



August 1, 2005

Via Electronic Mail

Ms. Sue Salveson  
Assistant Regional Administrator  
Sustainable Fisheries Division  
Alaska Region  
National Marine Fisheries Service  
Attn: Lori Durall  
Email: BSA79PR-0648-AT04@noaa.gov

Re: Fisheries of the Exclusive Economic Zone off Alaska; Groundfish Retention Standard

Dear Ms. Salveson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment to the Department of Commerce, National Marine Fisheries Service's (NMFS) proposed rule to implement Amendment 79 to the Fishery Management Plan (FMP) for the Groundfish of the Bering Sea and Aleutian Islands Management Area. The Office of Advocacy believes that NMFS has not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA). Advocacy recommends that NMFS prepare a revised initial regulatory flexibility analysis (IRFA) to address the concerns presented below.

**Advocacy Background**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>1</sup>

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

### **The Proposed Rule**

On June 16, 2005, NMFS published a proposed rule on *Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Retention Standard.*<sup>2</sup> The proposed rule implements Amendment 79 to the FMP for groundfish of the Bering Sea and Aleutian Islands. The purpose of the action is to reduce bycatch and improve utilization of groundfish harvested by catcher/processor trawl vessels. It implements an annual groundfish retention standard (GRS) as well as monitoring and enforcement measures for trawl catcher/processors greater than 125 feet.

### **Requirements of the RFA**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to prepare an initial regulatory flexibility analysis (IRFA) to assess the economic impact of a proposed action on small entities. Under Section 601(3) of the RFA "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, 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. The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.<sup>3</sup>

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<sup>2</sup> 70 Federal Register 35054.

<sup>3</sup> 5 USC § 603.

## Size Standard

The Office of Advocacy is concerned about the size standard used in the proposed rule. The proposed rule involves catcher/processors. SBA's Office of Size Standards indicates that the correct NAICS (North American Industry Classification System) code for this industry is code 311711, which is known as "Seafood Product Preparation and Packaging." This classification specifically includes establishments that are "floating factory ships." The size standard for businesses in that industry is 500 or fewer employees.<sup>4</sup>

However, on page 116 of the IRFA, NMFS states that a business involved in both operations, harvesting and processing seafood products, is a small business if it meets the \$3.5 million size standard for fish harvesting operations, which are in NAICS code 114111, rather than the 500 employee standard for floating factory ships in NAICS code 311711. There is no explanation for as to why NMFS believes that this is the appropriate standard.

In the Federal Register, NMFS states that it does not believe that any of the vessels are small. Advocacy cannot determine whether this would still be the case if NMFS were using the appropriate size standard.<sup>5</sup>

Moreover, Advocacy is concerned about NMFS' ability to consider alternatives that will mitigate the impact on small entities if NMFS does not believe that any small entities are going to be impacted by this proposal. According to the industry, Amendment 79 will increase the economic vulnerability of some vessels and force some of the members of the industry to exit the fishery because of high costs. Alternatives should be developed that address the concerns of the industry.

Advocacy believes that NMFS should base its analysis on the appropriate size standard and prepare an IRFA for Amendment 79 using the appropriate size standard.

## Other Issues

In addition to the size standard issue, Advocacy has been contacted by the fishing industry regarding the fact that certain aspects of the proposed rule were not recommended or discussed by the North Pacific Fishery Management Council. Specifically, the new monitoring and enforcement measures include a ban on mixing hauls, a new observer schedule, and the installation of a NMFS approved scale and a specified single observer location. According to the industry, these new measures will require costly reworking of the factory layouts and a reduction in production. Advocacy was unable to locate a discussion of these elements in the IRFA. Advocacy believes that

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<sup>4</sup> Information about NAICS codes and their respective size standards can be found at [https://eweb1.sba.gov/naics/dsp\\_naicssearch2.cfm](https://eweb1.sba.gov/naics/dsp_naicssearch2.cfm).

<sup>5</sup> Although the RFA allows an agency to summarize its IRFA in the Federal Register, the summary should provide the required elements. In the summary provided for Amendment 79, NMFS failed to provide the public with the information about the size standard that it was using to define a small business.

NMFS should perform an economic analysis of the new aspects of Amendment 79 and publish it for public comment.

### **Conclusion**

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. Advocacy recommends that NMFS perform an IRFA using the appropriate size standard to determine the full economic impact on small entities and consider significant alternatives to meet its objective while minimizing the impact on small exporters.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist NMFS in its RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Thomas M. Sullivan  
Chief Counsel for Advocacy

/s/

Jennifer A. Smith  
Assistant Chief Counsel for  
Economic Regulation and Banking

cc: The Honorable John D. Graham, Administrator, Office of Information and Regulatory Affairs