Department of Commerce • National Oceanic & Atmospheric Administration • National Marine Fisheries Service

# *NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 01-111-03*

***Fisheries Management***
***Policy on RFA Review Process***

***Procedures for Periodic Review of Significant Rules***
***Under Section 610 of the Regulatory Flexibility Act***

**NOTICE:** This publication is available at: http://www.nmfs.noaa.gov/directives/.

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**SUMMARY OF REVISIONS: This directive provides guidance for National Marine Fisheries Service's Headquarters, Regional Offices, and Science Centers regarding the timing, administration, and preparation of Section 610 reviews under the Regulatory Flexibility Act.**

Signed _____ 9/9/05
Date

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## I. Introduction

The purpose of the Regulatory Flexibility Act (RFA) is to ensure that agencies endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of businesses, organization, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. The RFA, with some exceptions, requires Federal agencies to prepare regulatory flexibility analyses (e.g., initial and final regulatory flexibility analyses) for each proposed and final rule. These analyses are designed to assess the impacts that various regulatory alternatives would have on small entities and to determine ways to minimize those impacts.

In order to assess the continuing effect of an agency rule on small entities, the RFA contains a provision (5 U.S.C. §610, referred to hearafter as "section 610 review") requiring Federal agencies to plan for the periodic review of agency-issued rules that have or will have a significant economic impact on a substantial number of small entities. The purpose of the section 610 review is to determine whether subject rules should be continued without change, amended, or rescinded, consistent with the stated objectives of applicable statutes. Federal agencies must, consistent with the RFA, conduct a section 610 review within 10 years of publication of such final rules. NMFS conducted a review of its regulations in 1995, consistent with the intent and purpose of section 610 of the RFA. The procedures described below govern the conduct of section 610 review for subject rules published by NMFS after 1995.

## II. Rules Subject to Review

NMFS considers subject rules to be those for which a final regulatory flexibility analysis (FRFA) was prepared. All final rules implementing a FMP, Amendment or other management program and which contain a FRFA are subject to the section 610 review except: (1) annual or multi-year specifications requiring proposed and final rulemaking; (2) in-season actions requiring proposed and final rulemaking; and (3) temporary or emergency rules requiring proposed and final rulemaking. With the exception of multi-year specifications, these actions are effective for one year or less and are rescinded by default. Multi-year specifications could be effective for longer periods. However, these are reviewed annually and revised by the Councils or NMFS when appropriate.

## III. Procedure

The initial section 610 review will cover the period January 1, 1996, through December 31, 2000, with a due date of January 1, 2006. Subsequent reviews will be conducted annually, e.g., the review for the calendar year 2001 will be due January 1, 2007; 2002 on January 1, 2008; 2003 on January 1, 2009; and so on. This method will allow adequate time to measure impacts from previous rules within the 10-year window provided for in Section 610.

The final rules should be reviewed to determine whether they should be continued without change, or whether they should be amended or rescinded, consistent with the stated objectives of applicable statutes. Section 610 of the RFA requires NMFS to consider the following factors when reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities:

(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.

In addition, analysts should describe in qualitative terms the management measures contained in each final rule and the economic impacts of regulations presented in the FRFA (See SUMMARY and FRFA for each final rule). Finally, if, in the course of conducting a review, the analyst determines the rule has been rescinded, the analyst need only identify when the rule was rescinded.

Section 610 does not require the results of the review to appear in a specific document. However, to ensure consistency, NMFS has established a standard table for reporting the results of Section 610 reviews (appendix 1). NMFS requires the review of rules to be made available to the appropriate fishery management councils and concerned individuals.

Please forward a copy of the finalized reviews to the Economist, Domestic Fisheries Division, Office of Sustainable Fisheries. If you have questions regarding preparation of the section 610 review, please contact the Domestic Fisheries Division at (301) 713-2341.

| Name, date, and FR Cite | Amendment 1 to the Bluefish FMP; 65 FR 45844, July 26, 2000 |
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| **Rescinded, Amended, or Continuing** | Amended with parts continuing |
| **Description of Management Measures and Complexity** | This rule implemented permit and reporting requirements for commercial vessels, dealers, and party/charter boats; implemented permit requirements for bluefish vessel operators; established a Bluefish Monitoring Committee charged with annually recommending to the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission the total allowable landings and other restrictions necessary to achieve the target fishing mortality rates specified in the FMP; established a framework adjustment process; established a 9-year stock rebuilding schedule; established a commercial quota with state allocations; and established a recreational harvest limit. The purpose of this rule is to control fishing mortality of bluefish and rebuild the stock. This rule was complex. |
| **Economic Impacts of Management Measures and Nature of Public Comments** | The measures contained in this rule were restrictive, and impacts on the industry were expected to be significant, especially with regard to bluefish fishers who had been fishing under individual commercial permits. While it was recognized that shifting to a commercial vessel permit would have negative economic impacts on party charter vessels and fishermen that don't own vessels but intend to sell bluefish, it was believed that the benefits of improved catch monitoring and the ability to notify the affected public of necessary changes in the fishery (closures, etc.) outweighed these losses to the industry. Moreover, it was believed that economic impacts could be mitigated by potential increases in harvest associated with a rebuilt bluefish stock. Therefore, relative to the SQ this program was expected to produce higher long-term benefits to the industry and the Nation. The Council, in adopting a rule by which the commercial quota could be increased up to 10.5 million lbs if the recreational catch was projected to be less than the recreational quota, mitigated the economic impact that a 5.9 million lb quota would have had on the aggregate small businesses affected by the Amendment. Furthermore, the 10.5 million lb rule compared to alternative allocations based on 1981-1993 data (6.69 million lbs) and 1985-1989 (6.37 million lbs) also benefited the aggregate of small businesses affected. The choice of a 10-year rebuilding timeline mitigated the impacts on the commercial fishery that would have occurred if the Council chose a five-year strategy (4.86 million lbs), a constant harvest strategy until the stock is recovered (5.13 million lbs), or a constant fishing mortality (F=0.23)(2.95 million lbs). The comment that was received regarding economic impacts on communities was related to minimum recreational size limits. This amendment did not put in place this measure; rather it allowed for the process that would consider such changes through the annual review process. |
| **Overlap with other State or Federal rules** | None |
| **Recommendation and Need for Continuing the Rule** | Continuing regulation includes rules for vessel permitting (commercial and party/charter vessels), operator, and dealer/processor permits at 648.4(a)(8)(i) and (ii), 648.5(a), and 648.6(a), respectively. Also, this rule continues regulations related to recordkeeping and reporting requirements for dealers (648.7(a)(1)(i)) and vessels (648.7(b)(1)(i)) and allowable catch quotas (648.160(a)) and recommended allocation of the TAL (648.160(c)) as per the recreational and commercial fishing sectors. The amendment also put in place regulations that continue today to allow for the review of annual changes to the measures (648.160(d)); the distribution of the commercial quota among the states (648.160(e)); procedures for authorizing quota transfers/overages (648.160(f)); notification requirements for closures (648.161(a) and (b)); recreational possession restrictions (648.164); and a framework adjustment process (648.165). Rules on the conduct of the fishery in Federal waters (e.g., permitting, reporting requirements) and at the docks are important in gathering information on the status of the stock, as well as establishing the social (e.g., demographic factors) and economic factors that drive the fisheries. Monitoring and enforcement of the rules according to the objectives of the FMP and Magnuson-Stevens Act guidelines will help to ensure that rebuilding targets are attained and overfishing does not occur. Allowing for a mechanism to evaluate the fisheries on an annual basis enables the Council to make necessary adjustments to the management measures. Enabling a mechanism for mid-year quota transfers prevents closures and overages and helps to center the activity of the fishery where it is most productive in meeting market demands and increases economic opportunities for vessels harvesting bluefish. Based on current technological, economic, and other conditions, there are no alternatives that are consistent with stated objectives of applicable statutes that would reduce impacts of the continuing portions of this rule. |