

FEDERAL REGULATION

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. Definitions. For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of \$100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the

ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. General Requirements. In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. Regulatory Impact Analysis and Review.

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, provided that, the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along

with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director, subject to the direction of the Task Force which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c) (1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c) (2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c) (2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c) (3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a) (2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a) (2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. Regulatory Review. Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. Regulatory Agendas.

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order.

These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. The Task Force and Office of Management and Budget.

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 et seq.

Sec. 7. Pending Regulations.

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to take effect as interim rules while they are being reconsidered in accordance with this Order, provided that, agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. Exemptions.

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, provided that, any such regulation shall be reported to the Director as soon as is practicable, the

agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, provided that, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. Judicial Review. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. Revocations. Executive Orders No. 12044,
as amended, and No. 12174 are revoked.

Richard Reagan

THE WHITE HOUSE,

February 17, 1981.

"Advance Copy"



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington, D.C. 20235

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GCF:MHF

RECEIVED

ON

MAR 18 1981

by GCAK

TO: A - James P. Walsh
FROM: F - Terry L. Leitzell

SUBJECT: Interim NMFS Procedures to Implement Executive Order 12291
and the Regulatory Flexibility Act--ACTION MEMORANDUM
(by March 11, 1981)

The President issued Executive Order 12291 (E.O. 12291) on February 17, 1981, which established the Administration's policy on the development and issuance of regulations. The policy of E.O. 12291 is to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for Presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations. We have been advised by the Department of Commerce (DOC) that all ongoing and proposed regulatory activities must immediately comply with E.O. 12291 and the Regulatory Flexibility Act (RFA). This memorandum recommends interim procedures, based on discussions with NOAA, for reviewing and processing regulatory actions for fishery management plans (FMPs), consistent with E.O. 12291 and the RFA.

Background

Prior to E.O. 12291, we conducted rulemaking activities in compliance with E.O. 12044. However, E.O. 12291 has raised the level of executive oversight from the NOAA Administrator to the Director, Office of Management and Budget (OMB), after appropriate clearance by the Secretary, DOC. In addition, E.O. 12291 places more emphasis on the need to justify imposing any regulation on society and requires that the potential benefits to society outweigh the potential costs (using both quantitative and qualitative comparisons). The Order also reinforces the policy set forth by the Secretary in his memorandum of January 29, 1981, which calls for, among other things, the reduction of unnecessary and ineffective regulations, and places greater emphasis on the quality of the Department's economic reporting, analysis, and policy development.

Current regulatory procedures established in DAO 218-7 and the NOAA Rulemaking Directive 21-24 are inconsistent with E.O. 12291. We have been informed by the Office of Regulatory Policy, DOC, that a revised DAO which incorporates the requirements of E.O. 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act will be issued in draft form in approximately 2 to 3 weeks. Until the new DAO is issued in final form and implemented through a new NOAA Rulemaking Directive, we need interim procedures to fulfill our legislative obligations under the Magnuson Fishery Conservation and Management Act.



10TH ANNIVERSARY 1970-1980

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Uncertainty concerning the final form of OMB and DOC policies to implement E.O. 12291 has necessitated establishing new priorities for actions contemplated between now and May 31, 1981. We have grouped the anticipated regulatory actions into three categories:

1. Regulatory actions which could be delayed until OMB and DOC regulatory policy is established;
2. Regulatory actions which are time critical and can be demonstrated to be in the best interests of society;
3. Regulatory actions for which we should seek OMB exemptions from E.O. 12291 because they are technical changes to FMPs or amendments, or implement regulatory actions authorized in FMPs when specific conditions have been satisfied.

ISSUE 1: Delay of regulatory actions for new FMPs, amendments to existing FMPs, technical changes, or inseason adjustments.

In response to the mandate of E.O. 12291 to insure well-reasoned regulations and to aim toward maximizing net societal benefits, we plan to delay certain regulatory actions pending further review. We have chosen these actions on the basis of whether fishery can continue in a status quo situation without suffering any adverse biological or economic impacts. The status quo situation includes no regulation in the fishery conservation zone; continuation of present regulations, or the lapse of existing regulations. These actions are listed in Table 1.

Table 1. Regulatory Actions that can be Delayed
Pending Further Guidance from OMB and DOC

<u>FMP Action</u>	<u>Regulations</u>	
	<u>Proposed</u>	<u>Final</u>
Atlantic groundfish: yellowtail flounder amendment	X	
Atlantic groundfish: supplement no. 4		X
Atlantic mackerel: amendment no. 2	X	
Atlantic butterfish: amendment no. 2	X	
Gulf of Mexico shrimp FMP		X
Gulf and South Atlantic Councils boundary line		X
Northern anchovy: 1980 amendment	X	
Precious corals FMP		X
Tanner crab: amendment no. 6		X
Tanner crab: amendment no. 7	X	
Bering Sea groundfish FMP: amendment no. 2	X	
Gulf of Alaska groundfish: amendment no. 9	X	
Foreign fishery regulations: reporting requirements	X	
Inseason adjustment: Gulf of Alaska groundfish reserve release	X	

	<u>Proposed</u>	<u>Final</u>
Inseason adjustment: Bering Sea groundfish reserve release	X	

Proposed Action

I propose that we defer the above regulatory actions that require publication of a proposed or final rule in the Federal Register.

ISSUE 2: Time Critical Regulatory Actions

We have identified seven regulatory actions which cannot be delayed because their absence could lead to overfishing of already depleted fishery resources, hinder the efficient implementation of an FMP presently in place, or cause U.S. fishermen to forego net economic benefits. These regulatory actions are as follows:

1. Amendment to the Preliminary Management Plan (PMP) for Groundfish off the Coasts of Washington, Oregon, and California. The objective of the amendment is to permit a joint venture in which U.S. fishing vessels can harvest shortbelly rockfish and sell them to foreign processing vessels. This is a time critical amendment because the fishery only occurs between April 15 and May 15. Without the amendment, foreign vessels could not enter the FCZ and purchase rockfish from U.S. fishing vessels, thus depriving the United States of an opportunity to increase exports of fishery products. In addition, a hake joint venture is expected to begin on May 1, 1981, and sufficient lead time is necessary to issue foreign fishing permits.
2. Amendment to the Fishery Management Plan for Commercial and Recreational Salmon Fishery off the Coasts of California, Oregon, and Washington. This fishery historically begins on May 1 of each year. The absence of any amendment for the 1981 fishing season would continue the 1980 regulations, which do not reflect the current biological and economic condition of the fishery. If the regulations are not based on updated scientific information, there may be continued overfishing of certain already depleted stocks. Also, the plan may not meet allocation patterns partially dictated by court-ordered allocations to treaty Indians. This amendment will be implemented by emergency regulations because the Pacific Council will not choose proposed management measures until its March 1981 meeting, leaving insufficient time for a 45-day notice of proposed rulemaking. (E.O. 12291 rescinded the 60 day notice of proposed rulemaking requirement of E.O. 12044.)
3. Amendment to the High Seas Salmon Plan off the Coast of Southeastern Alaska. This fishery usually begins on April 15 of each year. New biological information obtained during and after the 1980 season indicates that runs of "wild" as opposed to "hatchery" salmon may be lower in 1981 than recent levels. The salmon runs of wild stocks during the previous five-year period also were below historical averages.

The intent of the Council is to implement a management program to rebuild stocks starting with the 1981 fishing season. If the 1980 regulations are continued into 1981, the optimum yield would not reflect the best scientific data, and this could further endanger depleted stocks of wild salmon.

This will be a controversial amendment because of the potential adverse economic impact on current participants in the fishery. The optimum yield that has been proposed would reduce landings of U.S. fishermen in Southeastern Alaska by 10 to 15 percent for a 20 to 25 year period. The Council will choose the recommended management regime at its March 1981 meeting. If the amendment is approved by the Secretary, it will be implemented by emergency regulations.

4. Extension of Emergency Regulations for the Surf Clam and Ocean Quahog FMP. Emergency regulations currently in effect permit surf clam fishermen to use their own discretion to make up bad weather days whether or not a Coast Guard warning is posted. The extension is needed from March 4, 1981 (when the first 45-day period expires) through March 31, 1981 (when the "bad weather" provision of the FMP expires). If the emergency regulation is not extended, fishermen will be prohibited from making their own decisions of when to fish. This is the type of unnecessary burden E.O. 12291 intends to eliminate. (We have cleared the extension with DOC and OMB and have filed the notice with the Federal Register.)

5. Inseason Adjustment to the Atlantic Groundfish FMP to Decrease Catch Limits for Cod. This inseason adjustment, authorized by 50 CFR 651.23(f), is needed to spread fishing effort over the entire season and to reduce the possibility of a closure this summer.

6. Inseason Adjustment to the Atlantic Groundfish FMP to Increase Catch Limits for Yellowtail Flounder. This inseason adjustment, authorized by 50 CFR 651.23(f), is needed to correct an inconsistency between the catch limits for open and closed fisheries and to obviate misreporting problems with the quantity of catch by area.

7. Inseason Adjustment to the Tanner Crab FMP for an Area Closure. This inseason adjustment, authorized by 50 CFR 671.27(a), is based on catch levels and declining catch per unit of effort and is needed to prevent area optimum yield from being exceeded and to protect the resource from being overfished.

Proposed Action

I propose that we seek the necessary clearances from DOC and OMB to proceed with time critical regulatory actions.

ISSUE 3: Request to OMB to Exempt Certain Categories of Regulatory Actions from E.O. 12291.

Because of the dynamic and sometimes volatile nature of U.S. fisheries, there often is the need to rapidly implement certain types of management measures. For example, in the West Coast salmon fisheries it is difficult to predict the size of the run at the start of the season. There also are problems predicting effort because it depends on the run size and domestic and international economic conditions. During the season, some salmon runs may have to be closed, bag limits changed, or the length of the season altered to achieve spawning

escapements. Similarly, on the East Coast, there may have to be inseason adjustments to open or close areas, change the catch limits, or close fisheries such as in the Atlantic groundfish fishery to prevent overfishing and be consistent with vessel class allocations.

Under E.O. 12044, NMFS treated inseason adjustments as exempt from any requirement to determine whether they were "significant," because they were neither initial regulations implementing an FMP, nor amendments to existing regulations. The purpose of an inseason adjustment is to implement a management measure contained in an approved FMP and regulations under specified conditions as quickly as possible. Authority for these actions sometimes is delegated to the NMFS Regional Director operating within established guidelines. Placing an additional review/time requirement on inseason actions would defeat the purpose of the Executive Order through interference with the flexibility written into the original regulations. Inability to respond quickly to changing circumstances within a fishery would put more of a burden on the persons regulated than the agency originally intended.

PROPOSED ACTION

E.O. 12291 (section 8(b)) permits the Director, OMB, to exempt "any class or category of regulations from any or all requirements of the Order." I propose that we discuss this issue with the Office of Regulatory Policy (DOC) and determine the procedures for obtaining an OMB exemption. In the meantime, I also propose that we deem each inseason adjustment as exempt from any requirements to determine whether it is major or non-major. Nevertheless, we should notify the Office of Regulatory Policy of each inseason adjustment and request that it expedite review and clearance procedures.

ISSUE 4: Interim Procedures for Reviewing and Processing Time Critical Actions.

E.O. 12291 specifies procedures for issuing regulations that respond to an emergency situation and for regulations that can be processed in a timely fashion through DOC and OMB clearance channels.

Issuance of emergency regulations under E.O. 12291 requires the following actions:

1. Notify the Director of OMB as soon as is practicable;
2. Specify in the preamble to the emergency regulation in the Federal Register the reasons why it is impracticable to follow the procedures of E.O. 12291; and
3. Identify whether the emergency regulation is major or non-major and prepare a Regulatory Impact Analysis (RIA) after issuance if the determination is major.

Regulations issued through DOC and OMB clearance channels require the following actions:

1. Identify whether the regulation is major or non-major and prepare an RIA if the determination is major.
2. (a) Transmit the preliminary RIA and the notice of proposed rulemaking to OMB at least 60 days prior to the publication of the notice, and a final RIA and the final rule at least 30 days prior to the publication of the final major rule; or
(b) Transmit to OMB, at least 10 days prior to publication, every notice of proposed and final rulemaking for a non-major rule.

We also are required to comply with the Regulatory Flexibility Act and prepare a "Regulatory Flexibility Analysis (RFA)" if a regulation is expected to have a "significant economic impact" on small entities. An RFA is not required for any proposed or final rule if the agency head certifies that the rule will not have a "significant economic impact" on a substantial number of small entities. The certification or RFA must be sent to the Chief Counsel for Advocacy of the Small Business Administration.

And finally, the Paperwork Reduction Act (P.L. 96-511) requires that any proposed rule which contains a "collection of information request" must be sent to OMB for clearance. This requirement can be satisfied at the same time that we send regulations to OMB under E.O. 12291. Rules do not have to comply with the Paperwork Reduction Act until April 1, 1981.

SUBISSUE 4A: Interim Criteria to Determine Whether Time Critical
Regulatory Actions are Major or Non-Major
Under E.O. 12291.

E.O. 12291 provides broad criteria for determining whether a proposed regulation is major. Any regulation is considered a "major" rule if it is likely to result in:

1. An annual effect on the economy of \$100 million or more;
2. A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfortunately, these criteria do not provide guidance on defining the terms "major" or "adverse". Therefore, interim criteria have been developed that are scaled to the size of the fishing industry to obtain a more accurate reading of what are major regulations. The criteria, which are consistent with expected guidelines from DOC, are as follows:

Any fishery management plan or amendment to a plan is a "major" rule if it is likely to result in:

1. An increase in total cost or price of goods or services to the national economy of \$5 million or more in any one year;

2. An increase in cost or price of goods or services of 10 percent or more, in any one year, in any industry or market, level of government, or geographic region; provided that the incremental cost of production exceeds \$1 million annually or incremental revenues paid for goods or services so affected exceeds \$1 million annually.

3. An adverse impact on competition. This is defined as a regulation that restricts entry into a fishery or imposes a limited entry system, or in any way directly limits the number of U.S. fishing vessels that may participate in a fishery;

4. An adverse impact on employment. This is defined as a regulation which reduces employment in a fishery, either at the harvesting or processing level, by 10 percent in any one year, measured from a base year representative of historical employment levels in the fishery.

5. An adverse impact on investment. This is defined as a regulation which reduces the incentive to invest in innovative gear and equipment or increases the risk of investment.

6. An adverse impact on productivity. This is defined as a regulation which reduces gross revenues to the participants in a fishery by 10 percent or more in any one year, provided that the reduction in gross revenues is at least \$1 million (evaluated at the most recent prices).

7. Adverse impact on exports. This is defined as any regulation that constrains the ability of U.S. fishermen or processors to export fishery products; provided that there is no biological emergency.

A regulation may also be deemed major by the Secretary, Administrator, or Assistant Administrator because of the sensitivity, policy significance, or potential controversy of the subject.

An analysis will be required to determine whether any of the criteria for a major regulation have been triggered. This analysis will be similar to the "Regulatory Analysis" required by E.O. 12044. NMFS plans to develop guidelines for this analysis based on consultations with the DOC Chief Economist and the Office of Regulatory Policy.

SUBISSUE 4B: Interim Criteria to Determine Whether Time Critical Actions Have a Significant Economic Impact Under the Regulatory Flexibility Act (RFA).

The RFA requires that agencies assess the impacts of regulatory actions on small businesses with respect to estimating reporting, recordkeeping, and other compliance costs associated with a proposed rule. On the basis of the impacts, the agency head must certify whether or not the action will have a "significant economic impact." Under the RFA, an action can be significant if it has either a beneficial or detrimental impact on small entities. However, the term "significant" is not defined in the RFA either from a quantitative or qualitative standard. In other words, the determination of whether an action is significant is a policy judgment of the agency head making the decision.

NMFS will have to make this certification on the basis of an analysis supporting the management regime proposed in an FMP or amendment. This analysis has to address questions concerning the impacts of management action on small entities or small businesses at regional and local economic levels. The definition of "significant economic impacts", however, will vary by fishery because of their relative sizes and complexities.

Outline of Interim Procedures

On the basis of subissues 4A and 4B, NMFS has developed interim criteria to determine major/non-major rules under E.O. 12291 and significant rules under the RFA. These determinations will be made on the basis of an analysis (similar to the "Regulatory Analysis" under E.O. 12044) which NMFS plans to call a "Regulatory Impact Review". The Chief Economist and Office of Regulatory Policy have informally reviewed these criteria and procedures and have commented favorably.

The interim procedures NMFS plans to use to implement E.O. 12291 and comply with the RFA for time critical actions (Issue 2) and all future regulatory action, pending DOC guidelines, are as follows:

1. Develop guidelines for a Regulatory Impact Review (RIR) and temporarily use the current regulatory analysis guidelines under E.O. 12044.
2. Based on the conclusions of the RIR, evaluated against E.O. 12291 criteria as modified, make a determination of major/non-major.
 - A. If the determination is major, change the title of the Regulatory Impact Review to a Regulatory Impact Analysis.
 - B. If the determination is non-major, the RIR remains intact.
3. Based on conclusions of the RIR, the Assistant Administrator will certify whether the FMP or amendment does not have a "significant economic impact" (beneficial or detrimental).

4. Authorize the Assistant Administrator for Fisheries through authority delegated to the Office of Resource Conservation and Management to transmit the certification (under the Regulatory Flexibility Act) and accompanying RIR or RIA to the Small Business Administration for its review.

5. Adopt the following channels for clearance of proposed and final regulations:

- a. Assistant Administrator for Fisheries (AA) to Administrator, NOAA (A) for clearance
- b. A to DOC for clearance
- c. DOC to OMB for clearance
- d. DOC notifies A of OMB clearance
- e. A transmits regulations to Federal Register

PROPOSED ACTION

I propose that you adopt the interim procedures to assure that FMP regulations comply with E.O. 12291 and the RFA.

Issue 5: Determinations of Time Critical Regulatory Actions under E.O. 12291 and the RFA.

I have used the draft regulatory analyses for both salmon amendments (as required under E.O. 12044) and the determination of nonsignificance (E.O. 12044) for the PMP action to make the major/non-major determinations under E.O. 12291 and the significance certification under the RFA. These are as follows:

<u>Action</u>	<u>E.O. 12291</u>	<u>RFA</u>
COW Salmon	Non-major	Significant
High Seas Salmon	Major*	Significant
Surf Clam Extension	Non-major	Nonsignificant
Groundfish PMP	Non-major	Nonsignificant
Atlantic Groundfish Catch Adjustment	Non-major	Nonsignificant
Atlantic Groundfish Yellowtail Limits	Non-major	Nonsignificant
Tanner Crab Closure	Non-major	Nonsignificant

*This assumes that the North Pacific Council adopts either the 10 percent or 15 percent reduction in the optimum yield for chinook salmon.

PROPOSED ACTION

I propose that you concur with my determinations of major/non-major and significance for the amendments and inseason adjustments.

RECOMMENDATIONS

I recommend that you:

1. Concur with my proposal to delay some FMP regulatory actions pending further guidance from OMB and DOC;
2. Concur with my proposal to process time critical regulatory actions for FMPs;
3. Concur with my proposal to petition OMB to exempt inseason adjustments from E.O. 12291;
4. Adopt the proposed interim procedures to assure that FMP regulations comply with E.O. 12291 and the RFA; and
5. Concur with my determinations of major/non-major under E.O. 12291 and significance under the RFA for time critical actions.

CONCURRENCES

_____ I concur.
 _____ I do not concur.
 _____ I wish to consult with _____.

Date

James P. Walsh
Acting Administrator, NOAA

CLEARANCES

SIGNATURE AND DATE

F/CM:WGGordon _____
 ES:STinkham _____
 PP:MBelsky _____
 GC:MBWest _____

Drafted by: RASiegel, Staff Economist F/CM6, 634-7449 and
MHFrailey, Attorney GCF, 634-4224



UNITED STATES DEPARTMENT OF COMMERCE
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Telephone (907) 586-7414

DATE: March 21, 1981

TO : GCF-Maggie Frailey

FROM: GCAK-Pat Travers *Pat*

SUBJ: Interim NMFS Procedures to Implement E.O. 12291 and the RFA

Thank you for sending me the advance copy of the proposed NMFS interim procedures for implementing Executive Order 12291 and the Regulatory Flexibility Act in proceedings under the Magnuson Act. You and Bob Siegel did a very thorough job in covering the issues that are likely to arise pending the issuance of definitive DOC and NOAA implementing procedures, in spite of the time pressure you both were working under. Having reviewed the draft memo from Terry to Bud Walsh, I thought it might be useful to raise the following issues and suggestions.

(1) At pages 3-4 of the draft, the reasons that the Alaska salmon FMP amendment for 1981 should not be delayed for compliance with the Order are discussed. One important point that was omitted was that, in the absence of the amendment, power trollers will not be authorized to fish in the FCZ after April 15. This could help persuade OMB even more effectively than conservation-based arguments that emergency treatment under section 8 of the Order is appropriate.

(2) In the second full paragraph of page 5, it is suggested that in-season adjustments not be subjected to a major/non-major determination even during the period before OMB grants a categorical exemption for such adjustments under section 8(b) of the Order. Assuming that these in-season measures are currently subject to the Order, I see no basis for our unilaterally declining to make a major/non-major determination on each of them pending OMB action under section 8(b). Most in-season measures will probably be found to be non-major and, if the procedural suggestion I make below is accepted, the process of making this finding will not be particularly burdensome. On the other hand, some in-season adjustments, especially those concerning salmon, may impose significant burdens on particular individuals. Neither OMB nor the Department may look kindly on our omitting any impact assessment of such measures in the absence of a section 8(b) exemption.

(3) In the last paragraph of page 7 and the second half of page 8, the draft suggests that the major/non-major determination under the Order and the determination whether there will be a significant economic impact on a substantial number of small entities always be made through the preparation of a "regulatory impact review" that would be the same as a full-fledged regulatory analysis. To undertake such a full-scale effort even on minor amendments would



be analogous to requiring that a full EIS be required on each such action whether or not it was required under NEPA. The demands that such a procedure would impose on the agency's ever more limited resources would frustrate effective implementation of the Order and the RFA by dissipating analytical effort among a large number of relatively insignificant actions while diverting it from the actions that truly require thorough comparison of their benefits and burdens. By failing to distinguish it from the less intensive preliminary review that should be undertaken to determine whether an action falls within the criteria of the Order and the RFA, the proposal threatens to trivialize the much more exacting analysis that the Order and the RFA demand of actions having truly significant economic impacts that fall within those criteria. I would suggest, therefore, that the initial major/non-major determination under the Order and the determination whether there will be a significant economic impact on a substantial number of small entities under the RFA be made through the preparation of a "regulatory impact assessment" bearing the same relationship to a regulatory impact or flexibility analysis as an environmental assessment bears to an EIS. As under NEPA, when it is plain from the beginning that an action will require a regulatory impact or flexibility analysis, the agency will dispense with the preparation of an assessment and proceed directly to the preparation of the analysis.

(4) At the top of page 8, the criterion for preparation of a regulatory flexibility analysis under the RFA is inexactly stated. It is not merely whether or not the action will "have a significant economic impact", but whether it will "have a significant economic impact on a substantial number of small entities."

(5) In the first half of page 9, the draft proposes that, following Departmental clearance, regulations be transmitted to OMB by Bob Miki's office. At page 3 of his memo of March 3 on implementation of the Order, Bud Walsh seems to provide that he will send the DOC-cleared regulations to OMB.

Understandably, the rush that was necessary to develop these procedures left no opportunity for consultation with the Councils concerning them. I suggest that, at the earliest possible time, Terry invite the Councils' and the NMFS regions' comments on features that would be desirable in the final procedures. The Councils may, at first, be dismayed that DOC and NOAA are voluntarily developing for fishery regulations more inclusive criteria for "major" regulations than are prescribed by the Order. They should be fully apprised of DOC's lead agency status under the Order; of the fact that the Secretary himself has mandated this generous approach to the Order's spirit; and that he has specifically singled out fisheries as a regulatory area in need of the kind of analysis required under the Order and the RFA. While Bob McVey and I can initiate communication of this information, it would be extremely helpful if, in the near future, the Assistant Administrator for Fisheries, the Administrator, or even the Secretary communicated directly with the Councils on these matters.

Thank you for all your assistance in applying the new requirements to some of our recent actions. I will be in Anchorage from Monday, March 22 until the RAM, and will be in touch with you and Thorn from there.

cc; Jim Brennan
 Bob McVey
 Jim Brooks
 Ron Berg