and prepare observers for deployments on specific vessels; or

(ii) to validate the accuracy of the observer information collected.

(3) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (2)(A).

(c) RESTRICTION ON USE OF CERTAIN INFORMATION.—

(1) The Secretary shall promulgate regulations to restrict the use, in civil enforcement or criminal proceedings under this Act, the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.), and the Endangered Species Act (16 U.S.C. 1531 et seq.), of information collected by voluntary fishery data collectors, including sea samplers, while aboard any vessel for conservation and management purposes if the presence of such a fishery data collector aboard is not required by any of such Acts or regulations thereunder.

(2) The Secretary may not require the submission of a Federal or State income tax return or statement as a prerequisite for issuance of a permit until such time as the Secretary has promulgated regulations to ensure the confidentiality of information contained in such return or statement, to limit the information submitted to that necessary to achieve a demonstrated conservation and management purpose, and to provide appropriate penalties for violation of such regulations.

(d) CONTRACTING AUTHORITY.—Notwithstanding any other provision of law, the Secretary may provide a grant, contract, or other financial assistance on a sole-source basis to a State, Council, or Marine Fisheries Commission for the purpose of carrying out information collection or other programs if—

(1) the recipient of such a grant, contract, or other financial assistance is specified by statute to be, or has customarily been, such State, Council, or Marine Fisheries Commission; or

(2) the Secretary has entered into a cooperative agreement with such State, Council, or Marine Fisheries Commission.

(e) RESOURCE ASSESSMENTS.—

(1) The Secretary may use the private sector to provide vessels, equipment, and services necessary to survey the fishery resources of the United States when the arrangement will yield statistically reliable results.

(2) The Secretary, in consultation with the appropriate Council and the fishing industry--

(A) may structure competitive solicitations under paragraph (1) so as to compensate a contractor for a fishery resources survey by allowing the contractor to retain for sale fish harvested during the survey voyage;

(B) in the case of a survey during which the quantity or quality of fish harvested is not expected to be adequately compensatory, may structure those solicitations so as to provide that compensation by permitting the contractor to harvest on a subsequent voyage and retain for sale a portion of the allowable catch of the surveyed fishery; and

(C) may permit fish harvested during such survey to count toward a vessel's catch history under a fishery management plan if such survey was conducted in a manner that precluded a vessel's participation in a fishery that counted under the plan for purposes of determining catch history.

(3) The Secretary shall undertake efforts to expand annual fishery resource assessments in all regions of the Nation.

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SEC. 403. OBSERVERS **16 U.S.C. 1881b**

(a) GUIDELINES FOR CARRYING OBSERVERS.—Within one year after the date of enactment of the Sustainable Fisheries Act, the Secretary shall promulgate regulations, after notice and opportunity for public comment, for fishing vessels that carry observers. The regulations shall include guidelines for determining—

(1) when a vessel is not required to carry an observer on board because the facilities of such vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; and

(2) actions which vessel owners or operators may reasonably be required to take to render such facilities adequate and safe.

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(5) to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation;

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(6) to foster and maintain the diversity of fisheries in the United States; and

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(7) to ensure that the fishery resources adjacent to a Pacific Insular Area, including resident or migratory stocks within the exclusive economic zone adjacent to such areas, be explored, developed, conserved, and managed for the benefit of the people of such area and of the United States.

SEC. 3. DEFINITIONS 16 U.S.C. 1802

As used in this Act, unless the context otherwise requires—

(1) The term "anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.

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(2) The term "bycatch" means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.

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(3) The term "charter fishing" means fishing from a vessel carrying a passenger for hire (as defined in section 2101(21a) of title 46, United States Code) who is engaged in recreational fishing.

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(4) The term "commercial fishing" means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.

(5) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures

(A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and

(B) which are designed to assure that—

(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

(ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

(6) The term "Continental Shelf" means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas.

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(7) The term "Continental Shelf fishery resources" means the following:

CNIDARIA

Bamboo Coral—Acanella spp.;
Black Coral—Antipathes spp.;
Gold Coral—Callogorgia spp.;
Precious Red Coral—Corallium spp.;
Bamboo Coral—Keratoisis spp.; and
Gold Coral—Parazoanthus spp.

CRUSTACEA

Tanner Crab—Chionoecetes tanneri;
Tanner Crab—Chionoecetes opilio;
Tanner Crab—Chionoecetes angulatus;
Tanner Crab—Chionoecetes bairdi;
King Crab—Paralithodes camtschatica;
King Crab—Paralithodes platypus;
King Crab—Paralithodes brevipes;

Lobster—Homarus americanus;
Dungeness Crab—Cancer magister;
California King Crab—Paralithodes californiensis;
California King Crab—Paralithodes rathbuni;
Golden King Crab—Lithodes aequispinus;
Northern Stone Crab—Lithodes maja;
Stone Crab—Menippe mercenaria; and
Deep-sea Red Crab—Chaceon quinquedens.

MOLLUSKS

Red Abalone—Haliotis rufescens;
Pink Abalone—Haliotis corrugata;
Japanese Abalone—Haliotis kamtschatkana;
Queen Conch—Strombus gigas;
Surf Clam—Spisula solidissima; and
Ocean Quahog—Arctica islandica.

SPONGES

Glove Sponge—Spongia cheiris;
Sheepswool Sponge—Hippiospongia lachne;
Grass Sponge—Spongia graminea; and
Yellow Sponge—Spongia barbera.

If the Secretary determines, after consultation with the Secretary of State, that living organisms of any other sedentary species are, at the harvestable stage, either—

(A) immobile on or under the seabed, or

(B) unable to move except in constant physical contact with the seabed or subsoil, of the Continental Shelf which appertains to the United States, and publishes notices of such determination in the Federal Register, such sedentary species shall be considered to be added to the foregoing list and included in such term for purposes of this Act.

(8) The term "Council" means any Regional Fishery Management Council established under section 302.

104-297

(9) The term "economic discards" means fish which are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for other economic reasons.

104-297

(10) The term "essential fish habitat" means those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.

99-659

(11) The term "exclusive economic zone" means the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.

99-659, 101-627

(12) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds.

(13) The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

109-479

(14) The term ‘regional fishery association’ means an association formed for the mutual benefit of members—

(A) to meet social and economic needs in a region or subregion; and

(B) comprised of persons engaging in the harvest or processing of fishery resources in that specific region or subregion or who otherwise own or operate businesses substantially dependent upon a fishery.

(15) The term "fishery resource" means any fishery, any stock of fish, any species of fish, and any habitat of fish.

(16) The term "fishing" means—

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

104-297

(17) The term "fishing community" means a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community.

(18) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for—

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

(19) The term "foreign fishing" means fishing by a vessel other than a vessel of the United States.

(20) The term "high seas" means all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States.

101-627

(21) The term "highly migratory species" means tuna species, marlin (Tetrapturus spp. and Makaira spp.), oceanic sharks, sailfishes (Istiophorus spp.), and swordfish (Xiphias gladius).

109-479

(22) The term ‘import’—

(A) means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States; but

(B) does not include any activity described in subparagraph (A) with respect to fish caught in the exclusive economic zone or by a vessel of the United States.

104-297

(23) The term "individual fishing quota" means a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. Such term does not include community development quotas as described in section 305(i).

(24) The term "international fishery agreement" means any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party.

101-627, **104-297**

(25) The term "large-scale driftnet fishing" means a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of two and one-half kilometers or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing.

109-479

(26) The term ‘limited access privilege’—

(A) means a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person; and

(B) includes an individual fishing quota; but

(C) does not include community development quotas as described in section 305(i).

109-479

(27) The term ‘limited access system’ means a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.

(28) The term "Marine Fisheries Commission" means the Atlantic States Marine Fisheries Commission, the Gulf States Marine Fisheries Commission, or the Pacific States Marine Fisheries Commission.

101-627

(29) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation.

(30) The term "national standards" means the national standards for fishery conservation and management set forth in section 301.

101-627

(31) The term "observer" means any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act.

109-479

(32) The term ‘observer information’ means any information collected, observed, retrieved, or created by an observer or electronic monitoring system pursuant to authorization by the Secretary, or collected as part of a cooperative research initiative, including fish harvest or processing observations, fish sampling or weighing data, vessel logbook data, vessel or processor-specific information (including any safety, location, or operating condition observations), and video, audio, photographic, or written documents.

104-297

(33) The term "optimum", with respect to the yield from a fishery, means the amount of fish which—

(A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;

(B) is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and

(C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

104-297

(34) The terms "overfishing" and “overfished" mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.

104-297

(35) The term "Pacific Insular Area" means American Samoa, Guam, the Northern Mariana Islands, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Island, Wake Island, or Palmyra Atoll, as applicable, and includes all islands and reefs appurtenant to such island, reef, or atoll.

(36) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

104-297

(37) The term "recreational fishing" means fishing for sport or pleasure.

104-297

(38) The term "regulatory discards" means fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell.

(39) The term "Secretary" means the Secretary of Commerce or his designee.

104-297

(40) The term "special areas" means the areas referred to as eastern special areas in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990. In particular, the term refers to those areas east of the maritime boundary, as defined in that Agreement, that lie within 200 nautical miles of the baselines from which the breadth of the territorial sea of Russia is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured.[1]

(41) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States.

(42) The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

(43) The term "treaty" means any international fishery agreement which is a treaty within the meaning of section 2 of article II of the Constitution.

101-627

(44) The term "tuna species" means the following:

Albacore Tuna—Thunnus alalunga;
Bigeye Tuna—Thunnus obesus;
Bluefin Tuna—Thunnus thynnus;
Skipjack Tuna—Katsuwonus pelamis; and
Yellowfin Tuna—Thunnus albacares.

(45) The term "United States", when used in a geographical context, means all the States thereof.

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[1] Section 102(10) of Public Law 104-297 appears to codify the definition of "special areas" at paragraph 36 after the definition of "State." Section 405(a) of Public Law 104-297 appears to add a redundant definition of "special areas" and create numerous numbering conflicts in the definitions. The editors assume Congress intends to add one definition of "special areas" in alphabetical order.

95-354

(46) The term "United States fish processors" means facilities located within the United States for, and vessels of the United States used or equipped for, the processing of fish for commercial use or consumption.

95-354, **104-297**

(47) The term "United States harvested fish" means fish caught, taken, or harvested by vessels of the United States within any fishery regulated under this Act.

97-453, 100-239

(48) The term "vessel of the United States" means—

(A) any vessel documented under chapter 121 of title 46, United States Code;

(B) any vessel numbered in accordance with chapter 123 of title 46, United States Code, and measuring less than 5 net tons;

(C) any vessel numbered in accordance with chapter 123 of title 46, United States Code, and used exclusively for pleasure; or

(D) any vessel not equipped with propulsion machinery of any kind and used exclusively for pleasure.

104-297

(49) The term "vessel subject to the jurisdiction of the United States" has the same meaning such term has in section 3(c) of the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1903(c)).

101-627

(50) The term "waters of a foreign nation" means any part of the territorial sea or exclusive economic zone (or the equivalent) of a foreign nation, to the extent such territorial sea or exclusive economic zone is recognized by the United States.

109-479

SEC. 4. AUTHORIZATION OF APPROPRIATIONS. 16 U.S.C. 1803

There are authorized to be appropriated to the Secretary to carry out the provisions of this Act—

(1) $337,844,000 for fiscal year 2007;
(2) $347,684,000 for fiscal year 2008;
(3) $357,524,000 for fiscal year 2009;
(4) $367,364,000 for fiscal year 2010;
(5) $377,204,000 for fiscal year 2011;
(6) $387,044,000 for fiscal year 2012; and
(7) $396,875,000 for fiscal year 2013.

Title 50: Wildlife and Fisheries

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

Section Contents

Subpart D—National Standards

§ 600.305 General.
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§ 600.335 National Standard 6—Variations and Contingencies.
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§ 600.355 National Standard 10—Safety of Life at Sea.

Subpart D—National Standards

§ 600.305 General.

(a) *Purpose.* (1) This subpart establishes guidelines, based on the national standards, to assist in the development and review of FMPs, amendments, and regulations prepared by the Councils and the Secretary.

(2) In developing FMPs, the Councils have the initial authority to ascertain factual circumstances, to establish management objectives, and to propose management measures that will achieve the objectives. The Secretary will determine whether the proposed management objectives and measures are consistent with the national standards, other provisions of the Magnuson-Stevens Act, and other applicable law. The Secretary has an obligation under section 301(b) of the Magnuson-Stevens Act to inform the Councils of the Secretary's interpretation of the national standards so that they will have an understanding of the basis on which FMPs will be reviewed.

(3) The national standards are statutory principles that must be followed in any FMP. The guidelines summarize Secretarial interpretations that have been, and will be, applied under these principles. The guidelines are intended as aids to decisionmaking; FMPs formulated according to the guidelines will have a better chance for expeditious Secretarial review, approval, and implementation. FMPs that are in substantial compliance with the guidelines, the Magnuson-Stevens Act, and other applicable law must be approved.

(b) *Fishery management objectives.* (1) Each FMP, whether prepared by a Council or by the Secretary, should identify what the FMP is designed to accomplish (i.e., the management objectives to be attained in regulating the fishery under consideration). In establishing objectives, Councils balance biological constraints with human needs, reconcile present and future costs and benefits, and integrate the diversity of public and private interests. If objectives are in conflict, priorities should be established among them.

(2) How objectives are defined is important to the management process. Objectives should address the problems of a particular fishery. The objectives should be clearly stated, practicably attainable, framed in terms of definable events and measurable benefits, and based upon a comprehensive rather than a fragmentary approach to the problems addressed. An FMP should make a clear distinction between objectives and the management measures chosen to achieve them. The objectives of each FMP provide the context within which the Secretary will judge the consistency of an FMP's conservation and management measures with the national standards.

(c) *Word usage.* The word usage refers to all regulations in this subpart.

(1) *Must* is used, instead of “shall”, to denote an obligation to act; it is used primarily when referring to requirements of the Magnuson-Stevens Act, the logical extension thereof, or of other applicable law.

(2) *Shall* is used only when quoting statutory language directly, to avoid confusion with the future tense.

(3) *Should* is used to indicate that an action or consideration is strongly recommended to fulfill the Secretary's interpretation of the Magnuson-Stevens Act, and is a factor reviewers will look for in evaluating a SOPP or FMP.

(4) *May* is used in a permissive sense.

(5) *May not* is proscriptive; it has the same force as “must not.”

(6) *Will* is used descriptively, as distinguished from denoting an obligation to act or the future tense.

(7) *Could* is used when giving examples, in a hypothetical, permissive sense.

(8) *Can* is used to mean “is able to,” as distinguished from “may.”

(9) *Examples* are given by way of illustration and further explanation. They are not inclusive lists; they do not limit options.

(10) *Analysis,* as a paragraph heading, signals more detailed guidance as to the type of discussion and examination an FMP should contain to demonstrate compliance with the standard in question.

(11) *Council* includes the Secretary, as applicable, when preparing FMPs or amendments under section 304(c) and (g) of the Magnuson-Stevens Act.

(12) *Stock or stock complex* is used as a synonym for “fishery” in the sense of the Magnuson-Stevens Act's first definition of the term; that is, as “one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographic, scientific, technical, recreational, or economic characteristics,” as distinguished from the Magnuson-Stevens Act's second definition of fishery as “any fishing for such stocks.”

[61 FR 32540, June 24, 1996, as amended at 63 FR 7075, Feb. 12, 1998; 63 FR 24229, May 1, 1998]

§ 600.310 National Standard 1—Optimum Yield.

(a) *Standard 1.* Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the OY from each fishery for the U.S. fishing industry.

(b) *General.* The determination of OY is a decisional mechanism for resolving the Magnuson-Stevens Act's multiple purposes and policies, implementing an FMP's objectives, and balancing the various interests that comprise the national welfare. OY is based on MSY, or on MSY as it may be reduced under paragraph (f)(3) of this section. The most important limitation on the specification of OY is that the choice of OY and the conservation and management measures proposed to achieve it must prevent overfishing.

(c) *MSY.* Each FMP should include an estimate of MSY as explained in this section.

(1) *Definitions.* (i) “MSY” is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.

(ii) “MSY control rule” means a harvest strategy which, if implemented, would be expected to result in a long-term average catch approximating MSY.

(iii) “MSY stock size” means the long-term average size of the stock or stock complex, measured in terms of spawning biomass or other appropriate units, that would be achieved under an MSY control rule in which the fishing mortality rate is constant.

(2) *Options in specifying MSY.* (i) Because MSY is a theoretical concept, its estimation in practice is conditional on the choice of an MSY control rule. In choosing an MSY control rule, Councils should be guided by the characteristics of the fishery, the FMP's objectives, and the best scientific information available. The simplest MSY control rule is to remove a constant catch in each year that the estimated stock size exceeds an appropriate lower bound, where this catch is chosen so as to maximize the resulting long-term average yield. Other examples include the following: Remove a constant fraction of the biomass in each year, where this fraction is chosen so as to maximize the resulting long-term average yield; allow a constant level of escapement in each year, where this level is chosen so as to maximize the resulting long-term average yield; vary the fishing mortality rate as a continuous function of stock size, where the parameters of this function are constant and chosen so as to maximize the resulting long-term average yield. In any MSY control rule, a given stock size is associated with a given level of fishing mortality and a given level of potential harvest, where the long-term average of these potential harvests provides an estimate of MSY.

(ii) Any MSY values used in determining OY will necessarily be estimates, and these will typically be associated with some level of uncertainty. Such estimates must be based on the best scientific information available (see §600.315) and must incorporate appropriate consideration of risk (see §600.335). Beyond these requirements, however, Councils have a reasonable degree of latitude in determining which estimates to use and how these estimates are to be expressed. For example, a point estimate of MSY may be expressed by itself or together with a confidence interval around that estimate.

(iii) In the case of a mixed-stock fishery, MSY should be specified on a stock-by-stock basis. However, where MSY cannot be specified for each stock, then MSY may be specified on the basis of one or more species as an indicator for the mixed stock as a whole or for the fishery as a whole.

(iv) Because MSY is a long-term average, it need not be estimated annually, but it must be based on the best scientific information available, and should be re-estimated as required by changes in environmental or ecological conditions or new scientific information.

(3) *Alternatives to specifying MSY.* When data are insufficient to estimate MSY directly, Councils should adopt other measures of productive capacity that can serve as reasonable proxies for MSY, to the extent possible. Examples include various reference points defined in terms of relative spawning per recruit. For instance, the fishing mortality rate that reduces the long-term average level of spawning per recruit to 30–40 percent of the long-term average that would be expected in the absence of fishing may be a reasonable proxy for the MSY fishing mortality rate. The long-term average stock size obtained by fishing year after year at this rate under average recruitment may be a reasonable proxy for the MSY stock size, and the long-term average catch so obtained may be a reasonable proxy for MSY. The natural mortality rate may also be a reasonable proxy for the MSY fishing mortality rate. If a reliable estimate of pristine stock size (i.e., the long-term average stock size that would be expected in the absence of fishing) is available, a stock size approximately 40 percent of this value may be a reasonable proxy for the MSY stock size, and the product of this stock size and the natural mortality rate may be a reasonable proxy for MSY.

(d) *Overfishing* —(1) *Definitions.* (i) “To overfish” means to fish at a rate or level that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.

(ii) “Overfishing” occurs whenever a stock or stock complex is subjected to a rate or level of fishing mortality that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.

(iii) In the Magnuson-Stevens Act, the term “overfished” is used in two senses: First, to describe any stock or stock complex that is subjected to a rate or level of fishing mortality meeting the criterion in paragraph (d)(1)(i) of this section, and second, to describe any stock or stock complex whose size is sufficiently small that a change in management practices is required in order to achieve an appropriate level and rate of rebuilding. To avoid confusion, this section uses “overfished” in the second sense only.

(2) *Specification of status determination criteria.* Each FMP must specify, to the extent possible, objective and measurable status determination criteria for each stock or stock complex covered by that FMP and provide an analysis of how the status determination criteria were chosen and how they relate to reproductive potential. Status determination criteria must be expressed in a way that enables the Council and the Secretary to monitor the stock or stock complex and determine annually whether overfishing is occurring and whether the stock or stock complex is overfished. In all cases, status determination criteria must specify both of the following:

(i) *A maximum fishing mortality threshold or reasonable proxy thereof.* The fishing mortality threshold may be expressed either as a single number or as a function of spawning biomass or other measure of productive capacity. The fishing mortality threshold must not exceed the fishing mortality rate or level associated with the relevant MSY control rule. Exceeding the fishing mortality threshold for a period of 1 year or more constitutes overfishing.

(ii) *A minimum stock size threshold or reasonable proxy thereof.* The stock size threshold should be expressed in terms of spawning biomass or other measure of productive capacity. To the extent possible, the stock size threshold should equal whichever of the following is greater: One-half the MSY stock size, or the minimum stock size at which rebuilding to the MSY level would be expected to occur within 10 years if the stock or stock complex were exploited at the maximum fishing mortality threshold specified under paragraph (d)(2)(i) of this section. Should the actual size of the stock or stock complex in a given year fall below this threshold, the stock or stock complex is considered overfished.

(3) *Relationship of status determination criteria to other national standards* —(i) *National standard 2.* Status determination criteria must be based on the best scientific information available (see §600.315). When data are insufficient to estimate MSY, Councils should base status determination criteria on reasonable proxies thereof to the extent possible (also see paragraph (c)(3) of this section). In cases where scientific data are severely limited, effort should also be directed to identifying and gathering the needed data.

(ii) *National standard 3.* The requirement to manage interrelated stocks of fish as a unit or in close coordination notwithstanding (see §600.320), status determination criteria should generally be specified in terms of the level of stock aggregation for which the best scientific information is available (also see paragraph (c)(2)(iii) of this section).

(iii) *National standard 6.* Councils must build into the status determination criteria appropriate consideration of risk, taking into account uncertainties in estimating harvest, stock conditions, life history parameters, or the effects of environmental factors (see §600.335).

(4) *Relationship of status determination criteria to environmental change.* Some short-term environmental changes can alter the current size of a stock or stock complex without affecting the long-term productive capacity of the stock or stock complex. Other environmental changes affect both the current size of the stock or stock complex and the long-term productive capacity of the stock or stock complex.

(i) If environmental changes cause a stock or stock complex to fall below the minimum stock size threshold without affecting the long-term productive capacity of the stock or stock complex, fishing mortality must be constrained sufficiently to allow rebuilding within an acceptable time frame (also see paragraph (e)(4)(ii) of this section). Status determination criteria need not be respecified.

(ii) If environmental changes affect the long-term productive capacity of the stock or stock complex, one or more components of the status determination criteria must be respecified. Once status determination criteria have been respecified, fishing mortality may or may not have to be reduced, depending on the status of the stock or stock complex with respect to the new criteria.

(iii) If manmade environmental changes are partially responsible for a stock or stock complex being in an overfished condition, in addition to controlling effort, Councils should recommend restoration of habitat and other ameliorative programs, to the extent possible (see also the guidelines issued pursuant to section 305(b) of the Magnuson-Stevens Act for Council actions concerning essential fish habitat).

(5) *Secretarial approval of status determination criteria.* Secretarial approval or disapproval of proposed status determination criteria will be based on consideration of whether the proposal:

(i) Has sufficient scientific merit.

(ii) Contains the elements described in paragraph (d)(2) of this section.

(iii) Provides a basis for objective measurement of the status of the stock or stock complex against the criteria.

(iv) Is operationally feasible.

(6) *Exceptions.* There are certain limited exceptions to the requirement to prevent overfishing. Harvesting one species of a mixed-stock complex at its optimum level may result in the overfishing of another stock component in the complex. A Council may decide to permit this type of overfishing only if all of the following conditions are satisfied:

(i) It is demonstrated by analysis (paragraph (f)(6) of this section) that such action will result in long-term net benefits to the Nation.

(ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.

(iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA.

(e) *Ending overfishing and rebuilding overfished stocks* —(1) *Definition.* A threshold, either maximum fishing mortality or minimum stock size, is being “approached” whenever it is projected that the threshold will be breached within 2 years, based on trends in fishing effort, fishery resource size, and other appropriate factors.

(2) *Notification.* The Secretary will immediately notify a Council and request that remedial action be taken whenever the Secretary determines that:

(i) Overfishing is occurring;

(ii) A stock or stock complex is overfished;

(iii) The rate or level of fishing mortality for a stock or stock complex is approaching the maximum fishing mortality threshold;

(iv) A stock or stock complex is approaching its minimum stock size threshold; or

(v) Existing remedial action taken for the purpose of ending previously identified overfishing or rebuilding a previously identified overfished stock or stock complex has not resulted in adequate progress.

(3) *Council action.* Within 1 year of such time as the Secretary may identify that overfishing is occurring, that a stock or stock complex is overfished, or that a threshold is being approached, or such time as a Council may be notified of the same under paragraph (e)(2) of this section, the Council must take remedial action by preparing an FMP, FMP amendment, or proposed regulations. This remedial action must be designed to accomplish all of the following purposes that apply:

(i) If overfishing is occurring, the purpose of the action is to end overfishing.

(ii) If the stock or stock complex is overfished, the purpose of the action is to rebuild the stock or stock complex to the MSY level within an appropriate time frame.

(iii) If the rate or level of fishing mortality is approaching the maximum fishing mortality threshold (from below), the purpose of the action is to prevent this threshold from being reached.

(iv) If the stock or stock complex is approaching the minimum stock size threshold (from above), the purpose of the action is to prevent this threshold from being reached.

(4) *Constraints on Council action.* (i) In cases where overfishing is occurring, Council action must be sufficient to end overfishing.

(ii) In cases where a stock or stock complex is overfished, Council action must specify a time period for rebuilding the stock or stock complex that satisfies the requirements of section 304(e)(4)(A) of the Magnuson-Stevens Act.

(A) A number of factors enter into the specification of the time period for rebuilding:

(*1*) The status and biology of the stock or stock complex;

(*2*) Interactions between the stock or stock complex and other components of the marine ecosystem (also referred to as “other environmental conditions”);

(*3*) The needs of fishing communities;

(*4*) Recommendations by international organizations in which the United States participates; and

(*5*) Management measures under an international agreement in which the United States participates.

(B) These factors enter into the specification of the time period for rebuilding as follows:

(*1*) The lower limit of the specified time period for rebuilding is determined by the status and biology of the stock or stock complex and its interactions with other components of the marine ecosystem, and is defined as the amount of time that would be required for rebuilding if fishing mortality were eliminated entirely.

(*2*) If the lower limit is less than 10 years, then the specified time period for rebuilding may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the United States participates, except that no such upward adjustment can result in the specified time period exceeding 10 years, unless management measures under an international agreement in which the United States participates dictate otherwise.

(*3*) If the lower limit is 10 years or greater, then the specified time period for rebuilding may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the United States participates, except that no such upward adjustment can exceed the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life-history characteristics. For example, suppose a stock could be rebuilt within 12 years in the absence of any fishing mortality, and has a mean generation time of 8 years. The rebuilding period, in this case, could be as long as 20 years.

(C) A rebuilding program undertaken after May 1, 1998 commences as soon as the first measures to rebuild the stock or stock complex are implemented.

(D) In the case of rebuilding plans that were already in place as of May 1, 1998, such rebuilding plans must be reviewed to determine whether they are in compliance with all requirements of the Magnuson-Stevens Act, as amended by the Sustainable Fisheries Act.

(iii) For fisheries managed under an international agreement, Council action must reflect traditional participation in the fishery, relative to other nations, by fishermen of the United States.

(5) *Interim measures.* The Secretary, on his/her own initiative or in response to a Council request, may implement interim measures to reduce overfishing under section 305(c) of the Magnuson-Stevens Act, until such measures can be replaced by an FMP, FMP amendment, or regulations taking remedial action.

(i) These measures may remain in effect for no more than 180 days, but may be extended for an additional 180 days if the public has had an opportunity to comment on the measures and, in the case of Council-recommended measures, the Council is actively preparing an FMP, FMP amendment, or proposed regulations to address overfishing on a permanent basis. Such measures, if otherwise in compliance with the provisions of the Magnuson-Stevens Act, may be implemented even though they are not sufficient by themselves to stop overfishing of a fishery.

(ii) If interim measures are made effective without prior notice and opportunity for comment, they should be reserved for exceptional situations, because they affect fishermen without providing the usual procedural safeguards. A Council recommendation for interim measures without notice-and-comment rulemaking will be considered favorably if the short-term benefits of the measures in reducing overfishing outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants in the fishery.

(f) *OY* — (1) *Definitions.* (i) The term “optimum,” with respect to the yield from a fishery, means the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities and taking into account the protection of marine ecosystems; that is prescribed on the basis of the MSY from the fishery, as reduced by any relevant economic, social, or ecological factor; and, in the case of an overfished fishery, that provides for rebuilding to a level consistent with producing the MSY in such fishery.

(ii) In national standard 1, use of the phrase “achieving, on a continuing basis, the OY from each fishery” means producing, from each fishery, a long-term series of catches such that the average catch is equal to the average OY and such that status determination criteria are met.

(2) *Values in determination.* In determining the greatest benefit to the Nation, these values that should be weighed are food production, recreational opportunities, and protection afforded to marine ecosystems. They should receive serious attention when considering the economic, social, or ecological factors used in reducing MSY to obtain OY.

(i) The benefits of food production are derived from providing seafood to consumers, maintaining an economically viable fishery together with its attendant contributions to the national, regional, and local economies, and utilizing the capacity of the Nation's fishery resources to meet nutritional needs.

(ii) The benefits of recreational opportunities reflect the quality of both the recreational fishing experience and non-consumptive fishery uses such as ecotourism, fish watching, and recreational diving, and the contribution of recreational fishing to the national, regional, and local economies and food supplies.

(iii) The benefits of protection afforded to marine ecosystems are those resulting from maintaining viable populations (including those of unexploited species), maintaining evolutionary and ecological processes (e.g., disturbance regimes, hydrological processes, nutrient cycles), maintaining the evolutionary potential of species and ecosystems, and accommodating human use.

(3) *Factors relevant to OY.* Because fisheries have finite capacities, any attempt to maximize the measures of benefit described in paragraph (f)(2) of this section will inevitably encounter practical constraints. One of these is MSY. Moreover, various factors can constrain the optimum level of catch to a value less than MSY. The Magnuson-Stevens Act's definition of OY identifies three categories of such factors: Social, economic, and ecological. Not every factor will be relevant in every fishery. For some fisheries, insufficient information may be available with respect to some factors to provide a basis for corresponding reductions in MSY.

(i) *Social factors.* Examples are enjoyment gained from recreational fishing, avoidance of gear conflicts and resulting disputes, preservation of a way of life for fishermen and their families, and dependence of local communities on a fishery. Other factors that may be considered include the cultural place of subsistence fishing, obligations under Indian treaties, and worldwide nutritional needs.

(ii) *Economic factors.* Examples are prudent consideration of the risk of overharvesting when a stock's size or productive capacity is uncertain, satisfaction of consumer and recreational needs, and encouragement of domestic and export markets for U.S.-harvested fish. Other factors that may be considered include the value of fisheries, the level of capitalization, the decrease in cost per unit of catch afforded by an increase in stock size, and the attendant increase in catch per unit of effort, alternate employment opportunities, and economies of coastal areas.

(iii) *Ecological factors.* Examples are stock size and age composition, the vulnerability of incidental or unregulated stocks in a mixed-stock fishery, predator-prey or competitive interactions, and dependence of marine mammals and birds or endangered species on a stock of fish. Also important are ecological or environmental conditions that stress marine organisms, such as natural and manmade changes in wetlands or nursery grounds, and effects of pollutants on habitat and stocks.

(4) *Specification.* (i) The amount of fish that constitutes the OY should be expressed in terms of numbers or weight of fish. However, OY may be expressed as a formula that converts periodic stock assessments into target harvest levels; in terms of an annual harvest of fish or shellfish having a minimum weight, length, or other measurement; or as an amount of fish taken only in certain areas, in certain seasons, with particular gear, or by a specified amount of fishing effort.

(ii) Either a range or a single value may be specified for OY. Specification of a numerical, fixed-value OY does not preclude use of annual target harvest levels that vary with stock size. Such target harvest levels may be prescribed on the basis of an OY control rule similar to the MSY control rule described in paragraph (c)(1)(ii) of this section, but designed to achieve OY on average, rather than MSY. The annual harvest level obtained under an OY control rule must always be less than or equal to the harvest level that would be obtained under the MSY control rule.

(iii) All fishing mortality must be counted against OY, including that resulting from bycatch, scientific research, and any other fishing activities.

(iv) The OY specification should be translatable into an annual numerical estimate for the purposes of establishing any TALFF and analyzing impacts of the management regime. There should be a mechanism in the FMP for periodic reassessment of the OY specification, so that it is responsive to changing circumstances in the fishery.

(v) The determination of OY requires a specification of MSY, which may not always be possible or meaningful. However, even where sufficient scientific data as to the biological characteristics of the stock do not exist, or where the period of exploitation or investigation has not been long enough for adequate understanding of stock dynamics, or where frequent large-scale fluctuations in stock size diminish the meaningfulness of the MSY concept, the OY must still be based on the best scientific information available. When data are insufficient to estimate MSY directly, Councils should adopt other measures of productive capacity that can serve as reasonable proxies for MSY to the extent possible (also see paragraph (c)(3) of this section).

(vi) In a mixed-stock fishery, specification of a fishery-wide OY may be accompanied by management measures establishing separate annual target harvest levels for the individual stocks. In such cases, the sum of the individual target levels should not exceed OY.

(5) *OY and the precautionary approach.* In general, Councils should adopt a precautionary approach to specification of OY. A precautionary approach is characterized by three features:

(i) Target reference points, such as OY, should be set safely below limit reference points, such as the catch level associated with the fishing mortality rate or level defined by the status determination criteria. Because it is a target reference point, OY does not constitute an absolute ceiling, but rather a desired result. An FMP must contain conservation and management measures to achieve OY, and provisions for information collection that are designed to determine the degree to which OY is achieved on a continuing basis—that is, to result in a long-term average catch equal to the long-term average OY, while meeting the status determination criteria. These measures should allow for practical and effective implementation and enforcement of the management regime, so that the harvest is allowed to reach OY, but not to exceed OY by a substantial amount. The Secretary has an obligation to implement and enforce the FMP so that OY is achieved. If management measures prove unenforceable—or too restrictive, or not rigorous enough to realize OY—they should be modified; an alternative is to reexamine the adequacy of the OY specification. Exceeding OY does not necessarily constitute overfishing. However, even if no overfishing resulted from exceeding OY, continual harvest at a level above OY would violate national standard 1, because OY was not achieved on a continuing basis.

(ii) A stock or stock complex that is below the size that would produce MSY should be harvested at a lower rate or level of fishing mortality than if the stock or stock complex were above the size that would produce MSY.

(iii) Criteria used to set target catch levels should be explicitly risk averse, so that greater uncertainty regarding the status or productive capacity of a stock or stock complex corresponds to greater caution in setting target catch levels. Part of the OY may be held as a reserve to allow for factors such as uncertainties in estimates of stock size and DAH. If an OY reserve is established, an adequate mechanism should be included in the FMP to permit timely release of the reserve to domestic or foreign fishermen, if necessary.

(6) *Analysis.* An FMP must contain an assessment of how its OY specification was determined (section 303(a)(3) of the Magnuson-Stevens Act). It should relate the explanation of overfishing in paragraph (d) of this section to conditions in the particular fishery and explain how its choice of OY and conservation and management measures will prevent overfishing in that fishery. A Council must identify those economic, social, and ecological factors relevant to management of a particular fishery, then evaluate them to determine the amount, if any, by which MSY exceeds OY. The choice of a particular OY must be carefully defined and documented to show that the OY selected will produce the greatest benefit to the Nation. If overfishing is permitted under paragraph (d)(6) of this section, the assessment must contain a justification in terms of overall benefits, including a comparison of benefits under alternative management measures, and an analysis of the risk of any species or ecologically significant unit thereof reaching a threatened or endangered status, as well as the risk of any stock or stock complex falling below its minimum stock size threshold.

(7) *OY and foreign fishing.* Section 201(d) of the Magnuson-Stevens Act provides that fishing by foreign nations is limited to that portion of the OY that will not be harvested by vessels of the United States.

(i) *DAH.* Councils must consider the capacity of, and the extent to which, U.S. vessels will harvest the OY on an annual basis. Estimating the amount that U.S. fishing vessels will actually harvest is required to determine the surplus.

(ii) *DAP.* Each FMP must assess the capacity of U.S. processors. It must also assess the amount of DAP, which is the sum of two estimates: The estimated amount of U.S. harvest that domestic processors will process, which may be based on historical performance or on surveys of the expressed intention of manufacturers to process, supported by evidence of contracts, plant expansion, or other relevant information; and the estimated amount of fish that will be harvested by domestic vessels, but not processed (e.g., marketed as fresh whole fish, used for private consumption, or used for bait).

(iii) *JVP.* When DAH exceeds DAP, the surplus is available for JVP. JVP is derived from DAH.

[63 FR 24229, May 1, 1998]

§ 600.315 National Standard 2—Scientific Information.

(a) *Standard 2.* Conservation and management measures shall be based upon the best scientific information available.

(b) *FMP development.* The fact that scientific information concerning a fishery is incomplete does not prevent the preparation and implementation of an FMP (see related §§600.320(d)(2) and 600.340(b).

(1) Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature. Successful fishery management depends, in part, on the timely availability, quality, and quantity of scientific information, as well as on the thorough analysis of this information, and the extent to which the information is applied. If there are conflicting facts or opinions relevant to a particular point, a Council may choose among them, but should justify the choice.

(2) FMPs must take into account the best scientific information available at the time of preparation. Between the initial drafting of an FMP and its submission for final review, new information often becomes available. This new information should be incorporated into the final FMP where practicable; but it is unnecessary to start the FMP process over again, unless the information indicates that drastic changes have occurred in the fishery that might require revision of the management objectives or measures.

(c) *FMP implementation.* (1) An FMP must specify whatever information fishermen and processors will be required or requested to submit to the Secretary. Information about harvest within state boundaries, as well as in the EEZ, may be collected if it is needed for proper implementation of the FMP and cannot be obtained otherwise. The FMP should explain the practical utility of the information specified in monitoring the fishery, in facilitating inseason management decisions, and in judging the performance of the management regime; it should also consider the effort, cost, or social impact of obtaining it.

(2) An FMP should identify scientific information needed from other sources to improve understanding and management of the resource, marine ecosystem, and the fishery (including fishing communities).

(3) The information submitted by various data suppliers should be comparable and compatible, to the maximum extent possible.

(d) *FMP amendment.* FMPs should be amended on a timely basis, as new information indicates the necessity for change in objectives or management measures.

(e) *SAFE Report.* (1) The SAFE report is a document or set of documents that provides Councils with a summary of information concerning the most recent biological condition of stocks and the marine ecosystems in the FMU and the social and economic condition of the recreational and commercial fishing interests, fishing communities, and the fish processing industries. It summarizes, on a periodic basis, the best available scientific information concerning the past, present, and possible future condition of the stocks, marine ecosystems, and fisheries being managed under Federal regulation.

(i) The Secretary has the responsibility to assure that a SAFE report or similar document is prepared, reviewed annually, and changed as necessary for each FMP. The Secretary or Councils may utilize any combination of talent from Council, state, Federal, university, or other sources to acquire and analyze data and produce the SAFE report.

(ii) The SAFE report provides information to the Councils for determining annual harvest levels from each stock, documenting significant trends or changes in the resource, marine ecosystems, and fishery over time, and assessing the relative success of existing state and Federal fishery management programs. Information on bycatch and safety for each fishery should also be summarized. In addition, the SAFE report may be used to update or expand previous environmental and regulatory impact documents, and ecosystem and habitat descriptions.

(iii) Each SAFE report must be scientifically based, and cite data sources and interpretations.

(2) Each SAFE report should contain information on which to base harvest specifications.

(3) Each SAFE report should contain a description of the maximum fishing mortality threshold and the minimum stock size threshold for each stock or stock complex, along with information by which the Council may determine:

(i) Whether overfishing is occurring with respect to any stock or stock complex, whether any stock or stock complex is overfished, whether the rate or level of fishing mortality applied to any stock or stock complex is approaching the maximum fishing mortality threshold, and whether the size of any stock or stock complex is approaching the minimum stock size threshold.

(ii) Any management measures necessary to provide for rebuilding an overfished stock or stock complex (if any) to a level consistent with producing the MSY in such fishery.

(4) Each SAFE report may contain additional economic, social, community, essential fish habitat, and ecological information pertinent to the success of management or the achievement of objectives of each FMP.

(5) Each SAFE report may contain additional economic, social, and ecological information pertinent to the success of management or the achievement of objectives of each FMP.

[61 FR 32540, June 24, 1996, as amended at 63 FR 24233, May 1, 1998]

§ 600.320 National Standard 3—Management Units.

(a) *Standard 3.* To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(b) *General.* The purpose of this standard is to induce a comprehensive approach to fishery management. The geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries. Wherever practicable, an FMP should seek to manage interrelated stocks of fish.

(c) *Unity of management.* Cooperation and understanding among entities concerned with the fishery (e.g., Councils, states, Federal Government, international commissions, foreign nations) are vital to effective management. Where management of a fishery involves multiple jurisdictions, coordination among the several entities should be sought in the development of an FMP. Where a range overlaps Council areas, one FMP to cover the entire range is preferred. The Secretary designates which Council(s) will prepare the FMP, under section 304(f) of the Magnuson-Stevens Act.

(d) *Management unit.* The term “management unit” means a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives.

(1) *Basis.* The choice of a management unit depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives. For example:

(i) *Biological* —could be based on a stock(s) throughout its range.

(ii) *Geographic* —could be an area.

(iii) *Economic* —could be based on a fishery supplying specific product forms.

(iv) *Technical* —could be based on a fishery utilizing a specific gear type or similar fishing practices.

(v) *Social* —could be based on fishermen as the unifying element, such as when the fishermen pursue different species in a regular pattern throughout the year.

(vi) *Ecological* —could be based on species that are associated in the ecosystem or are dependent on a particular habitat.

(2) *Conservation and management measures.* FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ. The measures need not be identical for each geographic area within the management unit, if the FMP justifies the differences. A management unit may contain, in addition to regulated species, stocks of fish for which there is not enough information available to specify MSY and OY or to establish management measures, so that data on these species may be collected under the FMP.

(e) *Analysis.* To document that an FMP is as comprehensive as practicable, it should include discussions of the following:

(1) The range and distribution of the stocks, as well as the patterns of fishing effort and harvest.

(2) Alternative management units and reasons for selecting a particular one. A less-than-comprehensive management unit may be justified if, for example, complementary management exits or is planned for a separate geographic area or for a distinct use of the stocks, or if the unmanaged portion of the resource is immaterial to proper management.

(3) Management activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures. Where state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations. The FMP should also discuss the impact that Federal regulations will have on state management activities.

(4) Management activities of other countries having an impact on the fishery, and how the FMP's management measures are designed to take into account these impacts. International boundaries may be dealt with in several ways. For example:

(i) By limiting the management unit's scope to that portion of the stock found in U.S. waters;

(ii) By estimating MSY for the entire stock and then basing the determination of OY for the U.S. fishery on the portion of the stock within U.S. waters; or

(iii) By referring to treaties or cooperative agreements.

[61 FR 32540, June 24, 1996, as amended at 63 FR 24234, May 1, 1998]

§ 600.325 National Standard 4—Allocations.

(a) *Standard 4.* Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be:

(1) Fair and equitable to all such fishermen.

(2) Reasonably calculated to promote conservation.

(3) Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(b) *Discrimination among residents of different states.* An FMP may not differentiate among U.S. citizens, nationals, resident aliens, or corporations on the basis of their state of residence. An FMP may not incorporate or rely on a state statute or regulation that discriminates against residents of another state. Conservation and management measures that have different effects on persons in various geographic locations are permissible if they satisfy the other guidelines under Standard 4. Examples of these precepts are:

(1) An FMP that restricted fishing in the EEZ to those holding a permit from state X would violate Standard 4 if state X issued permits only to its own citizens.

(2) An FMP that closed a spawning ground might disadvantage fishermen living in the state closest to it, because they would have to travel farther to an open area, but the closure could be justified under Standard 4 as a conservation measure with no discriminatory intent.

(c) *Allocation of fishing privileges.* An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, and if the measures conform with paragraphs (c)(3)(i) through (c)(3)(iii) of this section.

(1) *Definition.* An “allocation” or “assignment” of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4. Adoption of an FMP that merely perpetuates existing fishing practices may result in an allocation, if those practices directly distribute the opportunity to participate in the fishery. Allocations of fishing privileges include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational and commercial fishermen, assignment of ocean areas to different gear users, and limitation of permits to a certain number of vessels or fishermen.

(2) *Analysis of allocations.* Each FMP should contain a description and analysis of the allocations existing in the fishery and of those made in the FMP. The effects of eliminating an existing allocation system should be examined. Allocation schemes considered, but rejected by the Council, should be included in the discussion. The analysis should relate the recommended allocations to the FMP's objectives and OY specification, and discuss the factors listed in paragraph (c)(3) of this section.

(3) *Factors in making allocations.* An allocation of fishing privileges must be fair and equitable, must be reasonably calculated to promote conservation, and must avoid excessive shares. These tests are explained in paragraphs (c)(3)(i) through (c)(3)(iii) of this section:

(i) *Fairness and equity.* (A) An allocation of fishing privileges should be rationally connected to the achievement of OY or with the furtherance of a legitimate FMP objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. For instance, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of long-time participants in the fishery. On the other hand, there is a rational connection between an objective of harvesting shrimp at their maximum size and closing a nursery area to trawling.

(B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as “fair and equitable,” if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo. Where relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.

(ii) *Promotion of conservation.* Numerous methods of allocating fishing privileges are considered “conservation and management” measures under section 303 of the Magnuson-Stevens Act. An allocation scheme may promote conservation by encouraging a rational, more easily managed use of the resource. Or, it may promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product. To the extent that rebuilding plans or other conservation and management measures that reduce the overall harvest in a fishery are necessary, any harvest restrictions or recovery benefits must be allocated fairly and equitably among the commercial, recreational, and charter fishing sectors of the fishery.

(iii) *Avoidance of excessive shares.* An allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers that would not otherwise exist.

(iv) *Other factors.* In designing an allocation scheme, a Council should consider other factors relevant to the FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery by present participants and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing.

[61 FR 32540, June 24, 1996, as amended at 63 FR 24234, May 1, 1998]

§ 600.330 National Standard 5—Efficiency.

(a) *Standard 5.* Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(b) *Efficiency in the utilization of resources* —(1) *General.* The term “utilization” encompasses harvesting, processing, marketing, and non-consumptive uses of the resource, since management decisions affect all sectors of the industry. In considering efficient utilization of fishery resources, this standard highlights one way that a fishery can contribute to the Nation's benefit with the least cost to society: Given a set of objectives for the fishery, an FMP should contain management measures that result in as efficient a fishery as is practicable or desirable.

(2) *Efficiency.* In theory, an efficient fishery would harvest the OY with the minimum use of economic inputs such as labor, capital, interest, and fuel. Efficiency in terms of aggregate costs then becomes a conservation objective, where “conservation” constitutes wise use of all resources involved in the fishery, not just fish stocks.

(i) In an FMP, management measures may be proposed that allocate fish among different groups of individuals or establish a system of property rights. Alternative measures examined in searching for an efficient outcome will result in different distributions of gains and burdens among identifiable user groups. An FMP should demonstrate that management measures aimed at efficiency do not simply redistribute gains and burdens without an increase in efficiency.

(ii) Management regimes that allow a fishery to operate at the lowest possible cost (e.g., fishing effort, administration, and enforcement) for a particular level of catch and initial stock size are considered efficient. Restrictive measures that unnecessarily raise any of those costs move the regime toward inefficiency. Unless the use of inefficient techniques or the creation of redundant fishing capacity contributes to the attainment of other social or biological objectives, an FMP may not contain management measures that impede the use of cost-effective techniques of harvesting, processing, or marketing, and should avoid creating strong incentives for excessive investment in private sector fishing capital and labor.

(c) *Limited access.* A “system for limiting access,” which is an optional measure under section 303(b) of the Magnuson-Stevens Act, is a type of allocation of fishing privileges that may be considered to contribute to economic efficiency or conservation. For example, limited access may be used to combat overfishing, overcrowding, or overcapitalization in a fishery to achieve OY. In an unutilized or underutilized fishery, it may be used to reduce the chance that these conditions will adversely affect the fishery in the future, or to provide adequate economic return to pioneers in a new

fishery. In some cases, limited entry is a useful ingredient of a conservation scheme, because it facilitates application and enforcement of other management measures.

(1) *Definition.* Limited access (or limited entry) is a management technique that attempts to limit units of effort in a fishery, usually for the purpose of reducing economic waste, improving net economic return to the fishermen, or capturing economic rent for the benefit of the taxpayer or the consumer. Common forms of limited access are licensing of vessels, gear, or fishermen to reduce the number of units of effort, and dividing the total allowable catch into fishermen's quotas (a stock-certificate system). Two forms (i.e., Federal fees for licenses or permits in excess of administrative costs, and taxation) are not permitted under the Magnuson-Stevens Act, except for fees allowed under section 304(d)(2).

(2) *Factors to consider.* The Magnuson-Stevens Act ties the use of limited access to the achievement of OY. An FMP that proposes a limited access system must consider the factors listed in section 303(b)(6) of the Magnuson-Stevens Act and in §600.325(c)(3). In addition, it should consider the criteria for qualifying for a permit, the nature of the interest created, whether to make the permit transferable, and the Magnuson-Stevens Act's limitations on returning economic rent to the public under section 304(d). The FMP should also discuss the costs of achieving an appropriate distribution of fishing privileges.

(d) *Analysis.* An FMP should discuss the extent to which overcapitalization, congestion, economic waste, and inefficient techniques in the fishery reduce the net benefits derived from the management unit and prevent the attainment and appropriate allocation of OY. It should also explain, in terms of the FMP's objectives, any restriction placed on the use of efficient techniques of harvesting, processing, or marketing. If, during FMP development, the Council considered imposing a limited-entry system, the FMP should analyze the Council's decision to recommend or reject limited access as a technique to achieve efficient utilization of the resources of the fishing industry.

(e) *Economic allocation.* This standard prohibits only those measures that distribute fishery resources among fishermen on the basis of economic factors alone, and that have economic allocation as their only purpose. Where conservation and management measures are recommended that would change the economic structure of the industry or the economic conditions under which the industry operates, the need for such measures must be justified in light of the biological, ecological, and social objectives of the FMP, as well as the economic objectives.

[61 FR 32540, June 24, 1996, as amended at 63 FR 7075, Feb. 12, 1998; 63 FR 24234, May 1, 1998]

§ 600.335 National Standard 6—Variations and Contingencies.

(a) *Standard 6.* Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(b) *Conservation and management.* Each fishery exhibits unique uncertainties. The phrase “conservation and management” implies the wise use of fishery resources through a management regime that includes some protection against these uncertainties. The particular regime chosen must be flexible enough to allow timely response to resource, industry, and other national and regional needs. Continual data acquisition and analysis will help the development of management measures to compensate for variations and to reduce the need for substantial buffers. Flexibility in the management regime and the regulatory process will aid in responding to contingencies.

(c) *Variations.* (1) In fishery management terms, variations arise from biological, social, and economic occurrences, as well as from fishing practices. Biological uncertainties and lack of knowledge can hamper attempts to estimate stock size and strength, stock location in time and space, environmental/habitat changes, and ecological interactions. Economic uncertainty may involve changes in foreign or domestic market conditions, changes in operating costs, drifts toward overcapitalization, and economic perturbations caused by changed fishing patterns. Changes in fishing practices, such as the introduction of new gear, rapid increases or decreases in harvest effort, new fishing strategies, and the effects of new management techniques, may also create uncertainties. Social changes could involve increases or decreases in recreational fishing, or the movement of people into or out of fishing activities due to such factors as age or educational opportunities.

(2) Every effort should be made to develop FMPs that discuss and take into account these vicissitudes. To the extent practicable, FMPs should provide a suitable buffer in favor of conservation. Allowances for uncertainties should be factored into the various elements of an FMP. Examples are:

(i) *Reduce OY.* Lack of scientific knowledge about the condition of a stock(s) could be reason to reduce OY.

(ii) *Establish a reserve.* Creation of a reserve may compensate for uncertainties in estimating domestic harvest, stock conditions, or environmental factors.

(iii) *Adjust management techniques.* In the absence of adequate data to predict the effect of a new regime, and to avoid creating unwanted variations, a Council could guard against producing drastic changes in fishing patterns, allocations, or practices.

(iv) *Highlight habitat conditions.* FMPs may address the impact of pollution and the effects of wetland and estuarine degradation on the stocks of fish; identify causes of pollution and habitat degradation and the authorities having jurisdiction to regulate or influence such activities; propose recommendations that the Secretary will convey to those authorities to alleviate such problems; and state the views of the Council on unresolved or anticipated issues.

(d) *Contingencies.* Unpredictable events—such as unexpected resource surges or failures, fishing effort greater than anticipated, disruptive gear conflicts, climatic conditions, or environmental catastrophes—are best handled by establishing a flexible management regime that contains a range of management options through which it is possible to act quickly without amending the FMP or even its regulations.

(1) The FMP should describe the management options and their consequences in the necessary detail to guide the Secretary in responding to changed circumstances, so that the Council preserves its role as policy-setter for the fishery. The description should enable the public to understand what may happen under the flexible regime, and to comment on the options.

(2) FMPs should include criteria for the selection of management measures, directions for their application, and mechanisms for timely adjustment of management measures comprising the regime. For example, an FMP could include criteria that allow the Secretary to open and close seasons, close fishing grounds, or make other adjustments in management measures.

(3) Amendment of a flexible FMP would be necessary when circumstances in the fishery change substantially, or when a Council adopts a different management philosophy and objectives.

§ 600.340 National Standard 7—Costs and Benefits.

(a) *Standard 7.* Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) *Necessity of Federal management* —(1) *General.* The principle that not every fishery needs regulation is implicit in this standard. The Magnuson-Stevens Act requires Councils to prepare FMPs only for overfished fisheries and for other fisheries where regulation would serve some useful purpose and where the present or future benefits of regulation would justify the costs. For example, the need to collect data about a fishery is not, by itself, adequate justification for preparation of an FMP, since there are less costly ways to gather the data (see §600.320(d)(2). In some cases, the FMP preparation process itself, even if it does not culminate in a document approved by the Secretary, can be useful in supplying a basis for management by one or more coastal states.

(2) *Criteria.* In deciding whether a fishery needs management through regulations implementing an FMP, the following general factors should be considered, among others:

(i) The importance of the fishery to the Nation and to the regional economy.

(ii) The condition of the stock or stocks of fish and whether an FMP can improve or maintain that condition.

(iii) The extent to which the fishery could be or is already adequately managed by states, by state/Federal programs, by Federal regulations pursuant to FMPs or international commissions, or by industry self-regulation, consistent with the policies and standards of the Magnuson-Stevens Act.

(iv) The need to resolve competing interests and conflicts among user groups and whether an FMP can further that resolution.

(v) The economic condition of a fishery and whether an FMP can produce more efficient utilization.

(vi) The needs of a developing fishery, and whether an FMP can foster orderly growth.

(vii) The costs associated with an FMP, balanced against the benefits (see paragraph (d) of this section as a guide).

(c) *Alternative management measures.* Management measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments. Factors such as fuel costs, enforcement costs, or the burdens of collecting data may well suggest a preferred alternative.

(d) *Analysis.* The supporting analyses for FMPs 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. In determining the benefits and costs of management measures, each management strategy considered and its impacts on different user groups in the fishery should be evaluated. This requirement need not produce an elaborate, formalistic cost/benefit analysis. Rather, an evaluation of effects and costs, especially of differences among workable alternatives, including the status quo, is adequate. If quantitative estimates are not possible, qualitative estimates will suffice.

(1) *Burdens.* Management measures should be designed to give fishermen the greatest possible freedom of action in conducting business and pursuing recreational opportunities that are consistent with ensuring wise use of the resources and reducing conflict in the fishery. The type and level of burden placed on user groups by the regulations need to be identified. Such an examination should include, for example: Capital outlays; operating and maintenance costs; reporting costs; administrative, enforcement, and information costs; and prices to consumers. Management measures may shift costs from one level of government to another, from one part of the private sector to another, or from the government to the private sector. Redistribution of costs through regulations is likely to generate controversy. A discussion of these and any other burdens placed on the public through FMP regulations should be a part of the FMP's supporting analyses.

(2) *Gains.* The relative distribution of gains may change as a result of instituting different sets of alternatives, as may the specific type of gain. The analysis of benefits should focus on the specific gains produced by each alternative set of management measures, including the status quo. The benefits to society that result from the alternative management measures should be identified, and the level of gain assessed.

[61 FR 32540, June 24, 1996, as amended at 63 FR 7075, Feb. 12, 1998; 63 FR 24234, May 1, 1998]

§ 600.345 National Standard 8—Communities.

(a) *Standard 8.* Conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that are based upon the best scientific information available in order to:

(1) Provide for the sustained participation of such communities; and

(2) To the extent practicable, minimize adverse economic impacts on such communities.

(b) *General.* (1) This standard requires that an FMP take into account the importance of fishery resources to fishing communities. This consideration, however, is within the context of the conservation requirements of the Magnuson-Stevens Act. Deliberations regarding the importance of fishery resources to affected fishing communities, therefore, must not compromise the achievement of conservation requirements and goals of the FMP. Where the preferred alternative negatively affects the sustained participation of fishing communities, the FMP should discuss the rationale for selecting this alternative over another with a lesser impact on fishing communities. All other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative.

(2) This standard does not constitute a basis for allocating resources to a specific fishing community nor for providing preferential treatment based on residence in a fishing community.

(3) The term “fishing community” means a community that is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing or on directly related fisheries-dependent services and industries (for example, boatyards, ice suppliers, tackle shops).

(4) The term “sustained participation” means continued access to the fishery within the constraints of the condition of the resource.

(c) *Analysis.* (1) FMPs must examine the social and economic importance of fisheries to communities potentially affected by management measures. For example, severe reductions of harvests for conservation purposes may decrease employment opportunities for fishermen and processing plant

workers, thereby adversely affecting their families and communities. Similarly, a management measure that results in the allocation of fishery resources among competing sectors of a fishery may benefit some communities at the expense of others.

(2) An appropriate vehicle for the analyses under this standard is the fishery impact statement required by section 303(a)(9) of the Magnuson-Stevens Act. Qualitative and quantitative data may be used, including information provided by fishermen, dealers, processors, and fisheries organizations and associations. In cases where data are severely limited, effort should be directed to identifying and gathering needed data.

(3) To address the sustained participation of fishing communities that will be affected by management measures, the analysis should first identify affected fishing communities and then assess their differing levels of dependence on and engagement in the fishery being regulated. The analysis should also specify how that assessment was made. The best available data on the history, extent, and type of participation of these fishing communities in the fishery should be incorporated into the social and economic information presented in the FMP. The analysis does not have to contain an exhaustive listing of all communities that might fit the definition; a judgment can be made as to which are primarily affected. The analysis should discuss each alternative's likely effect on the sustained participation of these fishing communities in the fishery.

(4) The analysis should assess the likely positive and negative social and economic impacts of the alternative management measures, over both the short and the long term, on fishing communities. Any particular management measure may economically benefit some communities while adversely affecting others. Economic impacts should be considered both for individual communities and for the group of all affected communities identified in the FMP. Impacts of both consumptive and non-consumptive uses of fishery resources should be considered.

(5) A discussion of social and economic impacts should identify those alternatives that would minimize adverse impacts on these fishing communities within the constraints of conservation and management goals of the FMP, other national standards, and other applicable law.

[63 FR 24234, May 1, 1998, as amended at 73 FR 67810, Nov. 17, 2008]

§ 600.350 National Standard 9—Bycatch.

(a) *Standard 9.* Conservation and management measures shall, to the extent practicable:

(1) Minimize bycatch; and

(2) To the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(b) *General.* This national standard requires Councils to consider the bycatch effects of existing and planned conservation and management measures. Bycatch can, in two ways, impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation. First, bycatch can increase substantially the uncertainty concerning total fishing-related mortality, which makes it more difficult to assess the status of stocks, to set the appropriate OY and define overfishing levels, and to ensure that OYs are attained and overfishing levels are not exceeded. Second, bycatch may also preclude other more productive uses of fishery resources.

(c) *Definition—Bycatch.* The term “bycatch” means fish that are harvested in a fishery, but that are not sold or kept for personal use.

(1) *Inclusions.* Bycatch includes the discard of whole fish at sea or elsewhere, including economic discards and regulatory discards, and fishing mortality due to an encounter with fishing gear that does not result in capture of fish (i.e., unobserved fishing mortality).

(2) *Exclusions.* Bycatch excludes the following:

(i) Fish that legally are retained in a fishery and kept for personal, tribal, or cultural use, or that enter commerce through sale, barter, or trade.

(ii) Fish released alive under a recreational catch-and-release fishery management program. A catch-and-release fishery management program is one in which the retention of a particular species is prohibited. In such a program, those fish released alive would not be considered bycatch.

(iii) Fish harvested in a commercial fishery managed by the Secretary under Magnuson-Stevens Act sec. 304(g) or the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971d) or highly migratory species harvested in a commercial fishery managed by a Council under the Magnuson-Stevens Act or the Western and Central Pacific Fisheries Convention Implementation Act, that are not regulatory discards and that are tagged and released alive under a scientific tagging and release program established by the Secretary.

(d) *Minimizing bycatch and bycatch mortality.* The priority under this standard is first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided must, to the extent practicable, be returned to the sea alive. Any proposed conservation and management measure that does not give priority to avoiding the capture of bycatch species must be supported by appropriate analyses. In their evaluation, the Councils must consider the net benefits to the Nation, which include, but are not limited to: Negative impacts on affected stocks; incomes accruing to participants in directed fisheries in both the short and long term; incomes accruing to participants in fisheries that target the bycatch species; environmental consequences; non-market values of bycatch species, which include non-consumptive uses of bycatch species and existence values, as well as recreational values; and impacts on other marine organisms. To evaluate conservation and management measures relative to this and other national standards, as well as to evaluate total fishing mortality, Councils must—

(1) *Promote development of a database on bycatch and bycatch mortality in the fishery to the extent practicable.* A review and, where necessary, improvement of data collection methods, data sources, and applications of data must be initiated for each fishery to determine the amount, type, disposition, and other characteristics of bycatch and bycatch mortality in each fishery for purposes of this standard and of section 303(a)(11) and (12) of the Magnuson-Stevens Act. Bycatch should be categorized to focus on management responses necessary to minimize bycatch and bycatch mortality to the extent practicable. When appropriate, management measures, such as at-sea monitoring programs, should be developed to meet these information needs.

(2) *For each management measure, assess the effects on the amount and type of bycatch and bycatch mortality in the fishery.* Most conservation and management measures can affect the amounts of bycatch or bycatch mortality in a fishery, as well as the extent to which further reductions in bycatch are practicable. In analyzing measures, including the status quo, Councils should assess the impacts of minimizing bycatch and bycatch mortality, as well as consistency of the selected measure with other national standards and applicable laws. The benefits of minimizing bycatch to the extent practicable should be identified and an assessment of the impact of the selected measure on bycatch and bycatch mortality provided. Due to limitations on the information available, fishery managers may not be able to generate precise estimates of bycatch and bycatch mortality or other effects for each alternative. In the absence of quantitative estimates of the impacts of each alternative, Councils may use qualitative measures. Information on the amount and type of bycatch should be summarized in the SAFE reports.

(3) *Select measures that, to the extent practicable, will minimize bycatch and bycatch mortality.* (i) A determination of whether a conservation and management measure minimizes bycatch or bycatch mortality to the extent practicable, consistent with other national standards and maximization of net benefits to the Nation, should consider the following factors:

(A) Population effects for the bycatch species.

(B) Ecological effects due to changes in the bycatch of that species (effects on other species in the ecosystem).

(C) Changes in the bycatch of- other species of fish and the resulting population and ecosystem effects.

(D) Effects on marine mammals and birds.

(E) Changes in fishing, processing, disposal, and marketing costs.

(F) Changes in fishing practices and behavior of fishermen.

(G) Changes in research, administration, and enforcement costs and management effectiveness.

(H) Changes in the economic, social, or cultural value of fishing activities and nonconsumptive uses of fishery resources.

(I) Changes in the distribution of benefits and costs.

(J) Social effects.

(ii) The Councils should adhere to the precautionary approach found in the Food and Agriculture Organization of the United Nations (FAO) Code of Conduct for Responsible Fisheries (Article 6.5), which is available from the Director, Publications Division, FAO, Viale delle Terme di Caracalla, 00100 Rome, Italy, when faced with uncertainty concerning any of the factors listed in this paragraph (d)(3).

(4) *Monitor selected management measures.* Effects of implemented measures should be evaluated routinely. Monitoring systems should be established prior to fishing under the selected management measures. Where applicable, plans should be developed and coordinated with industry and other concerned organizations to identify opportunities for cooperative data collection, coordination of data management for cost efficiency, and avoidance of duplicative effort.

(e) *Other considerations.* Other applicable laws, such as the MMPA, the ESA, and the Migratory Bird Treaty Act, require that Councils consider the impact of conservation and management measures on living marine resources other than fish; i.e., marine mammals and birds.

[63 FR 24235, May 1, 1998, as amended at 73 FR 67811, Nov. 17, 2008]

§ 600.355 National Standard 10—Safety of Life at Sea.

(a) *Standard 10.* Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

(b) *General.* (1) Fishing is an inherently dangerous occupation where not all hazardous situations can be foreseen or avoided. The standard directs Councils to reduce that risk in crafting their management measures, so long as they can meet the other national standards and the legal and practical requirements of conservation and management. This standard is not meant to give preference to one method of managing a fishery over another.

(2) The qualifying phrase “to the extent practicable” recognizes that regulation necessarily puts constraints on fishing that would not otherwise exist. These constraints may create pressures on fishermen to fish under conditions that they would otherwise avoid. This standard instructs the Councils to identify and avoid those situations, if they can do so consistent with the legal and practical requirements of conservation and management of the resource.

(3) For the purposes of this national standard, the safety of the fishing vessel and the protection from injury of persons aboard the vessel are considered the same as “safety of human life at sea. The safety of a vessel and the people aboard is ultimately the responsibility of the master of that vessel. Each master makes many decisions about vessel maintenance and loading and about the capabilities of the vessel and crew to operate safely in a variety of weather and sea conditions. This national standard does not replace the judgment or relieve the responsibility of the vessel master related to vessel safety. The Councils, the USCG, and NMFS, through the consultation process of paragraph (d) of this section, will review all FMPs, amendments, and regulations during their development to ensure they recognize any impact on the safety of human life at sea and minimize or mitigate that impact where practicable.

(c) *Safety considerations.* The following is a non-inclusive list of safety considerations that should be considered in evaluating management measures under national standard 10.

(1) *Operating environment.* Where and when a fishing vessel operates is partly a function of the general climate and weather patterns of an area. Typically, larger vessels can fish farther offshore and in more adverse weather conditions than smaller vessels. An FMP should try to avoid creating situations that result in vessels going out farther, fishing longer, or fishing in weather worse than they generally would have in the absence of management measures. Where these conditions are unavoidable, management measures should mitigate these effects, consistent with the overall management goals of the fishery.

(2) *Gear and vessel loading requirements.* A fishing vessel operates in a very dynamic environment that can be an extremely dangerous place to work. Moving heavy gear in a seaway creates a dangerous situation on a vessel. Carrying extra gear can also significantly reduce the stability of a fishing vessel, making it prone to capsizing. An FMP should consider the safety and stability of fishing vessels when requiring specific gear or requiring the removal of gear from the water. Management measures should reflect a sensitivity to these issues and provide methods of mitigation of these situations wherever possible.

(3) *Limited season and area fisheries.* Fisheries where time constraints for harvesting are a significant factor and with no flexibility for weather, often called “derby” fisheries, can create serious safety problems. To participate fully in such a fishery, fishermen may fish in bad weather and overload their vessel with catch and/or gear. Where these conditions exist, FMPs should attempt to mitigate these effects and avoid them in new management regimes, as discussed in paragraph (e) of this section.

(d) *Consultation.* During preparation of any FMP, FMP amendment, or regulation that might affect safety of human life at sea, the Council should consult with the USCG and the fishing industry as to the nature and extent of any adverse impacts. This consultation may be done through a Council

advisory panel, committee, or other review of the FMP, FMP amendment, or regulations. Mitigation, to the extent practicable, and other safety considerations identified in paragraph (c) of this section should be included in the FMP.

(e) *Mitigation measures.* There are many ways in which an FMP may avoid or provide alternative measures to reduce potential impacts on safety of human life at sea. The following is a list of some factors that could be considered when management measures are developed:

(1) Setting seasons to avoid hazardous weather.

(2) Providing for seasonal or trip flexibility to account for bad weather (weather days).

(3) Allowing for pre- and post-season “soak time” to deploy and pick up fixed gear, so as to avoid overloading vessels with fixed gear.

(4) Tailoring gear requirements to provide for smaller or lighter gear for smaller vessels.

(5) Avoiding management measures that require hazardous at-sea inspections or enforcement if other comparable enforcement could be accomplished as effectively.

(6) Limiting the number of participants in the fishery.

(7) Spreading effort over time and area to avoid potential gear and/or vessel conflicts.

(8) Implementing management measures that reduce the race for fish and the resulting incentives for fishermen to take additional risks with respect to vessel safety.

[63 FR 24236, May 1, 1998]

The National Environmental Policy Act of 1969, as amended

(Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

Purpose

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332].

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban an rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with

particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;
4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345].

In exercising its powers, functions, and duties under this Act, the Council shall --

1. consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry,

agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

2. utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346].

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a].

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

The Environmental Quality Improvement Act, as amended (Pub. L. No. 91- 224, Title II, April 3, 1970; Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984.

42 USC § 4372.

(a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this chapter referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Office of Management and Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions ;under this chapter and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of Title 5, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of Title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by --

1. providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91- 190;
2. assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;
3. reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;
4. promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encouraging the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;
5. assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;
6. assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established throughout the Federal Government;
7. collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 3324(a) and (b) of Title 31 and section 5 of Title 41 in carrying out his functions.

42 USC § 4373. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

42 USC § 4374. There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following fiscal years which sums are in addition to those contained in Public Law 91- 190:

(a) $2,126,000 for the fiscal year ending September 30, 1979.

(b) $3,000,000 for the fiscal years ending September 30, 1980, and September 30, 1981.

(c) $44,000 for the fiscal years ending September 30, 1982, 1983, and 1984.

(d) $480,000 for each of the fiscal years ending September 30, 1985 and 1986.

42 USC § 4375.

(a) There is established an Office of Environmental Quality Management Fund (hereinafter referred to as the "Fund") to receive advance payments from other agencies or accounts that may be used solely to finance --

1. study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and
2. Federal interagency environmental projects (including task forces) in which the Office participates.

(b) Any study contract or project that is to be financed under subsection (a) of this section may be initiated only with the approval of the Director.

(c) The Director shall promulgate regulations setting forth policies and procedures for operation of the Fund.

Regulatory Flexibility Act
as amended by
Small Business Regulatory Enforcement Fairness Act

SECTIONS

601. Definitions
602. Regulatory agenda
603. Initial regulatory flexibility analysis
604. Final regulatory flexibility analysis
605. Avoidance of duplicative or unnecessary analyses
606. Effect on other law
607. Preparation of analyses
608. Procedure for waiver or delay of completion
609. Procedures for gathering comments
610. Periodic review of rules
611. Judicial review
612. Reports and intervention rights

SEC. 601. DEFINITIONS [CITE: 5 USC 601]

For purposes of this chapter–

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; and

(7) the term "collection of information"--

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either--

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) recordkeeping requirement.--The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1165; amended Pub. L. 104-121, title II, Sec. 241(a)(2), Mar. 29, 1996, 110 Stat. 864.)

SEC. 602. REGULATORY AGENDA [CITE: 5 USC 602]

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain--

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166.)

SEC. 603. INITIAL REGULATORY FLEXIBILITY ANALYSIS [CITE: 5 USC 603]

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) 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;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain 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. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as–

(a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(c) the use of performance rather than design standards; and

(d) an exemption from coverage of the rule, or any part thereof, for such small entities.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166; amended Pub. L. 104-121, title II, Sec. 241(a)(1), Mar. 29, 1996, 110 Stat. 864.)

SEC. 604. FINAL REGULATORY FLEXIBILITY ANALYSIS [CITE: 5 USC 604]

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a succinct statement of the need for, and objectives of, the rule;

(2) 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;

(3) 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;

(4) 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

(5) 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.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub. L. 104-121, title II, Sec. 241(b), Mar. 29, 1996, 110 Stat. 864.)

SEC. 605. AVOIDANCE OF DUPLICATIVE OR UNNECESSARY ANALYSES [CITE: 5 USC 605]

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub. L. 104-121, title II, Sec. 243(a), Mar. 29, 1996, 110 Stat. 866.)

SEC. 606. EFFECT ON OTHER LAW [CITE: 5 USC 606]

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.)

SEC. 607. PREPARATION OF ANALYSES [CITE: 5 USC 607]

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.)

SEC. 608. PROCEDURE FOR WAIVER OR DELAY OF COMPLETION [CITE: 5 USC 608]

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.)

SEC. 609. PROCEDURES FOR GATHERING COMMENTS [CITE: 5 USC 609]

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as–

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter–

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168; amended Pub. L. 104-121, title II, Sec. 244(a), Mar. 29, 1996, 110 Stat. 867.)

SEC. 610. PERIODIC REVIEW OF RULES [CITE: 5 USC 610]

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors--

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169.)

SEC. 611. JUDICIAL REVIEW [CITE: 5 USC 611]

(a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to--

(1) remanding the rule to the agency, and

(2) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169; amended Pub. L. 104-121, title II, Sec. 242, Mar. 29, 1996, 110 Stat. 865.)

SEC. 612. REPORTS AND INTERVENTION RIGHTS [CITE: 5 USC 612]

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(e) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub. L. 104-121, title II, Sec. 243(b), Mar. 29, 1996, 110 Stat. 866.)

Federal Register
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Presidential Documents

Title 3—

The President

Executive Order 12866 of September 30, 1993

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are 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. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.*

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall 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) Each agency shall 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) Each agency shall 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, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall 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) Each agency shall 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) Each agency shall 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) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall 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) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall 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.

(12) Each agency shall 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.

Sec. 2. *Organization.* An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive order: (a) ''Advisors'' refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) ''Agency,'' unless otherwise indicated, means any authority of the United States that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) ''Director'' means the Director of OMB.

(d) ''Regulation'' or ''rule'' means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) ''Regulatory action'' means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) ''Significant regulatory action'' means any regulatory action that is likely to result in a rule that may:

(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 legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term ''agency'' or ''agencies'' shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term ''agency'' or ''agencies'' shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group (''Working Group''), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. *Existing Regulations.* In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) 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;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this 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

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and (iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. *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 shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

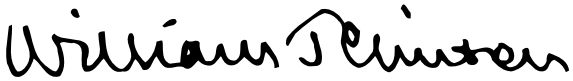
Sec. 8. *Publication.* Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. *Agency Authority.* Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. *Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. *Revocations.* Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,
September 30, 1993.

[FR citation 58 FR 51735]

Executive Order 12866 of September 30, 1993, as amended by E.O. 13258 of February 26, 2002 and E.O. 13422 of January 18, 2007

REGULATORY PLANNING AND REVIEW

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are 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. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.* (a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

(2) Each agency shall 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) Each agency shall 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, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall 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) Each agency shall 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) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall 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) Each agency shall avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies.

(11) Each agency shall tailor its regulations and guidance documents 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.

(12) Each agency shall draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. *Organization.* An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and guidance documents and assuring that the regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President and regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations and guidance documents, as provided by this Executive order.

(c) *Assistance.* In fulfilling his responsibilities under this Executive order, the President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Director of the Office of Science and Technology Policy; (7) the Deputy Assistant to the President and Director for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Chairman of the Council on Environmental Quality and Director of the Office on Environmental Quality; (12) the Assistant to the President for Homeland Security; and (13) the Administrator of OIRA, who also shall coordinate

communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a regulation that may:

(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 legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

(g) "Guidance document" means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue

(h) "Significant guidance document" –

(1) means a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

(A) lead to an annual effect 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;

(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or

(D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order; and

(2) does not include:

(A) Guidance documents on regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(B) Guidance documents that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(C) Guidance documents on regulations that are limited to agency organization, management, or personnel matters; or

(D) Any other category of guidance documents exempted by the Administrator of OIRA.

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting*. The Director may convene a meeting of agency heads and other government personnel as appropriate to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda*. For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan*. For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Officer, and the Plan shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits of each rule as well as the agency's best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order, and specific citation to such statute, order, or other legal authority;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies and the Advisors.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency and the Advisors.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies and the Advisors.

(6) The Director may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility and the Advisors. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Director on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences*. The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. *Existing Regulations*. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Director, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) 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;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this 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

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. *Resolution of Conflicts.* (a) 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 shall be resolved by the President, with the assistance of the Chief of Staff to the President ("Chief of Staff"), acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

(b) Resolution of such conflicts shall be informed by recommendations developed by the Chief of Staff, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

(c) During the Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Chief of Staff shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

(d) At the end of this review process, the President, or the Chief of Staff acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. *Publication.* Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Director, as provided under section 7 of this order. Upon receipt of this request, the Director shall notify OIRA and

the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. *Significant Guidance Documents*. Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency's compliance with the requirements of this section. Upon the request of the Administrator, for each matter identified as, or determined by the Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before issuance of the significant guidance document.

Sec. 10. *Preservation of Agency Authority.* Nothing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof, including the authority of the Attorney General relating to litigation.

Sec. 11. *Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 12. *Revocations.* Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

NORTH CAROLINA FISHERIES ASSOCIATION, INC. and GEORGES

SEAFOOD, INC., Plaintiffs, STATE OF NORTH CAROLINA, ex

rel. James B. Hunt, Jr., Governor, and NORTH CAROLINA

DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES,

Plaintiffs-Intervenors v. WILLIAM M. DALEY, Secretary of

Commerce, Defendant

CIVIL ACTION NO. 2:97cv339

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF

VIRGINIA, NORFOLK DIVISION

16 F. Supp. 2d 647; 1997 U.S. Dist.

October 10, 1997, Decided

October 10, 1997, Filed; Nunc Pro Tunc September 29, 1997

DISPOSITION: [**1] Quota REMANDED to the Secretary of Commerce. Counts Three and Five DISMISSED WITH PREJUDICE; Defendant's motion for summary judgment on Counts Two, Four, Seven, Eight and Ten GRANTED.

COUNSEL: For NORTH CAROLINA FISHERIES ASSOCIATION, INC., GEORGES SEAFOOD,

INC., plaintiffs: Waverley Lee Berkley, III, Mark Steven Davis, McGuire, Woods, Battle & Boothe, Norfolk, VA.

For THE STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, intervenor-plaintiffs: Michael Vincent Hernandez, Professor, Virginia Beach, VA.

For THE STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, intervenor-plaintiffs: Daniel F. McLawhorn, North Carolina Department of Justice, Raleigh, NC.

For WILLIAM M. DALEY, defendant: George M. Kelley, III, United States Attorney's Office, Norfolk, VA.

For WILLIAM M. DALEY, defendant: Lois J. Schiffer, U.S. Department of Justice, Washington, DC.

For WILLIAM M. DALEY, defendant: Eileen Sobeck, Kelly E. Mofield, Office of the Attorney General, Washington, DC.

For NATURAL RESOURCES DEFENSE COUNCIL, movant: Richard Ernest John Slaney, Wolcott, Rivers, Wheary, Basnight & Kelly, P.C., Virginia [**2] Beach, VA.

JUDGES: Robert G. Doumar, UNITED STATES DISTRICT JUDGE.

OPINIONBY: Robert G. Doumar

OPINION: [*648] ORDER & OPINION

In its simplest terms, this case is an effort by the fisherman of North Carolina to increase [*649] the amount of summer flounder that they are authorized to land for the year 1997. Much of the problem centers on an overfishing of some 592,748 pounds of fish which they allegedly caught in excess of their quota in the year 1995. In addition, Plaintiffs and Intervenor-Plaintiffs raise problems with the National Marine Fisheries Service's computing of the catch, its timing in making determinations, and its consideration of the economic effects on the fisherman. The age old problem of the regulator versus the regulated and the differing interpretations each places on certain factors is involved.

Using a combination of inputs, the Defendant Secretary fixes a quota for fisherman to land summer flounder. This quota applies to both recreational and commercial fisherman. Here, we are concerned with the commercial fisherman and their quota. The ceremonial courtroom was jam-packed with fisherman on the day of the hearing. Mostly these fisherman are from small communities in Eastern North Carolina [**3] bordering the sounds and barrier beaches.

This case is before the court on Plaintiffs', Intervenor-Plaintiffs' and Defendant's cross-motions for summary judgment. In summary, the Court finds for the Plaintiffs and Intervenor-Plaintiffs on Counts One, Six and Nine. The Court REMANDS the 1997 quota to the Secretary of Commerce and ORDERS the Secretary to conduct a level of economic analysis consistent with his obligations under the Regulatory Flexibility Act and National Standard 8 of the Magnuson-Stevens Act as discussed below. As to Count Nine, the Court ORDERS the Secretary to publish each year's adjusted quota within a reasonable period of time to enable fisherman to utilize the quota appropriately. The Court DISMISSES Counts Three and Five WITH PREJUDICE; and the Court GRANTS Defendant's motion for summary judgment on Counts Two, Four, Seven, Eight and Ten.

I. Background

The summer flounder fisheries on the East Coast are subject to a detailed management scheme which is designed to reduce the mortality rate of summer flounder. The fishery management plan (FMP) for summer flounder was initially adopted by the National Marine Fisheries Service in 1988. Several amendments [**4] to that plan have been made since that time. Part of this management scheme includes the establishment of a coastwide quota for summer flounder which is apportioned between the various states on the East Coast.

The quota is established by the National Marine Fisheries Services (NMFS) after considering the recommendations of the Summer Flounder Monitoring Committee. n1 In determining the quota, a stock assessment is calculated which is an assessment of the number of summer flounder in the entire fishery. This is established by considering many factors including the prior year's catch based on landings reported. In determining this figure, it is generally accepted that the landings will be under-reported by approximately 30%. n2 Therefore, the stock assessment for 1997 included a reduction of the final population estimate by the amount reported overfished in 1995 plus approximately 30% for under-reporting. In determining the 1997 quota and assessment, the figures for 1995 are highly determinative because the 1996 figures are not yet available when the agency begins its calculations. See infra note 14.

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n1 The Summer Flounder Monitoring Committee consists of representatives from the Atlantic States Marine Fisheries Commission, the New England Fisheries Management Council, the Mid-Atlantic Fishery Management Council, and the National Marine Fisheries Service. [**5]

n2 The Court bases this figure on how the 1997 quota was determined. See Minutes of the Mid-Atlantic Fishery Management Council Meeting, September 17-19, 1997, at 6, 9, 58, A.R. at 307, 310, 359. The figure for under-reporting varies from 20% to 50%. Id. Thus, 30% is an approximation.

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The quota is allocated between commercial and recreational fisheries. North Carolina is allocated slightly less than 27.5% of the coastwide commercial quota. 50 C.F.R. § 648.100(d)(1). NMFS is required by federal regulation to announce the proposed commercial quota for each year on October 15 of the.previous year. 50 C.F.R. § 648.100(c). Furthermore, if a state overfishes in any [*650] given year, the overages from that year must be deducted from that state's annual quota for the following year, 50 C.F.R. § 648.100(d)(2).

Dealers--persons or firms that receive summer flounder for a commercial purpose--submit weekly reports to NMFS stating the number of fish purchased and the name and permit number of the vessels from which the fish were purchased. Owners and operators also submit fishing vessel trip reports. [**6] In addition to collecting weekly summaries from dealers, NMFS also collects dealer purchase reports to verify the information contained on the weekly summaries. In 1995 and 1996, NMFS did not collect dealer purchase reports from dealers in North Carolina while it did collect these reports from dealers in other states. n3

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n3 The federal government notes in its response that, because North Carolina maintained a trip-ticket system and collected records of all landings of summer flounder in the state, NMFS approached North Carolina in March 1996 to negotiate an agreement whereby data could be shared thus decreasing the burden on dealers in North Carolina. Federal Defendant's Response at 13-14. (The federal government does not explain why it did not collect these reports in 1995.) The negotiations were suspended in December 1996 when North Carolina informed NMFS that the information was confidential under North Carolina law and could not be shared. Id. at 14. A negotiation is not an agreement, therefore, NMFS was not relieved of its responsibility to obtain information in a timely fashion until an agreement was reached.

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[**7]

North Carolina's proposed quota for 1996 was published on November 28, 1995. The final quota was published on January 4, 1996. See infra Figure 1. North Carolina's 1996 quota was 3,049,589 pounds of summer flounder. On December 10, 1996 close to the end of North Carolina's fishing season, the federal government adjusted North Carolina's 1996 quota downward by 592,748 pounds due to an overage from the 1995 season. n4

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n4 North Carolina had previously had its 1996 quota reduced by 5,773 pounds which it voluntarily transferred to Virginia. <=1> 61 Fed. Reg. 10286 (1996).

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On December 18, 1996, the federal government announced the proposed quota for 1997, over two months after it was required to do so. 50 C.F.R. § 648.100(c). Relying on this proposed quota and its meetings with the federal government, North Carolina closed its fishery on January 10, 1997, only ten days after the season opened, in order to reserve 30% of its quota for its fall fishery.

The final quota for 1997 was published on March 7, 1997. North [**8] Carolina's quota was again established at 3,049,589 lbs. Then, as required by federal regulation, the federal government reduced North Carolina's quota by 1,237,149 which was North Carolina's overage for 1996. See infra discussion of Count Seven. North Carolina's 1997 quota was again adjusted downward on July 7, 1997 due to 538,835 pounds of additional overages discovered for 1996. Therefore, North Carolina's current adjusted quota for 1997 is 1,273,605.

Figure 1. This table outlines the actions taken in regard to the North Carolina summer flounder quota in 1996 and 1997.

Pounds Date Action of Flounder Source

1/4/96 1996 NC quota set 3,049,859 lbs. A.R. at 139
3/13/96 NC transfers fish to Virginia (5,773) lbs. Reg. 10286
Adjusted 1996 NC quota 3,043,816 lbs. Reg. 10286
4/5/96 States 1997 quotas adjusted for A.R. at 169 1995 overage; no adjustment for North Carolina
12/10/96 NC quota adjusted for 1995 (592,748) lbs. A.R. at 645 overage
Adjusted 1996 NC quota 2,451,068 lbs. A.R. at 645
12/18/96 1997 quota proposed 3,049,589 lbs. A.R. at 658
4/7/97 1997 NC quota set 3,049,589 lbs. A.R. at 744
NC quota adjusted for 1996 (1,237,149) lbs. A.R. at 744 overage *

Adjusted 1997 NC quota 1,812,440 lbs. A.R. at 744 62 Fed.
7/15/97 NC quota adjusted for (538,835) lbs. Reg. 37741 additional overage discovered for 1996 62 Fed.
Adjusted 1997 NC quota 1,273,605 lbs. Reg. 37741

[**9]

* 1996 overage is calculated by subtracting the 1996 landings from the adjusted 1996 quota: 1996 landings 3,688,217
Adjusted 1996 quota (2,451,068)
1996 overage (1,237,149)

[*651] Plaintiffs, North Carolina Fisheries Association and Georges Seafood, Inc., filed a ten count complaint with this Court on April 4, 1997 alleging that the federal government violated the Regulatory Flexibility Act, the Magnuson-Stevens Act, the Administrative Procedure Act and various federal regulations in setting and adjusting the 1997 quota and in adjusting the 1996 quota. Defendant filed an answer on May 28, 1997. Intervenor-Plaintiffs, the State of North Carolina and the North Carolina Department of Environment, Health and Natural Resources, filed a complaint very similar to the Plaintiffs' complaint on August 26, 1997. n5

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n5 Throughout the rest of this opinion, Plaintiffs and Intervenor-Plaintiffs will be referred to collectively as "Plaintiffs" as these parties adopted each others motions, memorandums in support and responses and divided the issues between them for oral argument.

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All parties filed motions for summary judgment, and the court heard arguments on September 22, 1997. At that time, the Court determined that it was necessary to have an evidentiary hearing on September 29, 1997 to determine whether there was a sufficient economic impact such that the Secretary of Commerce needed to do more fact finding than was evident from the administrative record before determining that there was no significant impact on small businesses. More than 100 men and women who make their living fishing in the various coastal communities in North Carolina came to court willing to testify to the substantial effect that the quota had on their businesses.

II. Analysis

Standard of Review

Both the Regulatory Flexibility Act, <=6> 5 U.S.C. § 611, and the Magnuson-Stevens Act, <=7> 16 U.S.C. § 1855 (f), provide for judicial review of agency actions. Agency actions under both statutes are to be reviewed for compliance in accordance with Administrative Procedure Act, <=8> 5 U.S.C. § 701 et seq. Regulatory Flexibility Act, 5 U.S.C. § 611 (a)(2); Magnuson-Stevens Act, <=10> 16 U.S.C. 1855 U.S.C. § 1855 (f)(1).

The Administrative Procedure Act (APA) states that a reviewing [**11] court shall "hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706 (2)(A).

Therefore, this Court will review the Secretary's actions in accordance with these standards. See Fishermen's Dock Cooperative, Inc. v. Brown, 75 F.3d 164, 167-68 (4th Cir. 1996).

Count One

Plaintiffs allege in Count One of their complaint that NMFS's failure to conduct an initial regulatory flexibility analysis and final regulatory flexibility analysis when setting the 1997 quota violated §§ 603 & 604 of the Regulatory Flexibility Act and thus violated the Administrative Procedure Act.

Defendant argues that he complied with § 605 (b) of the Regulatory Flexibility Act by certifying that there would be no significant economic impact on small entities. n6 The Defendant did make a certification when he published the proposed rule: "The proposed measures would not have a [*652] significant economic impact on a substantial number of small entities." 61 Fed. Reg. 66648 (1996), A.R. at 658. The Secretary also provided the "factual basis" for the certification: "The [**12] recommended 1997 quota is no different from the 1996 coastwide harvest limit of 18.51 million lb." Id. While this is a "statement," it does not provide a factual basis. There is no explanation why the fact that the quotas are the same means there will be no impact. n7 While the federal government cannot be expected to explore every possible contingency before certifying that there is no significant impact, the government must make some showing that it has at least considered the potential effects of this quota, this year. n8 There is no evidence in the Administrative Record that any such consideration was undertaken. n9

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n6 Section 605 (b) of the Regulatory Flexibility Act states:

Sections 603 and 604 of this title [requiring initial and final regulatory flexibility analyses] shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification.[**13]

n7 Ever since Keynes proposed his theories of tax and spending, the government has undertaken to regulate all types of activity while supposedly considering economic effects. The court notes that the Secretary's reasoning provides an interesting new economic theory--regulations which merely adopt the past have no economic effect on the future. The Secretary must believe the economy never changes. This theory must have Keynes in perpetual motion, and the court cautions anyone from treading too close to his grave lest that person be drawn into the ground by the funnel effect created.

n8 Ironically, one of the very changes in condition that led to what appears to the court to be a significant impact is the central issue of this lawsuit--the fact that North Carolina is being forced to pay back 1995 overages, calculations of which were not finalized until December of 1996, when it was far too late to manage the fishery to avoid this outcome. While the overages do have to be subtracted under the existing law, the effect of NMFS's timing in adjusting the 1996 quota was devastating on North Carolina fisherman.

The federal government knew when it made its proposal that the fisherman would be landing substantially less fish because of 1995 and 1996 overages: "I propose holding the harvest level at the level recommended by the Council, however. These measures, and the deduction of 1995 and 1996 overages, will reduce the actual 1997 landings substantially, more in line with the FMP objectives." Memo from Dr. Andrew Rosenberg, Regional Administrator to Rolland Schmitten, Assistant Administrator for Fisheries A.R. at 629. "Many states have exceeded their 1996 quotas and the 1997 quota will be decreased at least 14% as a result . . . ." Id., A.R. at 631.

The government also noted, directly after stating that there would be no significant economic impact because the quota had remained the same from 1996 to 1997, that "these measures may impact the fishing industry negatively for the short term, but will prove beneficial in the future." <=14> 61 Fed. Reg. 66648 (1996). [**14]

n9 NMFS's own guidelines outline the criteria to be used in making this determination:

After reviewing the criteria for significant economic impact on a substantial number of small entities . . . , the Council and the Regional Director may initially conclude that a regulatory flexibility analysis is unnecessary. Section 605 (b) of the RFA allows certification at the time of the proposed or final rule that it will not, if promulgated, have a significant economic impact on a substantial number of small entities. An explanation of the certification of non-significance should be contained in the proposed rule. The certification is a legally conclusive determination that the regulatory flexibility analysis is unnecessary. . . .

A certification should contain the following elements as appropriate made by the "agency head" or one to whom the "agency head" has formally delegated authority for the RFA

I. A statement that the regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities.

ii. A "succinct statement" explaining how the conclusion in 1 above was reached. The statement should include the following elements.

- It should make clear the reasoning for the determination, especially for important regulations.

- It should include the criteria used to determine that the rule will not have a "significant impact" on small entities. NMFS's Guidelines on Regulatory Analysis of Fishery Management Actions ("Guidelines") at 14, Administrative Record ("A.R.") at 61-62.

NMFS's Guidelines define a substantial number of small entities as follows:

In general, a "substantial number" of small entities is more than 20 percent of those entities . . . . This percentage is calculated on the number of small entities affected by the regulations out of the total universe of small entities in a particular industry or segment of that industry. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry (user group, gear type, geographical area, etc.), that segment would be considered the universe for the purposes of this criterion. The 20 percent criterion represents a general guide because there may be instances when the intent of the RFA would imply the need for a regulatory flexibility analysis even though less than 20 percent of the small entities in the industry are affected. Guidelines at 13, A.R. at 60. It should be noted that North Carolina is allotted just under 27.5% of the quota suggesting that North Carolina fisherman constitute at least 20% of the small entities affected by the quota.Furthermore, because of the timing of the final 1996 quota adjustment for North Carolina, the effect of the 1997 quota fell heavily on one geographic segment of the industry, North Carolina. Therefore, under NMFS's Guidelines, North Carolina could be considered a "universe" for the purposes of this guideline.

NMFS outlines five criteria which, if met, would mean that there would be a significant economic impact on small entities:

1. The regulations are likely to result in a reduction in annual gross revenues by more than 5 percent.

2. Annual compliance costs (annualized capital, operating, reporting, etc.) increase total costs of production for small entities by more that [sic] 5 percent.

3. Compliance costs as a percent of sales for small entities are at least 10 percent higher than compliance costs as a percent of sales for large entities.

4. Capital costs of compliance represent a significant portion of capital available to small entities, considering internal cash flow and external financing capabilities.

5. The requirements of the regulation are likely to result in a number of the small entities affected being forced to cease business operations. This number is not precisely defined by SBA, but a "rule of thumb" to trigger this criterion would be 2 percent of the small entities affected.

Guidelines at 14, A.R. at 61. Clearly, both criterion (1) and criterion (5) appear to be implicated in this case.

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The federal government did consider three possible quotas for the 1997 fishery, but the [*653] government failed to do any significant analysis to support its conclusion that there would be no significant impact. The only justification provided by the government was that the quota remained the same from 1996 to 1997. There is no record whatsoever showing that the federal government did any comparison between conditions in 1996 and 1997. A simple conclusory statement that, because the quota was the same in 1997 as it was in 1996, there would be no significant impact, is not an analysis. It is evident to this Court from the some 100 North Carolina fisherman who appeared to testify that their businesses were significantly affected that there was a significant economic impact, and there must have been some change in conditions between the two years to cause such an impact.

The United States Supreme Court has held that an action may be considered arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983). It is clear to [**16] this Court that the Secretary acted arbitrarily and capriciously in failing to give any significant consideration to the economic impact of the quota on the North Carolina fishery.

The Court will not substitute its findings for those of the Secretary of Commerce nor will the Court change the quota. n10 Instead, the Court finds that the Secretary of Commerce violated the Regulatory Flexibility Act and REMANDS this quota to the Secretary and ORDERS him to undertake enough analysis to determine whether the quota had a significant economic impact on the North Carolina fishery. The Court further ORDERS the Secretary to include in his analysis whether the adjusted quota will have a significant economic impact on small entities in North Carolina. The Court ORDERS the Secretary to report the results to this Court by December 1, 1997. If the Secretary finds, after giving the matter a sufficient level of consideration and reducing that consideration to writing, that there is no significant economic effect on a substantial number of small entities, then so be it; but this Court will not stand by and allow the Secretary to attempt to achieve a desirable end by using illegal means.

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n10 During oral argument, counsel for the Defendant noted the federal government's objection to the Court's taking of evidence that was outside the Administrative Record. The Court considered this evidence not to substitute its findings for the Secretary's but to determine whether there was any evidence of such an impact as the record was completely devoid of such evidence or of any showing that NMFS had tried to obtain it.

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Count Six

The Court addresses Count Six at this point in its opinion because Plaintiffs argued [*654] this count collectively with Count One and the two counts are closely related. Plaintiffs argue in Count Six that Defendant failed to meet National Standard 8 of the Magnuson-Stevens Act, <=16> 16 U.S.C. § 1851 (a)(8). Plaintiff's Complaint at PP 52-53. National Standard 8 provides, Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities. 16 U.S.C. § 1851(a)(8).

The Defendant argues that the quota is in line with his obligation to prevent overfishing and rebuild overfished stocks. It is clear that the Defendant has a duty to rebuild overfished stocks, but the defendant also has a statutory obligation to balance that duty with his responsibility to minimize the adverse impacts on fishing communities such as [**18] those in North Carolina.

Defendant again attempts to rely on the fact that he set the 1997 quota at the same level as the 1996 quota as evidence that he complied with National Standard 8. This justification is ludicrous. When the 1996 quota was published, National Standard 8 was not part of the Magnuson-Stevens Act. There is no evidence that this quota complied with National Standard 8 in 1996. Therefore, even if no conditions changed between 1996 and 1997, which the Court highly doubts, there is no evidence that this quota complied with National Standard 8 in 1997. The very reason National Standard 8 was added to the Magnuson-Stevens Act was that there was no requirement in the Act that "fishery management councils . . . try to minimize the adverse economic impacts of fisheries regulations on fishing communities." 142 Cong. Rec. S10794-02, S10825 (daily ed. Sept. 18, 1996) (statement of Sen. Snowe).

Defendant contends that "the Magnuson-Stevens Act does not require a thorough analysis of alternatives" and that a requirement that NMFS "consider a range of alternatives to the proposed rule setting the quota . . . is without legal precedent." Federal Defendant's Response at 11. Certainly, [**19] it is without "legal precedent" as the law only came into effect within the last year. If the Court were to follow the Defendant's line of reasoning, National Standard 8 would be written

out of the statute by NMFS within that same short period of time. Granted, administrative agencies have a substantial amount of discretion in determining how they will follow Congressional mandates. That discretion, however, does not include rewriting or ignoring statutes. NMFS is required not only to "take into account the economic impact," Federal Defendant's Response at 11, but also, "to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8).

Accordingly, the Court finds that the Secretary acted arbitrarily and capriciously in failing to comply with National Standard 8 and REMANDS the quota to the Secretary and ORDERS the Secretary to perform a level of economic analysis sufficient to comply with National Standard 8 and "to the extent practicable, minimize the adverse economic impacts on [fishing] communities." Id. Whether this analysis is done in conjunction with the analysis the Court has ordered in regard to the Regulatory Flexibility Act [**20] or separately is left to the discretion of the Secretary. Again, the Court ORDERS the Secretary to report the results to this Court by December 1, 1997.

Count Two

In Count Two, Plaintiffs argue that Defendant violated the APA because the 1997 summer flounder quota does not allow for the achievement of "optimum yield" on a continuing basis contrary to the requirements of National Standard 1 of the Magnuson-Stevens Act, <=19> 16 U.S.C. § 1851(a)(1). Plaintiff's Complaint at P 36-38.

The crux of Plaintiffs' argument seems to be that because less fish will be fished than the initial quota allows (because of the subtraction of the overages from the quota), optimum yield is not being achieved. [*655] Plaintiffs', however, misconstrue the term "optimum yield." The District of Columbia Circuit has defined optimum yield as "maximum yield less whatever amount need be conserved for economic, social or ecological reasons." C & W Fish Co., Inc. v. Fox, 289 U.S. App. D.C. 323, 931 F.2d 1556, 1563 (D.C. Cir. 1991). This Court has also held that "'optimum yield is not the same as 'maximum yield.'" J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1148 (E.D. Va. 1995). Furthermore, optimum [**21] yield is measured on a continuing basis, therefore "management measures must aim to achieve, on a continuing basis, the optimum yield from each fishery, not the optimum yield in a single year." Id.

The Court finds that the Secretary did not violate National Standard 1 and GRANTS the Secretary's motion for summary judgment on Count Two.

Count Three

During oral argument, Plaintiffs withdrew Count Three which alleged that Defendant violated the APA because it failed to comply with National Standard 2 of the Magnuson-Stevens Act, <=22> 16 U.S.C. § 1851(a)(2), which requires that conservation and management measures be based on the best scientific information available. Plaintiff's Complaint at PP 40-42. Therefore, Count Three is

DISMISSED WITH PREJUDICE.

Count Four

In Count Four, Plaintiffs argue that Defendant violated the APA because the1997 summer flounder quota for North Carolina discriminates between residents ofdifferent states in violation of National Standard 4 of the Magnuson-StevensAct, <=23> 16 U.S.C. § 1851(a)(4). Plaintiff's Complaint at PP 44-46.

Plaintiffs argue that NMFS used North Carolina's numbers in determining North Carolina's overage but used [**22] its own (NMFS's) numbers in calculating the overages of other states. The federal government claims that it used its own numbers in calculating North Carolina's overage for 1995; however, counsel for the Defendant could not point to an accounting of how NMFS arrived at the final number of 592,748 pounds. What is clear is that the federal government was alerted to the discrepancy between its numbers and. North Carolina's numbers for 1995 by the State of North Carolina. At some point after being made aware of the discrepancy, NMFS decided, in economic parlance, to audit North Carolina's numbers in the agency's own fashion.

The Mid-Atlantic Fishery Management Council noted in its discussions regarding the 1997 management measures that under-reporting in the various fisheries may be as high as 30%. Minutes of the Mid-Atlantic Fishery Management Council Meeting, September 17-19, 1997, at 6, 9, 58, A.R. at 307, 310, 359.

Thus, presumably NMFS's audit of North Carolina brought North Carolina's numbers more in line with the actual number of fish caught. Despite NMFS's awareness that its figures are inaccurate and its knowing that there is approximately 30% under-reporting, NMFS did not audit [**23] any other fishery besides North Carolina's. The Court finds that NMFS's actions amount to a violation of National Standard 4. n11

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n11 The Court also notes another differentiation in the treatment of North Carolina: North Carolina was the only state to have its 1996 quota adjusted in December, 1996 long after it was feasible for the state to adopt a plan to account for the overage during the 1996 fishing season.

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The Court finds, however, that this violation did not prejudice the Plaintiffs for two reasons. First, Plaintiffs admit there were overages and their own figures were higher than those ultimately arrived at by the federal government. Second, counsel for Plaintiffs conceded during oral arguments that "for the purposes of [Plaintiffs'] remedy" it was "willing to accept that there is a number of 592 thousand pounds which they took as an overage which should not have been taken." Excerpt of Proceedings, September 22, 1997 Hearing. Although focusing on the fact that the number was derived from North Carolina's [**24] figures, Plaintiffs never made a showing that the number was lower than 592,748 pounds. Therefore, because there is no prejudice shown by the Plaintiffs, the Court must uphold the Secretary's actions as they relate to National Standard 4 as it has no figure to substitute therefore. See J.H. Miles & Co., 910 F. Supp. at 1146.

[*656] Even though the Court finds for the Secretary, it questions NMFS's actions. Auditing only North Carolina and not any other state seems on its face to be extremely unfair because, when analyzing the stock assessment and setting the 1997 quota, under-reporting was assumed. Minutes of the Mid-Atlantic Fishery Management Council Meeting, September 17-19, 1997, at 6-11, A.R. at 307-12. The severely close auditing of North Carolina implies that there was some reason to hold North Carolina to a higher standard than other states. The fact that North Carolina has participated in other suits, see Fishermen's Dock Cooperative, 75 F.3d 164, should not cause NMFS to apply different standards to North Carolina than it applied to other states. If the agency desires in effect to audit North Carolina's records, then it should audit other states as well as it is a coastwide [**25] quota. Thus, although North Carolina was judged differently by the NMFS and the Secretary could not show the basis for NMFS's determination of the overage other than North Carolina's own figures, this Court cannot find prejudice from what Plaintiffs admit was an overage.

Count Five

Plaintiffs withdrew Count Five during oral argument. Count Five alleged that Defendant did not meet National Standard 6 of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(6), requiring that conservation and management measures take into account and allow for variations among, and contingencies in fisheries, fishery resources, and catches. Plaintiff's Complaint at PP 48-50.

Accordingly, this Court DISMISSES Count Five WITH PREJUDICE.

Count Seven

Plaintiffs argue that Defendant violated the APA because the 1997 fishing quota applied overages from 1995 and 1996 against the 1997 quota and therefore violated 50 C.F.R. § 648.100(d)(2). Plaintiff's Complaint at PP 56-60. Section 648.100(d)(2) of 50 C.F.R. states that, "any overages of the commercial quota landed in any state will be deducted from that state's annual quota for the following year."

The federal government complied with the [**26] letter of the law in a most undesirable fashion. n12 On December 10, 1996, the federal government subtracted the 1995 overage of 592,748 pounds from North Carolina's 1996 adjusted quota (adjusted from the transfer to Virginia, see supra note 4, to reach an adjusted 1996 quota of 2,451,068 pounds. North Carolina fisherman landed 3,688,217 pounds of fish in 1996; therefore, there was an overage of 1,237,149 pounds for 1996. This overage was subtracted from the 1997 quota of 3,049,589 to arrive at an adjusted 1997 quota of 1,812,440 pounds. See supra Fig. 1. Although, practically speaking, the timing of the quota adjustment essentially led to 1995's overage being applied to 1997's quota, technically, and therefore, legally, the overage was applied to 1996 quota. Accordingly, the Courts GRANTS summary judgment to the Defendant on Count Seven. n13

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n12 The Governor and Senator from North Carolina after inquiries and meetings had one understanding of what would be deducted from the 1997 quota while the Secretary and his representatives had another. Each side left the same meeting with a different view as to whether the 1995 overage was to be deducted from the 1997 quota. The position of the agency was that only the 1996 overage would be deducted from the 1997 quota. The North Carolina representatives believed the 1995 quota would not be deducted from the 1997 quota. However, later the agency's position was clarified when the 1996 quota was adjusted on December 10, 1996 for the 1995 overage, and then the entire 1996 overage was then deducted from the 1997 quota. Thus, according to the agency, the 1995 overage was not deducted from the 1997 quota. While the agency's action was legally correct, it is not a desirable way to do business. [**27]

n13 The Court takes this opportunity to reiterate its determination below that the Secretary and NMFS must find a way to determine overages and adjust quotas in a reasonable amount of time so that states are able to respond to the information in such a way so as to avoid the devastating effect that this late determination has had on North Carolina.

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Count Eight

Plaintiffs argue that the adjusted quota was set in violation of the APA because 50 C.F.R. § 648.100(c) requires that the Regional Director of NMFS publish a proposed rule in the Federal Register by October 15 to [*657] implement a coast wide commercial quota, but in 1996 the proposed rule was not published until December 18. Plaintiff's Complaint at PP 62-64.

Under the Magnuson-Stevens Act, a party challenging a regulation promulgated by the Secretary must do so within 30 days of promulgation or publication of the regulation. 16 U.S.C. § 1855(f). Therefore, while Plaintiffs are correct that the proposed rule was published more than two months after it was supposed to be, they are barred by the statute of limitations from raising [**28] this claim. The Court GRANTS the Secretary's motion for summary judgment on Count Eight.

Count Nine

In Count Nine, Plaintiffs allege that Defendant violated the APA and the Magnuson-Stevens Act because it failed to adequately police the federally-permitted fisheries dealers to assure that landings were reported accurately and timely as required by 50 C.F.R. § 648.7(a)(1). Plaintiff's Complaint at PP 66-69.

The Secretary defends himself on this count by arguing that NMFS did not collect the information it was supposed to because of its negotiations with North Carolina. As stated above, see supra note 3, NMFS and North Carolina never reached a final agreement. The federal government also argues that "plaintiffs' suggestion that NMFS has the responsibility or ability to monitor every landing in every state and to monitor which purchasers are not adequately reporting landings is untenable." Defendant's Brief in Support of Summary Judgment at 26. Yet, given that it is the federal government's responsibility to determine the quota from year to year, and it has decided that overages for any given year will be subtracted from the succeeding year's quota, that is exactly what [**29] the federal government must do. Not only must the government make these determinations, but it must do so in a reasonable amount of time so that states have at least a remote chance of making adjustments to their own fishery management schemes which will enable them to comply with the quota set by the federal government.

While the Court cannot go so far as Plaintiffs request and order the government to publish the adjusted quotas by January 1 of each year, an order better left to Congress, the Court can and does ORDER the Secretary to publish the final adjusted quota within a reasonable period of time to enable the fisherman to utilize the quota appropriately.

Count Ten

In their final claim, Plaintiffs allege that Defendant violated the APA and Magnuson-Stevens Act because the Defendant used the 1995 harvest numbers in determining the 1997 quota and then reduced the 1997 quota by the 1995 overage. PP 71-72. n14

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n14 Plaintiff explains the application of the 1995 overage to 1997's quota as follows:

The [Mid-Atlantic Fishery Management Council committee responsible for calculating proposed summer flounder fishery quotas, [sic] uses the state's information data base for the last available year to calculate the next year's proposed quota. Since the 1996 fishing year was ongoing when quota calculation started in June, 1996, the 1995 landings were used in the calculation of the 1997 quota.

Plaintiff's Complaint at P 71.

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In essence, Plaintiffs argues that all the fish that have been caught, including overages, are considered in the stock assessment. The stock assessment is then used in determining the quota. The overages are then subtracted from the quota once it is determined even though these numbers were already considered in determining the stock assessment. Therefore, according to Plaintiffs, there is a "double counting."

Plaintiffs are correct that the amount of summer flounder overfished are included in calculating the stock assessment. n15 While this may, in fact, be a kind of [*658] "double counting," it violates neither the Magnuson-Stevens Act nor the Administrative Procedure Act. The subtraction of overages called for in 50 C.F.R. § 648.100(d)(2) is a form of punishment meant to act as a deterrent to prevent overfishing in the future. Without this deterrent, fisherman could overfish every year with no consequences, and NMFS would have no means whatsoever to ensure compliance with the quotas. While another means of punishment may have been chosen, subtraction of overages is the most practical method which has been adopted for this purpose.

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n15 The Summer Flounder Monitoring Committee will annually review the best available data including, but not limited to, commercial and recreational catch/landing statistics, current estimates of fishing mortality, stock status, the most recent estimates of recruitment, VPA results, target mortality levels, beneficial impacts of size/mesh regulations, as well as the level of noncompliance by fishermen or States and recommend to the Council Committee and ASMFC Interstate Fishery Management Program (ISFMP) Policy Board commercial (annual quota, minimum fish size, and minimum mesh size) and recreational (possession and size limits and seasonal closures) measures designed to assure that the target mortality level on summer flounder is not exceeded . . . .Measures to Attain Management Measures § 9.1.2.2, A.R. at 7 (emphasis added).

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If Plaintiffs had wanted to challenge this method, they should have done so with 30 days of promulgation or publication of the regulation. See 16 U.S.C. § 1855(f). Having failed to do so, Plaintiffs must abide by the regulation until such time as they convince the Secretary or Congress to change it. Accordingly, the Court GRANTS Defendant's motion for summary judgment on

Count Ten.

III. Conclusion

In conclusion, the Court notes that the NMFS's actions in this case are troublesome. The federal government indicates in one instance that the 1997 quota was arrived at separately and expertly. In another, the government indicates that, because the 1997 quota was the same as the 1996 quota, there is no need to conduct any analysis to determine whether the quota has any significant economic impact. Finally, the most substantial problem in this case could have been avoided had the NMFS acted in a timely manner in adjusting the 1996 quota the first place.

Accordingly, the Court REMANDS the quota to the Secretary of Commerce and ORDERS the Secretary to conduct the requisite level of analysis to determine whether a certification of no significant impact is appropriate under § 605(b) [**32] of the Regulatory Flexibility Act and an economic analysis sufficient to comply with National Standard 8 of the Magnuson-Stevens Act. Furthermore, the Court ORDERS the Secretary to fix each year's fishing quota including adjustments, within a reasonable period of time.

The Court DISMISSES Counts Three and Five WITH PREJUDICE; and the Court GRANTS Defendant's motion for summary judgment on Counts Two, Four, Seven, Eight and Ten.

IT IS SO ORDERED.

Robert G. Doumar

UNITED STATES DISTRICT JUDGE

Norfolk, VA

October 10, 1997

entered nunc pro tunc September 29, 1997

*** Last Modified: 6/5/01**

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS 16 U.S.C. 1853

95-354, 99-659, 101-627, 104-297

(a) REQUIRED PROVISIONS.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interest in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

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(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational, charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this Act, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors;

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 304(a) (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

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(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for—

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

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(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

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(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;

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(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

97-453, 99-659, 101-627, 102-251, **104-297**

(b) DISCRETIONARY PROVISIONS.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to—

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone [or special areas,]* or for anadromous species or Continental Shelf fishery resources beyond such zone [or areas]*;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

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(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 408, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this Act that prohibits all fishing, ensure that such closure—

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the—

(A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);

(B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and

(C) transshipment or transportation of fish or fish products under permits issued pursuant to section 204;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;

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(5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

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(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

(C) the economics of the fishery;

(D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;

(F) the fair and equitable distribution of access privileges in the fishery; and

(G) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10) include, consistent with the other provisions of this Act, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;

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(12) include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14)[sic][15] prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

97-453, **104-297**

(c) PROPOSED REGULATIONS.—Proposed regulations which the Council deems necessary or appropriate for the purposes of—

(1) implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment under section 304; and

(2) making modifications to regulations implementing a fishery management plan or plan amendment may be submitted to the Secretary at any time after the plan or amendment is approved under section 304.

[15] So in original.

P.L. 109-479, sec. 104(b), MSA § 303 note **16 U.S.C. 1853 note**

EFFECTIVE DATES; APPLICATION TO CERTAIN SPECIES.—The amendment made by subsection (a)(10)[16]—

(1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and

(B) in fishing year 2011 for all other fisheries; and

(2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and

(3) shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(1) or 1854(e), respectively).

109-479

SEC. 303A. LIMITED ACCESS PRIVILEGE PROGRAMS. **16 U.S.C. 1853a**

(a) IN GENERAL.—After the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

(b) NO CREATION OF RIGHT, TITLE, OR INTEREST.—Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this Act—

(1) shall be considered a permit for the purposes of sections 307, 308, and 309;

(2) may be revoked, limited, or modified at any time in accordance with this Act, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;

(3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;

(4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and

(5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share.

[16] Section 104(a)(10) of P.L. 109-479 added section 303(a)(15).

(c) REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—

(1) IN GENERAL.—Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote—

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this Act, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

(2) WAIVER.—The Secretary may waive the requirement of paragraph (1)(E) if the Secretary determines that—

(A) the fishery has historically processed the fish outside of the United States; and

(B) the United States has a seafood safety equivalency agreement with the country where processing will occur.

(3) FISHING COMMUNITIES.—

(A) IN GENERAL.—

(i) ELIGIBILITY.—To be eligible to participate in a limited access privilege program to harvest fish, a fishing community shall—

(I) be located within the management area of the relevant Council;

(II) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(III) consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area; and

(IV) develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery, for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(ii) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section for any person who fails to comply with the requirements of the community sustainability plan. Any limited access privileges denied or revoked under this section may be reallocated to other eligible members of the fishing community.

(B) PARTICIPATION CRITERIA.—In developing participation criteria for eligible communities under this paragraph, a Council shall consider—

(i) traditional fishing or processing practices in, and dependence on, the fishery;

(ii) the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the expected effectiveness, operational transparency, and equitability of the community sustainability plan; and

(vi) the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting or processing activities in the fishery.

(4) REGIONAL FISHERY ASSOCIATIONS.—

(A) IN GENERAL.—To be eligible to participate in a limited access privilege program to harvest fish, a regional fishery association shall—

(i) be located within the management area of the relevant Council;

(ii) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;

(iii) be a voluntary association with established by-laws and operating procedures;

(iv) consist of participants in the fishery who hold quota share that are designated for use in the specific region or subregion covered by the regional fishery association, including commercial or recreational fishing, processing, fishery-dependent support businesses, or fishing communities;

(v) not be eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that is [sic][17] members contribute; and

(vi) develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(B) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section to any person participating in a regional fishery association who fails to comply with the requirements of the regional fishery association plan.

[17] So in original.

(C) PARTICIPATION CRITERIA.—In developing participation criteria for eligible regional fishery associations under this paragraph, a Council shall consider—

(i) traditional fishing or processing practices in, and dependence on, the fishery;

(ii) the cultural and social framework relevant to the fishery;

(iii) economic barriers to access to fishery;

(iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;

(v) the administrative and fiduciary soundness of the association; and

(vi) the expected effectiveness, operational transparency, and equitability of the fishery association plan.

(5) ALLOCATION.—In developing a limited access privilege program to harvest fish a Council or the Secretary shall—

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of—

(i) current and historical harvests;

(ii) employment in the harvesting and processing sectors;

(iii) investments in, and dependence upon, the fishery; and

(iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through—

(i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and

(ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—

(i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and

(ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges; and

(E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council.

(6) PROGRAM INITIATION.—

(A) LIMITATION.—Except as provided in subparagraph (D), a Council may initiate a fishery management plan or amendment to establish a limited access privilege program to harvest fish on its own initiative or if the Secretary has certified an appropriate petition.

(B) PETITION.—A group of fishermen constituting more than 50 percent of the permit holders, or holding more than 50 percent of the allocation, in the fishery for which a limited access privilege program to harvest fish is sought, may submit a petition to the Secretary requesting that the relevant Council or Councils with authority over the fishery be authorized to initiate the development of the program. Any such petition shall clearly state the fishery to which the limited access privilege program would apply. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the limited access program shall be eligible to sign a petition for such a program and shall serve as the basis for determining the percentage described in the first sentence of this subparagraph.

(C) CERTIFICATION BY SECRETARY.—Upon the receipt of any such petition, the Secretary shall review all of the signatures on the petition and, if the Secretary determines that the signatures on the petition represent more than 50 percent of the permit holders, or holders of more than 50 percent of the allocation in the fishery, as described by subparagraph (B), the Secretary shall certify the petition to the appropriate Council or Councils.

(D) NEW ENGLAND AND GULF REFERENDUM.—

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program, including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2⁄3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council, and by a majority of those voting in the referendum among eligible permit holders with respect to the Gulf Council. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum. If an individual fishing quota program fails to be approved by the requisite number of those voting, it may be revised and submitted for approval in a subsequent referendum.

(ii) The Secretary shall conduct a referendum under this subparagraph, including notifying all persons eligible to participate in the referendum and making available to them information concerning the schedule, procedures, and eligibility requirements for the referendum process and the proposed individual fishing quota program. Within 1 year after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, the Secretary shall publish guidelines and procedures to determine procedures and voting eligibility requirements for referenda and to conduct such referenda in a fair and equitable manner.

(iii) The provisions of section 407(c) of this Act shall apply in lieu of this subparagraph for an individual fishing quota program for the Gulf of Mexico commercial red snapper fishery.

(iv) Chapter 35 of title 44, United States Code, (commonly known as the Paperwork Reduction Act) does not apply to the referenda conducted under this subparagraph.

(v) The Secretary shall promulgate criteria for determining whether additional fishery participants are eligible to vote in the New England referendum described in clause (i) in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum.

(vi) In this subparagraph, the term ‘individual fishing quota’ does not include a sector allocation.

(7) TRANSFERABILITY.—In establishing a limited access privilege program, a Council shall—

(A) establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies adopted by the Council for the fishery under paragraph (5); and

(B) establish, in coordination with the Secretary, a process for monitoring of transfers (including sales and leases) of limited access privileges.

(8) PREPARATION AND IMPLEMENTATION OF SECRETARIAL PLANS.—This subsection also applies to a plan prepared and implemented by the Secretary under section 304(c) or 304(g).

(9) ANTITRUST SAVINGS CLAUSE.—Nothing in this Act shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of the preceding sentence, the term ‘antitrust laws’ has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.

(d) AUCTION AND OTHER PROGRAMS.—In establishing a limited access privilege program, a Council shall consider, and may provide, if appropriate, an auction system or other program to collect royalties for the initial, or any subsequent, distribution of allocations in a limited access privilege program if—

(1) the system or program is administered in such a way that the resulting distribution of limited access privilege shares meets the program requirements of this section; and

(2) revenues generated through such a royalty program are deposited in the Limited Access System Administration Fund established by section 305(h)(5)(B) and available subject to annual appropriations.

(e) COST RECOVERY.—In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 304(d)(2), for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

(f) CHARACTERISTICS.—A limited access privilege established after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 is a permit issued for a period of not more than 10 years that—

(1) will be renewed before the end of that period, unless it has been revoked, limited, or modified as provided in this subsection;

(2) will be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have failed to comply with any term of the plan identified in the plan as cause for revocation, limitation, or modification of a permit, which may include conservation requirements established under the plan;

(3) may be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have committed an act prohibited by section 307 of this Act; and

(4) may be acquired, or reacquired, by participants in the program under a mechanism established by the Council if it has been revoked, limited, or modified under paragraph (2) or (3).

(g) LIMITED ACCESS PRIVILEGE ASSISTED PURCHASE PROGRAM.—

(1) IN GENERAL.—A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) to be used, pursuant to section 53706(a)(7) of title 46, United States Code, to issue obligations that aid in financing—

(A) the purchase of limited access privileges in that fishery by fishermen who fish from small vessels; and

(B) the first-time purchase of limited access privileges in that fishery by entry level fishermen.

(2) ELIGIBILITY CRITERIA.—A Council making a submission under paragraph (1) shall recommend criteria, consistent with the provisions of this Act, that a fisherman must meet to qualify for guarantees under subparagraphs (A) and (B) of paragraph (1) and the portion of funds to be allocated for guarantees under each subparagraph.

(h) EFFECT ON CERTAIN EXISTING SHARES AND PROGRAMS.—Nothing in this Act, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation in effect before the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.

(i) TRANSITION RULES.—

(1) IN GENERAL.—The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, except that—

(A) the requirements of section 303(d) of this Act in effect on the day before the date of enactment of that Act shall apply to any such program;

(B) the program shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation; and

(C) nothing in this subsection precludes a Council from incorporating criteria contained in this section into any such plans.

(2) PACIFIC GROUNDFISH PROPOSALS.—The requirements of this section, other than subparagraphs (A) and (B) of subsection (c)(1) and subparagraphs (A), (B), and (C) of paragraph (1) of this subsection, shall not apply to any proposal authorized under section 302(f) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 that is submitted within the timeframe prescribed by that section.

P.L. 109-479, sec. 106(e), MSA § 303A note **16 U.S.C. 1853a note**
APPLICATION WITH AMERICAN FISHERIES ACT.—Nothing in section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as added by subsection (a) [P.L. 109-479], shall be construed to modify or supersede any provision of the American Fisheries Act (46 U.S.C. 12102 note; 16 U.S.C. 1851 note; et alia).

P.L. 104-297, sec. 108(i), MSA § 303 note
EXISTING QUOTA PLANS.—Nothing in this Act [P.L.104-297] or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

SEC. 304. ACTION BY THE SECRETARY 16 U.S.C. 1854

104-297

(a) REVIEW OF PLANS.—

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; individuals or households; and State, Local, or Tribal government.

Estimated Number of Respondents: 10,968.

Estimated Time Per Response: 5 minutes for an initial call-in or Internet report; 5 minutes for a confirmation call; 10 minutes for a landing card; 1 hour for a weekly state report; and 4 hours for an annual state report.

Estimated Total Annual Burden Hours: 1,403.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 26, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–7187 Filed 3–30–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Socio-Economic Assessment of Gulf of Mexico Fisheries Under the Limited Access Privilege Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 1, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Juan J. Agar, (305) 361–4218 or *Juan.Agar@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS) proposes to collect demographic, cultural, economic and social information about Gulf of Mexico fisheries managed under the limited access privilege program (LAPP). The survey also intends to inquire about the industry's perceptions, attitudes and beliefs about the performance of the LAPP. The data gathered will be used to describe the social and economic changes brought about by the LAPP, assess the economic performance of the industry under the LAPP, and evaluate the socio-economic impacts of future federal regulatory actions. In addition, the information will be used to strengthen and improve fishery management decision-making, satisfy legal mandates under Executive Order 12866, the Magnuson-Stevens Fishery Conservation and Management Act (U.S.C. 1801 et seq.), the Regulatory Flexibility Act, the Endangered Species Act, and the National Environmental Policy Act, and other pertinent statues.

II. Method of Collection

The socio-economic information sought will be collected via in-person, telephone and mail surveys.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,200.

Estimated Time Per Response: 1 hr.

Estimated Total Annual Burden Hours: 1,200.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 26, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–7189 Filed 3–30–09; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agricultural Advisory Committee; Thirteenth Renewal

The Commodity Futures Trading Commission has determined to renew the charter of the Commission's Agricultural Advisory Committee for a further period of two years. The Commission certifies that the renewal of the advisory committee is in the public interest in connection with duties imposed on the Commission by the Commodity Exchange Act, 7 U.S.C. 1, *et seq*.

The objectives and scope of activities of the Agricultural Advisory Committee are to conduct public meetings and submit reports and recommendations on issues affecting agricultural producers, processors, lenders and others interested in or affected by agricultural commodities markets, and to facilitate communications between the Commission and the diverse agricultural and agriculture-related organizations represented on the Committee. The Committee's membership represents a cross-section of interested and affected groups including representatives of producers, processors, lenders and other interested agricultural groups.

Interested persons may obtain information or make comments by