

National Standard 2 Guidelines for Scientific Information

Regulatory Impact Review (RIR)/Regulatory Flexibility Act Analysis (RFAA)

October 15, 2009

1.0 Introduction

National Standard 2 (NS2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA; 16 U.S.C. 1801 *et seq.*) requires that the “best scientific information available” be used when developing conservation and management measures for fishery management plans (FMPs), amendments to FMPs, and regulations promulgated to implement any such plan or plan amendment pursuant to the MSA. The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) of 2006 included provisions to improve the use of science in decision making, provide a stronger role for the Regional Fishery Management Councils’ (Councils) Scientific and Statistical Committees (SSCs), and establish an optional peer review process for scientific information used to advise Councils about conservation and management of fisheries. Therefore, the National Marine Fisheries Service (NMFS) is proposing revisions to the NS2 guidelines to address these MSA provisions and provide guidance and recommendations on peer review processes.

NMFS has developed proposed guidelines to update the existing guidelines for implementing National Standard 2. The proposed guidelines provide general guidance for the Councils and the Secretary of Commerce (Secretary) for evaluating what constitutes the “best scientific information available” for use in the effective conservation and management of the nation’s living marine resources. In preparing these proposed guidelines, NMFS recognized that federally-managed fisheries are diverse across and within regions with regard to the number and types of participants, the types of fishery resources targeted, and the established mechanisms and relationships between the Councils and their SSCs related to peer review processes and communication of scientific advice. Therefore, NMFS avoided prescribing specific “one-size-fits-all” requirements and instead is proposing guidelines that provide a general framework for NS2 implementation.

Executive Order 12866 (E.O. 12866) and the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) require analysis of the economic effects (that is, costs and benefits) of a proposed regulation on the national economy and potentially affected “small entities.” To fulfill the requirements under E.O. 12866, NMFS prepared a Regulatory Impact Review (RIR) which can be found in section 2.0. To fulfill the requirements under the RFA, NMFS prepared a Regulatory Flexibility Act analysis (RFAA) which can be found in section 3.0. The purpose of these analyses is to ensure that NMFS systematically considers the economic effects of these proposed guidelines on small business entities and on the public welfare.

1.1 Statement of the Problem and Management Objectives

National Standard 2 of the Magnuson-Stevens Fishery Conservation and Management Act states that “[c]onservation and management measures shall be based upon the best scientific

information available.” The objective of this proposed rule is to update existing NS2 guidelines to further clarify what constitutes “best scientific information available” and address MSRA provisions that strengthen the role of science in fishery conservation and management actions. These proposed guidelines specifically address: criteria for assessing what can be construed as the “best scientific information available;” peer review standards; the role of the Council SSC in the review and evaluation of scientific information; and requirements for Stock Assessment and Fishery Evaluation (SAFE) reports.

Developing national guidelines that apply NS2 across a diversity of fisheries and regions presents a challenge. The national interest in having uniform standards for developing conservation and management measures that reflect the “best scientific information available” must be balanced with the diversity of fisheries participants, fishery resources targeted, and existing management processes found across and within regions. Therefore, these proposed guidelines provide general guidance for NS2 implementation rather than prescriptive requirements that do not allow for flexibility in their application to specific fisheries, management actions, or existing institutional arrangements. Consequently, this RIR/RFAA evaluates, in general terms, the potential economic effects of these proposed guidelines on small business entities and the public welfare.

2.0 Analysis as Required by Executive Order 12866 (E.O. 12866)

The purpose of the Regulatory Impact Review (RIR) is to fulfill requirements of Executive Order 12866 (E.O. 12866) to evaluate economic effects of a proposed rule and alternatives on the public welfare (that is, the national economy). Specifically, the RIR is to determine whether the proposed rule is a “significant regulatory action.” As defined by E.O. 12866, a “significant regulatory action” is one that would likely result in an annual effect on the economy of \$100 million or more, create a serious inconsistency with another Federal action, materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or raise novel legal or policy issues. These criteria are further described in section 2.5.

As discussed in section 1.1, these proposed guidelines are intended as a general framework to be applied by the Councils and the Secretary for evaluation and utilization of “best scientific information available” for specific fishery management actions to be developed in the future. Under the MSA, these guidelines are advisory and do not have the force and effect of law. See, 16 U.S.C. 301(b). Thus, no economic impact is anticipated for the proposed NS2 guidelines. In the future, when the Councils and the Secretary apply the proposed NS2 guidelines to develop FMPs, amendments to FMPs, or other regulatory actions as required under the MSA, analyses of these proposed actions will be required and an associated RIR and Initial Regulatory Flexibility Analysis (IRFA) will be developed at that time.

The following sections set forth the basis for the agency’s determination that the proposed NS2 guidelines will not be a “significant regulatory action” as defined by E.O. 12866.

2.1 Statement of the Problem and Management Objectives

A summary of the problem and management objectives of the proposed NS2 guidelines can be found in section 1.1.

2.2 Description of Entities to which the Proposed Guidance will apply

The proposed NS2 guidelines, if adopted through a final action, will be used by the Secretary and the Councils when developing conservation and management measures for FMPs, plan amendments, and regulations promulgated to implement any such plans or amendments. Typically, when the Secretary and Councils, through NMFS, take fishery management actions, such actions could have impacts on vessel owners and operators and dealers that hold permits to conduct activities regulated by NMFS under the MSA.

In this case, the proposed action will apply to the Secretary and the Councils and will not have economic effects on vessel owners, operators or dealers. The NS2 guidelines provide procedural guidance to the Secretary and Council regarding the development of fishery conservation and management measures.

2.3 Description of Alternatives

No Action. Do not revise the current NS2 guidelines to provide updated guidance to the Secretary and the Councils for: evaluating what constitutes the “best scientific information available;” establishing peer review processes for review of scientific information used to advise the Councils; clarifying the role of the Council SSC in the review and evaluation of scientific information; and requirements for SAFE reports. Under the no-action alternative, there would be no economic effects on the national economy. However, the promulgation of NS2 guidelines is required by Section 301(b) of the MSA (16 U.S.C. 1851(b)). Revisions to the existing NS2 guidelines are being proposed at this time in light of recent amendments to the MSA, and are intended to strengthen the role of science in fishery conservation and management actions.

Preferred Action. The preferred alternative is to implement the proposed revision of the existing NS2 guidelines to provide guidance on implementation of the MSA amendments intended to strengthen the role of science in fishery conservation and management actions. The proposed NS2 guidelines provide general guidance on evaluating the timeliness, quality, and quantity of the “best scientific information available,” the role of the SSCs in the peer review process, and the formation of peer review panels when necessary. The proposed guidelines leave considerable discretion and flexibility to the Councils and the Secretary to develop FMPs, amendments to FMPs, and other regulatory actions from the “best scientific information available” that is relevant and applicable to their regional fisheries.

2.4 Economic Effects of the Proposed Guidelines

In general, economic impacts of proposed regulations on the national economy can be measured by considering changes in the gross domestic product (GDP). The GDP is the sum of the total consumption of goods and services, total investments and/or savings, and total government

expenditures. However, the proposed NS2 guidelines will not have economic effects in terms of GDP, or other economic indicators. As stated above, the NS2 guidelines are advisory and do not have the force and effect of law. The preferred alternative does not pose a significant regulatory impact to the national economy.

2.5 Significance under E.O. 12866

A “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 government 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 the Executive Order.

This rulemaking has been determined to be not significant under E.O. 12866 because it does not meet any of the criteria set forth above for a significant regulatory action. As discussed throughout this document, the proposed action, if adopted through a final rule, would not have economic effects, and will not 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 government or communities. As this action consists of general guidance on best scientific information available (BSIA), it will have no effect on entitlements, grants, user fees or loan programs. The action raises no novel legal or policy issues. It updates existing guidance on BSIA consistent with recommendations from the National Research Council of the National Academies and MSA amendments intended to strengthen the role of science in fishery conservation and management actions.

3.0 Analysis as Required by the Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) requires the examination of effects of proposed and existing rules on “small entities” such as small businesses, small organizations, and small governmental jurisdictions. In reviewing the potential effects of proposed regulations, the agency must either: 1) certify that the rule will not, if promulgated, have a “significant economic effect on a substantial number of small entities” and prepare a Regulatory Flexibility Act analysis (RFAA); or 2) prepare an Initial Regulatory Flexibility Analysis (IRFA).

The Small Business Administration (SBA) defines a small entity engaged in commercial fishing activities as a firm with annual gross receipts (annual gross revenues) of no more than \$4.0 million and a small entity engaged in for-hire recreational fishing activities (headboat or charter boat) as a firm with annual gross receipts (annual gross revenues) of no more than \$6.5 million.

The recipients of the NMFS permits for vessels, operators, and dealers discussed in section 2.2 are considered small entities for the purposes of this proposed rule.

To evaluate whether the proposed rule will have a “significant economic impact on a substantial number of small entities,” two criteria are considered: disproportionality and profitability. Disproportionality refers to whether the proposed regulation will place a substantial number of small entities at a significant competitive disadvantage to large entities. Profitability refers to whether the proposed regulation will significantly reduce profit for a substantial number of small entities and whether the costs (or reduction in revenues) imposed by the proposed regulation can be absorbed by the firm in the short- and medium-term or passed on to its consumers. If these costs (or reductions in revenues) cannot be absorbed so that either profits are reduced significantly or the solvency (ability to meet long term debt payments) of a substantial number of small entities is clearly threatened, then the impact of the rule is significant.

NMFS determined that the proposed NS2 guidelines would not have a “significant impact on a substantial number of small entities.” Therefore, a RFAA was prepared rather than an IRFA. This determination is discussed in section 3.3.

3.1 Objectives of, and Legal Basis for, the Proposed Guidelines

NMFS believes that the proposed NS2 guidelines will improve the ability of the Councils and the Secretary to evaluate and utilize the “best scientific information available” when preparing SAFE Reports, FMPs, FMP amendments, and other regulatory actions. The proposed NS2 guidelines will also provide guidance to the Secretary and the Councils on the establishment of peer review processes for review of scientific information used to advise the Councils on the conservation and management of fisheries. The authority for this action is provided in Section 301(b) of the Magnuson-Stevens Act which states, “(T)he Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.” (16 U.S.C. 1851(b)).

3.2 Description and Estimate of the Number of Small Business Entities to Which Rule Applies

As described in section 2.2, the proposed action will not apply to any small business entity. The NS2 guidelines provide procedural guidance to the Secretary and Council regarding the use of best scientific information available and peer review processes and do not have the force and effect of law.

3.3 Certification of this Action under RFA

NMFS has determined that implementation of the proposed NS2 guidelines will not have a “significant economic impact on a substantial number of small entities.” In terms of disproportionality, the proposed guidelines, if implemented, will not put small entities at a significant competitive disadvantage relative to large entities because there will not be any impacts to either small or large entities. In terms of profitability, the proposed guidelines will not reduce profit significantly for a substantial number of small entities. NMFS is recommending

that the Office of General Counsel for the Department of Commerce certify to the Chief Counsel for advocacy of the Small Business Administration that the proposed guidelines will not have a significant economic impact on a substantial number of small entities. When certifying under section 605(b) of the RFA, it is not necessary to prepare an Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule or a Final Regulatory Flexibility Analysis (FRFA) for the final rule. Therefore, this Regulatory Flexibility Act analysis (RFAA) was prepared to provide the factual basis for NMFS' recommendation to certify this proposed rule.

As described in the NMFS' *Guidelines for Economic Review of National Marine Fisheries Service Regulatory Actions*,¹ this RFAA was prepared to provide the factual basis for certification. The basis of this determination is that the NS2 guidelines are advisory and do not have the force and effect of law. The primary objective of the NS2 guidelines is to provide general guidance for the Councils and the Secretary when evaluating "best scientific information available," rather than proposing a prescriptive, one-size-fits-all standard. There is considerable diversity among federally-managed fisheries across and within regions and a more prescriptive approach would ignore the diversity inherent in these fisheries. Thus, the proposed NS2 guidelines are general enough to allow for flexibility and adaptability to regional fisheries, while providing relevant criteria for evaluating "best scientific information available" that provides some standardization in operating procedures across the U.S. Because the proposed NS2 guidelines provide general guidance focusing on scientific information and review processes, they will not have any economic impacts on any business entities.

As the Councils and the Secretary apply the revised NS2 guidelines to specific fisheries, they will develop FMPs, FMP amendments, or other regulatory actions that will be accompanied by environmental, economic, and social analyses prepared pursuant to the Regulatory Flexibility Act, National Environmental Policy Act, and other relevant statutes. Any economic effects on vessel owners, dealers, or operators in the short- or long-term will be analyzed and, if appropriate, an IRFA will be developed at that time.

3.4 Paperwork Reduction Act

The Paperwork Reduction Act (PRA) concerns the collection of information. The intent of the PRA is to minimize the Federal paperwork burden for individuals, small businesses, state and local governments, and other persons, as well as to maximize the usefulness of information collected by the Federal government.

The proposed guidelines do not contain any new recordkeeping or reporting requirements subject to the PRA. When the Councils and the Secretary of Commerce develop FMPs, FMP amendments, or other regulatory actions as required under the Magnuson-Stevens Act and the revised NS2 guidelines, such actions may include new collection-of-information activities or

¹ National Marine Fisheries Service. 2007. *Guidelines for Economic Review of National Marine Fisheries Service Regulatory Actions*. Prepared by M. Raizin. National Marine Fisheries Service Instruction 01-111-05, National Marine Fisheries Procedures for RFA and E.O. 12866 Review Process. Silver Spring, Maryland. Available at: http://www.nmfs.noaa.gov/sfa/domes_fish/EconomicGuidelines.pdf

requirements. In the event that new collection-of-information activities or requirements are proposed, specific analysis regarding the public's reporting burden as required under the PRA would accompany such an action.

3.5 Relationship to Other Federal Rules

NMFS is not aware that the proposed guidelines will duplicate, overlap, or conflict with other relevant Federal rules.