

APPENDIX F: RELEVANT LAWS AND EXECUTIVE ORDERS

(This section was prepared by staff of the Western Pacific Regional Fishery Management Council and staff from the NOAA's Pacific Islands Regional Office.)

The conservation and management of living marine resources in the U.S. is entrusted to the NMFS, which carries out its charge under many laws, treaties, and legislative mandates from the U.S. Congress and the President. The most relevant of these to the current action are briefly introduced in the following sections.

Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act)

The Magnuson-Stevens Act (MSA) is the principal federal statute that provides for the management of marine fisheries in the U.S. Originally enacted as the Fishery Conservation and Management Act in 1976 (Public Law 94-265), this law is arguably the most significant fisheries legislation in U.S. history. It has been amended frequently since 1976; most recently in 1996, by the Sustainable Fisheries Act (SFA) (Public Law 104-297). The basic concepts of the Magnuson-Stevens Act have not changed over the course of its amendment history. These include the preeminent concept that the biological conservation of a fishery resource has priority over use of that resource. A second basic concept of the law is that conservation and management decision-making must be based on the best available scientific information, and, moreover, that this information includes social, economic and ecological factors along with biological factors. The MSA's third basic concept is that the needs of fishery resource users vary across the nation, and regional participation in the policy making process should be maximized.

The Magnuson-Stevens Act (as amended in 1996) includes the following policy statement regarding the nation's fisheries [16 U.S.C. 1801, Sec. 2(c)]:

POLICY.--It is further declared to be the policy of the Congress in this Act--

- (1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;
- (2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;
- (3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of interested and affected States and citizens; considers efficiency; draws upon federal, state, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish; and is workable and effective;
- (4) to permit foreign fishing consistent with the provisions of this Act;
- (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;

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

(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.

The Magnuson-Stevens Act also established ten National Standards that serve as the overarching objectives for fishery conservation and management [16 U.S.C. 1851, Sec. 301(a).] and provide the foundation for development fishery management plans and their amendments:

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

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

(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.

(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 United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(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.

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

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

(8) 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.

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

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

The Magnuson-Stevens Act also mandates the Secretary of Commerce (Secretary) to develop advisory guidelines to assist in the development of FMPs. These guidelines serve primarily to interpret and aid compliance with the national standards. The national standards guidelines are codified at 50 CFR Part 600, and were most recently revised on May 1, 1998 (63 FR 24212).

National Environmental Policy Act (NEPA)

This Act, signed into law in 1970 (42 U.S.C. 4321 et seq.), has two principal purposes. One is to require federal agencies to evaluate the potential environmental effects of any major federal action being planned. The intent of this requirement is to assure that public officials make well-informed decisions about the potential impacts of the actions they are considering. The second principal purpose is to promote public awareness of potential impacts at the earliest planning stages of major federal actions. The intent of this requirement is to provide the public opportunity to be involved and influence decision making on federal actions. In short, NEPA ensures that environmental information is available to government officials and the public before decisions are made and before actions are taken.

Federal fishery management actions subject to NEPA requirements include the approval of FMPs and FMP implementing regulations. This requires preparation of either an environmental impact statement (EIS) or supplemental environmental impact statement (SEIS) for major fishery management actions that significantly affect the quality of the human environment and documents that finding for public consideration and comment before a decision is made, or an environmental assessment (EA) for fishery management actions that will not significantly affect the human environment. If an EA does not support a finding of no significant impact, then an EIS or DEIS must be prepared. In addition to NEPA implementing regulations (at 40 CFR 1500-1508), NEPA compliance by fisheries management actions is guided by NOAA Administrative Order 216-6.

Endangered Species Act (ESA)

The ESA (16 U.S.C. 1531 et seq.) provides for the protection and conservation of endangered and threatened species of fish, wildlife and plants. Section 7(a)(1) of the ESA requires federal agencies to “conserve” endangered and threatened species, however, “conservation” is broadly defined. Section 7(a)(2) of the ESA requires federal agencies to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species.

When the action of a Federal agency may affect a protected species, that agency is required to consult with either the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service, depending upon the protected species that may be affected. For the actions described in this document, the NMFS Southwest Region, Pacific Islands Area Office (Sustainable Fisheries Program) consulted with the Protected Resources Division, also of NMFS. Section 7(b) of the ESA requires that the consultation be summarized in a biological opinion detailing how the action may affect protected species. That consultation considered the potential impacts to listed species arising from the implementation of the Fishery Management Plan for

the Bottomfish and Seamount Groundfish Fishery in the Western Pacific Region. The biological opinion resulting from this consultation was completed on March 8, 2002, and may be found in its entirety in Appendix I.

Marine Mammal Protection Act (MMPA)

The Marine Mammal Protection Act (MMPA) generally prohibits taking and importation of all marine mammals, except under limited exceptions. The MMPA gives the Secretary of Commerce authority and duties under the Act for all Cetaceans (whales, dolphins, and porpoises) and Pinnipeds (seals and sea lions, except walruses), and it gives authority for other species of marine mammals to the Secretary of the Interior. It requires the NMFS to prepare and periodically review stock assessments of marine mammal stocks (MMPA Section 117). It requires NMFS to publish in the Federal Register and revise at least annually a list of commercial fisheries that categorizes the fisheries based on the incidence of serious injury and mortality of marine mammals (MMPA Section 118(c)). For commercial fisheries categorized as Category I or II (frequent or occasional serious injury or mortality), NMFS must grant an authorization to incidentally take marine mammals upon receipt of a completed registration form. NMFS shall establish a program to monitor incidental mortality and serious injury of marine mammals during commercial fishing operations (MMPA Section 118 (d)), which it does through its observer program. NMFS shall implement a take reduction plan through establishment of a take reduction team for certain “strategic” stocks of marine mammals that interact with Category I or II fisheries to reduce incidental mortality and serious injury of marine mammals from commercial fishing operations (MMPA Section 118(f)). Upon request, and after making certain findings, NMFS shall authorize and prescribe regulations for incidental takes of small amounts of marine mammals (MMPA Section 101 (a) (5) (A)). IN the same manner, NMFS shall authorize and prescribe necessary measures and requirements for incidental harassment of small amounts of marine mammals (MMPA Section 101 (a) (5) (D)). NMFS shall issue or deny permits for public display (and maintain an inventory of marine mammals possessed for public display), scientific research, enhancing the survival or recovery of a stock, and educational or commercial photography, after receipt of an application to take marine mammals for those purposes (MMPA Section 104). If NMFS receives a petition for a status review of the species (or on the Secretary’s own initiative), NMFS shall make a determination whether a species or stock is depleted or is no longer depleted. NMFS shall prepare a conservation plan as soon as possible for any species or stock that NMFS determines is depleted (MMPA Section 115). NMFS shall enforce the provisions of Title I of the MMPA (MMPA Section 107).

The Fish and Wildlife Coordination Act (FWCA)

The FWCA authorizes collection of fisheries data and coordination with other agencies for environmental decisions affecting living marine resources. Both formal and informal consultations, cooperative research, and data gathering programs are routinely pursued.

Coastal Zone Management Act

The CZMA (16 U.S.C. 1451 et seq.) is designed to encourage and assist states in developing coastal management programs, to coordinate state activities, and to safeguard regional and national interests in the coastal zone. Section 307(c) of the CZMA requires that any federal activity affecting the land or water uses or natural resources of a state's coastal zone be consistent to the maximum extent possible with the enforceable policies of the affected state's approved coastal management program.

A proposed fishery management action that requires an FMP amendment or implementing regulations must be assessed to determine whether it directly affects the coastal zone of a state with an approved coastal zone management program. If so, NMFS must provide the state agency having CZM responsibility with a consistency determination for review at least 90 days before final action of NMFS.

Administrative Procedure Act (APA)

The APA (5 U.S.C. 553) requires federal agencies to give the public prior notice of rulemaking and an opportunity to comment on proposed rules. General notice of proposed rulemaking must be published in the Federal Register, unless persons subject to the rule have actual notice of the rule. Proposed rules published in the Federal Register must include reference to the legal authority under which the rule is proposed and explain the nature of the proposal including what action is proposed, why, what is its intended effect, and any relevant regulatory history that provides the public with a well-informed basis for understanding and commenting on the proposal. The APA does not specify how much time the public must be given for prior notice and opportunity to comment; however, NOAA subscribes to 30 days as a reasonable period for the public to be informed and submit comments on proposed fishery management regulations. Exceptions to 30-day prior notice protocol include (a) proposed rules that would implement FMP amendments, in which case the Magnuson-Stevens Act indicates a 45-day period, and (b) emergency regulations that often require immediate implementation.

Some regulations (e.g. emergency or interim) may be implemented immediately under the APA when the agency for good cause finds that prior notice and opportunity for public comment are impractical, unnecessary, or contrary to the public interest. The "good cause" reason for waiving normal public procedure must be fully explained in the Federal Register notice which publishes the final rule. The Magnuson-Stevens Act (at Section 305(c)) places further conditions and restrictions on the use of emergency or interim fishery regulations. For example, an emergency or interim fishery management measure may remain in effect for not more than 180 days and may be extended, by notice in the Federal Register only once for an additional 180-day period. On August 21, 1997 (62 FR 44421), NOAA published further policy guidelines in the form of criteria and justification standards for using emergency rule authority to address marine fishery management issues. These criteria define the phrase in Section 305(c) of the Magnuson-Stevens Act, "an emergency exists involving any fishery," as ...a situation that:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and

- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advanced notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under normal rulemaking process” (62 FR 44422).

The emergency rule guidelines also state that the normal public rulemaking process may be waived in an emergency if the emergency action might be justified under one or more of the following situations:

- (1) Ecological -- (A) to prevent overfishing as defined in an FMP, or as defined by the Secretary in the absence of an FMP, or (B) to prevent other serious damage to the fishery resource or habitat; or
- (2) Economic – to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be forgone; or
- (3) Social – to prevent significant community impacts or conflict between user groups; or
- (4) Public health – to prevent significant adverse effects to health of participants in a fishery or to the consumers of seafood products” (62 FR 44422).

Beyond these exceptions, a proposed rule is designed to give interested or affected persons opportunity to submit written data, views or arguments for, or against, the proposed action. After the end of a 30- or 45-day comment period, the APA requires comments received to be summarized and responded to in the final rule notice. Further, the APA requires the effective date of a final rule to be no less than 30 days after publication of the final notice in the Federal Register. This delayed effectiveness or “cooling off” period is intended to allow the affected public to become aware of and prepared to comply with the requirements of the rule. The 30-day delayed effectiveness period can be waived for a final rule only if it relieves a restriction, merely interprets an existing rule, or provides a statement of policy, or it must be made effective earlier than 30 days after publication for good cause. For fishery management regulations, the primary effect of the APA is to provide for public participation which, in combination with the Magnuson-Stevens Act, NEPA, and other statutes, limits the speed with which NMFS can implement non-emergency fishery regulations.

Regulatory Flexibility Act (RFA)

The RFA (5 U.S.C. 601 et seq.) requires federal agencies to assess the impacts of their proposed regulations on small entities and to seek ways to minimize economic effects on small entities that would be disproportionately or unnecessarily adversely affected. The most recent amendments to the RFA were enacted on March 29, 1996, with the Contract with America Advancement Act of 1996 (Public Law 104-121). Title II of that law, the Small Business Regulatory Enforcement Fairness Act (SBREFA), amended the RFA to require federal agencies to determine whether a proposed regulatory action would have a significant economic impact on a substantial number of small entities. For a federal agency, the most significant effect of SBREFA is that it made compliance with the RFA judicially reviewable.

The assessment requirement of the RFA is satisfied by a regulatory flexibility analysis, which applies to regulatory actions for which prior notice and comment is required under the APA.

Emergency or interim rules that waive notice and comment are not required to have regulatory flexibility analyses. Further, regulatory flexibility analyses are required only when an action is expected to have a “significant economic impact” on a “substantial number of small entities”. For purposes of these analyses, “small entities” include (a) small businesses which, for commercial fishing or fish processing, are firms with receipts of up to \$3 million annually or up to 500 employees, respectively, (b) small non-profit organizations, and (c) small governmental jurisdictions with a population of up to 50,000 persons. For Hawai‘i-based fisheries, all fishing firms are considered to be small entities. “Substantial number” has been interpreted by NMFS to mean more than 20 percent of those small entities that would be affected by the proposed regulation. Likewise, NMFS has established criteria for determining whether a proposed action would have a “significant economic impact” based on potential decreases in annual gross revenues, increases in production costs, compliance costs and capital costs, and potential business failures caused by the proposal. Any one of these criteria determined to be “significant” results in the entire action being considered “significant” under RFA.

An initial regulatory flexibility analysis (IRFA) is prepared for any proposed regulatory action that meets the above criteria for having an anticipated “significant economic impact” on a “substantial number of small entities.” In practice, NMFS has insufficient cost data on fishing and processing firms to determine with a high degree of confidence whether any particular regulation will not have a “significant economic impact.” Hence, an IRFA is prepared routinely for most proposed fishery management measures. The IRFA usually is combined with the EA or (supplemental) EIS document required by NEPA. However, if an action is determined to not have a “significant economic impact on a substantial number of small entities”, then a statement to this effect including a factual basis for the statement must be published in the Federal Register and sent to the Small Business Administration in lieu of a IFRA.

If, following public comments on the proposed rule, the action is considered to meet the criteria for requiring RFA analysis, then a final regulatory flexibility analysis (FRFA) must be prepared. The FRFA contains most of the same descriptive information presented in the IRFA, but also must include (a) a summary of significant issues raised in public comment on the IRFA and the agency’s response to those comments, and (b) a description of the steps the agency has taken to minimize the significant economic impacts on small entities, including a statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why all other alternatives considered were rejected. Finally, the FRFA or a summary of it must be published in the Federal Register with the final rule.

In addition, SBREFA established two new requirements on agencies that publish rules. First, for each rule or group of related rules for which an agency is required to publish an FRFA, the agency is required to publish one or more guides to assist small entities in complying with the rule. These guides, called “small entity compliance guides,” must explain what a small entity is required to do to comply with the rule(s). The guide is to be written in sufficiently plain language likely to be understood by affected small entities. Second, each agency regulating the activities of small entities is required to establish a program for responding to inquiries from small entities concerning information on, advice about, and compliance with statutes and regulations, as well

as interpreting and applying law to specific sets of facts supplied by small entities. Guidance given by an agency applying law to facts provided by a small entity may be considered as evidence of the reasonableness of any proposed fines, penalties, or damages sought against the small entity in any civil or administrative action.

Paperwork Reduction Act of 1995 (PRA)

The PRA (44 U.S.C. 3501 et seq., and 5 CFR part 1320) is designed “to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, federal contractors, state, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.” In brief, this law is intended to ensure that the government is not overly burdening the public with requests for information. This is accomplished through an information collection budget (ICB). The ICB for each agency is in terms of the total estimated time burden of responding to official inquiries. The President’s Office of Management and Budget (OMB) oversees the ICB of each agency. Agencies must annually identify and obtain clearance from OMB for new or significant revisions to reporting and record keeping requirements.

Procedurally, the PRA requirements constrain what, how, and how frequently information will be collected from the public affected by a rule that requires reporting (e.g. harvested fish). New collections of information must be submitted to OMB for clearance before a final rule may take effect. For each rule that requires a collection of information, the agency must describe in detail what data will be collected, how it will be collected and how often, from whom it will be collected, how much time will be spent by each affected person in complying with the information requirements, why the information is necessary and how it will be used. OMB can take 60 days to review and clear a proposed information collection; hence, to avoid a PRA delay of a rule, NMFS tries to start the PRA review and clearance process at least 30 days before submission of a proposed rule for review in NMFS’ central office. Information collections approved by OMB have a maximum effectiveness of three years. To be extended beyond that time requires another submission for OMB clearance. Required collections of information from the public cannot be enforced without being included in an approved ICB.

Freedom of Information Act (FOIA)

The original FOIA (5 U.S.C. 552) allowed the public to obtain government information, provided the information is not protected by one of the nine specific FOIA exemptions and requires that an agency respond to a FOIA request within specified time limits. Exempted information includes: classified secret matter of national defense or foreign policy, internal personnel rules and practices, information specifically exempted by other statutes, trade secrets and commercial and financial information, privileged interagency or intra-agency memoranda or letters, personal information affecting an individual’s privacy, and investigatory records for law enforcement purposes.

In 1996, the Electronic FOIA (E-FOIA) amendments (Public Law 104-231) changed FOIA by

(among other things) extending the time limit agencies had to respond to FOIA requests and requiring agencies to make reports available to the public by computer telecommunications or other electronic means, including listing their major information systems and a guide for obtaining information, and establishing an electronic reading room that includes agency policies, staff manuals, and an index of records released under FOIA requests.

All fishery management actions are subject to FOIA requests except for the exempted information detailed above. NMFS compliance with FOIA is guided by NOAA Administrative Order 205-14.

National Marine Sanctuaries Act

Under the National Marine Sanctuaries Act (16 U.S.C. §§1431 *et. seq.*) (also known as Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, the Secretary of Commerce is authorized to designate discrete areas of the marine environment as National Marine Sanctuaries to protect distinctive natural and cultural resources whose protection and beneficial use requires comprehensive planning and management. The National Marine Sanctuary Program is administered by the Sanctuaries and Reserves Division of the National Oceanic and Atmospheric Administration (NOAA).

The mission of the National Marine Sanctuary Program is to identify, designate, and manage areas of the marine environment of special national significance due to their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities. The goals of the Program are to provide enhanced resource protection through conservation and management of the Sanctuaries that complements existing regulatory authorities; to support, promote, and coordinate scientific research on, and public awareness of, the site-specific marine resources of the Sanctuaries; to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and to facilitate, to the extent compatible with the primary objective of resource protection, multiple uses of the National marine Sanctuaries.

The Act provides authority for comprehensive and coordinated conservation and management of these marine areas. The Regional Fishery Management Councils are tasked with developing fishery regulations consistent with the goals and objectives of a proposed sanctuary. The Council's regulations are subject to Secretarial review and approval. The Act also provides for civil penalties for violations of the Act, or regulations or permits issued under it and for civil suits to recover damages if sanctuary resources are injured or destroyed.

National Wildlife Refuge System Administration Act of 1966

The Act (16 U.S.C. §§668dd-668ee, as amended) provides for the administration and management of the national wildlife refuge system, including wildlife refuges, areas for the protection and conservation of fish and wildlife threatened with extinction, wildlife ranges, game ranges, wildlife management areas and waterfowl production areas.

The Act identifies areas to be designated as the National Wildlife Refuge System (System) and administered by the Secretary of the Interior (Secretary) through the U.S. Fish and Wildlife Service (Service).

In a System area, no person may: knowingly disturb, injure, cut, burn, remove, destroy, or possess real or personal property of the U.S., including natural growth; take or possess any fish, bird, mammal, wild vertebrate or invertebrate animal, or part, nest or egg; enter, use, or occupy a System area, unless the activities are performed by authorized personnel permitted by regulation or expressly permitted by law, proclamation, executive order or public land order establishing the area.

Except for listed threatened and endangered species where a cooperative agreement under the ESA does not exist, nothing in the Act authorizes the Secretary to control or regulate hunting or fishing on lands outside the System. Regulations permitting hunting and fishing within the System must be consistent with state fish and wildlife laws and regulations. The Act does not affect the authority, jurisdiction, or responsibility of the states to manage, control, or regulate fish and wildlife under state law or regulations within the System.

Under regulations, the Secretary may permit use of any area within the System if such use is compatible with the purposes for which an area was established. Violations or failure to comply with the Act or regulations will result in fines under Title 18 of the U.S. Code, or imprisonment for not more than one year, or both.

The Act was amended by the National Wildlife Refuge System Improvement Act (Public Law 105-57). It requires the Secretary to ensure that the “biological integrity, diversity and environmental health of the system is maintained for the benefit of present and future generations of Americans. The Act: requires monitoring of the status and trends of wildlife populations in all refuges, directs the Secretary to plan for the continued expansion of the refuge system to conserve the nation’s ecosystems, discourages non-wildlife-related commercial and recreational activities in refuges, such as jet skiing and boating, and promotes uses that focus on wildlife, such as bird watching, environmental education, hunting and fishing, requires that conservation threats be identified and addressed in individual refuges, and requires that fish and wildlife populations be inventoried during development of plans for individual refuges.

Executive Order 12866: Regulatory Planning and Review

Executive Order (EO) 12866 was signed by the President on September 30, 1993, published October 4, 1993 (58 FR 51735), and replaced EO 12291 and EO 12498. Its purpose, among other things, is to enhance planning and coordination with respect to new and existing regulations, and to make the regulatory process more accessible and open to the public. In addition, EO 12866 requires agencies to take a deliberative, analytical approach to rule making, including assessment of costs and benefits of the intended regulations. For fisheries management purposes, it requires NMFS to prepare (a) a regulatory impact review (RIR) for regulatory actions, and (b) a unified regulatory agenda twice a year which inform the public of the agency’s

expected regulatory actions.

The purpose of an RIR is to assess the potential economic impacts of a proposed regulatory action. As such, it can be used to satisfy NEPA requirements and as a basis for determining whether a proposed rule will have a significant impact on a substantial number of small entities which would trigger the completion of an IRFA under the RFA. For this reason, the RIR is frequently combined with an EA and an IRFA in a single EA/RIR/IRFA document that satisfies the analytical requirements of NEPA, RFA and EO 12866 for any proposed rule. Criteria for determining “significance” for EO 12866 purposes, however, are different than those for determining “significance” for RFA purposes. A “significant” rule under EO 12866 is one that is likely to:

- (1) Have an annual effect on the economy (of the nation) 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 serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in EO 12866.

Although fisheries management actions rarely have an annual effect on the national economy of \$100 million or more or trigger any of the other criteria, OMB makes the ultimate determination of significance under this EO based in large measure in the analysis in the RIR. An action determined to be significant is subject to OMB review and clearance before its publication and implementation.

An initial determination of significance, frequently without benefit of an RIR, is made for each proposed regulatory action by NMFS through a “listing document.” The listing document is a brief description of a proposed regulatory action, including a regulatory identifier number (RIN), and the expected schedule for rule making. Listing documents are prepared by NMFS and submitted through NOAA General Counsel and Department of Commerce Office of General Counsel to OMB. If OMB concurs in a determination of “not significant” under EO 12866, then OMB will not need to review the rule. In practice, NMFS attempts to submit a listing document at least three months before submission of the proposed rule.

The regulatory planning function of EO 12866 is served by the unified regulatory agenda which is prepared twice a year to inform the public of the agency’s expected regulatory actions and provide brief descriptions and timelines. In addition, a regulatory plan is prepared annually to report on the most significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or later.

Executive Order 12630: Takings

This EO on Government Actions and Interference with Constitutionally Protected Property Rights came into effect on March 18, 1988. This EO requires that each federal agency prepare a “takings implications assessment” for any of its administrative, regulatory, and legislative policies and actions that affect, or may affect, the use of any real or personal property. Fishery management measures that limit fishing seasons, areas, catch quotas, the size of harvested fish, and bag limits do not appear to have any takings implications, and thus, no takings implications assessment is required. However, if a fishing gear type is prohibited, for example, in such a way that a fisherman leaving the fishery would be unable to sell his investment in the gear, or if a fisherman is prohibited by federal action from exercising property rights granted by a state, then a takings implication assessment may need to be prepared.

“Takings” issues are raised frequently in the context of limited access systems that confer a harvesting privilege on a fisherman in the form of a permit to catch a specific amount of fish or a license to enter and participate in a fishery. Although such permits and licenses may be transferrable and therefore increase (or decrease) in market value, they themselves do not convey any property rights in the fishery resource (i.e., the fish). If, however, the federal government were to drastically reduce the amount of fish that may be harvested from a fishery for which a fisherman had a limited license or permit, and thereby reduce the transfer value of that license or permit “takings implications” may exist.

Executive Order 12898: Environmental Justice

Executive Order 12898, issued in 1994, requires that federal agencies incorporate Environmental Justice into their mission by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minorities populations and low income populations in the U.S.

Executive Order 13132: Federalism

The “Federalism” EO was signed by the President on August 4, 1999, and published August 10, 1999 (64 FR 43255). This EO superceded the previous “Federalism” EOs (12612 and 13083) but supplements EOs 12372, 12866, and 12988. This EO is intended to guide federal agencies in the formulation and implementation of “policies that have federalism implications.” Such policies include regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

The EO establishes fundamental federalism principles based on the U.S. Constitution, specifies federalism policy making criteria and special requirements for preemption of state law. For example, a federal action that limits the policy making discretion of a state is to be taken only where there is constitutional and statutory authority for the action and it is appropriate in light of

the presence of a problem of national significance. Also, where a federal statute does not have expressed provisions for preemption of state law, such a preemption by federal rule making may be done only when the exercise of state authority directly conflicts with the exercise of federal authority. Conflict between state and federal law is possible on fishery management issues, however, the Magnuson-Stevens Act (at sec. 306) explicitly establishes conditions for federal preemption of state regulations (and extension of state fishery management authority into the EEZ). This EO also requires consultation between federal and state officials, and requires a federalism impact statement for rules that have federalism implications.

Executive Order 12114: Environmental Effects Abroad

This EO, issued in 1979, directs agencies to consider the effects of major federal actions upon the environment of foreign nations of the “global commons”. These actions include those major federal actions that result in significant environmental effects that extend outside of the geographic borders of the U.S. In some cases, an EIS may be required. The EO encourages international agreements and an exchange of information between the affected nations and the United States.

Executive Order 13112: Invasive Species

Executive Order 13112 establishes guidelines to ensure that actions proposed by federal agencies, to the extent practicable by law, take into account and mitigate the introduction of invasive species. The EO also establishes an Invasive Species Council to provide national leadership regarding invasive species and to ensure that federal agency activities concerning invasive species are coordinated, cost-efficient, and effective.

Executive Order 13158: Marine Protected Areas

This new EO, signed by the President on May 26, 2000 and published on May 31, 2000 (65 FR 34909), directs the Department of Commerce and the Department of the Interior to jointly develop a national system of marine protected areas (MPAs). The purpose of the system is to strengthen the management, protection, and conservation of existing protected areas and establish new or expanded MPAs. The MPA system is to be scientifically based, representing diverse U.S. marine ecosystems, and the nation’s natural and cultural resources. Establishing such a system is intended to reduce the possibility that MPAs are harmed by federally-approved or funded activities.

Executive Order 12962: Recreational Fisheries

On June 7, 1995, the President signed EO12962 to improve the quality, function, sustainable productivity, and distribution of U.S. aquatic resources for increased recreational fishing opportunities nationwide.

Executive Order 13089: Coral Reef Protection

In June, 1998, the President signed an Executive Order for Coral Reef Protection which established the Coral Reef Task Force (CRTF) and directed all federal agencies with coral reef-related responsibilities to develop a strategy for coral reef protection. The federal agencies were directed to work cooperatively with state, territorial, commonwealth and local agencies; non-governmental organizations; the scientific community and commercial interests to develop the plan. The Task Force was directed to develop and implement a comprehensive program of research and mapping to inventory, monitor and address the major causes and consequences of degradation of coral reef ecosystems. The order directs federal agencies to use their authorities to protect coral reef ecosystems and, to the extent permitted by law, prohibits them from authorizing, funding, or carrying out any actions that will degrade these ecosystems.

Executive Orders 13178 and 13196: Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve

President Clinton issued Executive Order 13178 on December 4, 2000, establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, pursuant to the National Marine Sanctuaries Amendments Act of 2000. The EO was revised and finalized by Executive Order 13196, issued January 18, 2001. The principal purpose of the Reserve is the long-term conservation and protection of the coral reef ecosystem and related marine resources and species of the Northwestern Hawaiian Islands in their natural character.

The seaward boundary of the Reserve is 50nm from the approximate center geographical positions of Nihoa Island, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, Pearl and Hermes Reef, Midway Atoll, and Kure Island. The inland boundary of the Reserve around each of these land areas is the seaward boundary of Hawaii State waters and submerged lands, and the seaward boundary of the Midway Atoll National Wildlife Refuge.

All currently existing commercial Federal fishing permits and current levels of fishing effort and take, which also includes the non-permitted level of trolling for pelagic species by currently permitted bottomfish fishers, as determined by the Secretary and pursuant to regulations in effect on December 4, 2000 shall be capped as follows:

- (A) No commercial fishing may occur in Reserve Preservation Areas;
- (B) There shall be no increase in the number of permits of any particular type of fishing (such as for bottomfishing) beyond the number of permits of that type in effect the year preceding the date of this order;
- (C) The annual level of aggregate take under all permits of any particular type of fishing may not exceed the aggregate level of take under all permits of that type of fishing as follows:
 - (1) Bottomfish fishing - the annual aggregate level for each permitted bottomfish fisher shall be that permittee's individual average taken over the 5 years preceding December 4, 2000, as determined by the Secretary, provided that the Secretary, in furtherance of the principles of the reserve, may make a one-time reasonable increase to the total aggregate

- to allow for the use of two Native Hawaiian bottomfish fishing permits;
- (2) All other commercial fishing - the annual aggregate level shall be the permittee's individual take in the year preceding December 4, 2000, as determined by the Secretary.
- (D) There shall be no permits issued for any particular type of fishing for which there were no permits issued in the year preceding the date of this order; and
- (E) The type of fishing gear used by any permit holder may not be changed except with the permission of the Secretary.
- (F) Trolling for pelagic species shall be capped based on reported landings for the year preceding December 4, 2000.

All currently existing levels of recreational fishing effort, as determined by the Secretary and pursuant to regulations in effect on the day of this order, shall be capped (i.e., no increase of take levels or levels of fishing effort, species targeted, or change in gear types) throughout the Reserve.

To further protect Reserve resources, the following areas are hereby established as Reserve Preservation Areas:

- (1) From the seaward boundary of Hawai'i State waters and submerged lands to a mean depth of 100 fathoms (fm) around:
- (A) Nihoa Island, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 25fm, unless and until the Secretary determines otherwise after adequate public review and comment;
 - (B) Necker Island, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 25fm, unless and until the Secretary determines otherwise after adequate public review and comment;
 - (C) French Frigate Shoals;
 - (D) Gardner Pinnacles, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 25fm, unless and until the Secretary determines otherwise after adequate public review and comment;
 - (E) Maro Reef, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 25fm, unless and until the Secretary determines otherwise after adequate public review and comment;
 - (F) Laysan Island, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 50fm, unless and until the Secretary determines otherwise after adequate public review and comment;
 - (G) Lisianski Island, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue seaward of a mean depth of 25fm, unless and until the Secretary determines otherwise after adequate public review and comment;

- (H) Pearl and Hermes Atoll; and
- (I) Kure Atoll.
- (2) Twelve nautical miles around the approximate geographical centers of:
 - (A) The first bank immediately east of French Frigate Shoals;
 - (B) Southeast Brooks Bank, which is the first bank immediately west of French Frigate Shoals, provided that the closure area shall not be closer than approximately 3nm of the next bank immediately west;
 - (C) St. Rogatien Bank, provided that the closure area shall not be closer than approximately 3nm of the next bank immediately east, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue, unless and until the Secretary determines otherwise after adequate public review and comment; shall be allowed to continue, unless and until the Secretary determines otherwise after adequate public review and comment;
- (3) Twelve nautical miles around the approximate geographical centers of:
 - (A) The first bank west of St. Rogatien Bank, east of Gardner Pinnacles, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue for a period of 5 years from the date of this order; and
 - (B) Raita Bank, provided that commercial bottomfish fishing and commercial and recreational trolling for pelagic species shall be allowed to continue for a period of 5 years from the date of this order; and
 - (C) Provided that both banks described above shall only continue to allow commercial bottomfish fishing and commercial and recreational trolling for pelagic species after the 5-year time period if it is determined that continuation of such activities will have no adverse impact on the resources of these banks.

The following activities are prohibited within the Reserve Preservation Areas:

- (A) Commercial and recreational fishing;
- (B) Anchoring in any area that contains available mooring buoys, or anchoring outside an available anchoring area when such area has been designated by the Secretary;
- (C) Any type of touching or taking of living or dead coral;
- (D) Discharging or depositing any material or other matter except cooling water or engine exhaust; and
- (E) Such other activities that the Secretary identifies after adequate public review and comment, and after consideration of any advice and recommendations of the Reserve Council.