

9 Other applicable law

The MSFCMA (16 U.S.C. 1801 et seq.) provides the authority for U.S. fishery management. But fishery management decision-making is also affected by a number of other federal statutes designed to protect the biological and human components of U.S. fisheries, as well as the ecosystems within which those fisheries are conducted. Major laws affecting federal fishery management decision making are summarized below.

9.1 Administrative Procedures Act

All federal rulemaking is governed under the provisions of the Administrative Procedure Act (APA) (5 U.S.C. Subchapter II), which establishes a “notice and comment” procedure to enable public participation in the rulemaking process. Under the APA, NOAA Fisheries is required to publish notification of proposed rules in the *Federal Register* and to solicit, consider and respond to public comment on those rules before they are finalized. The APA also establishes a 30-day wait period from the time a final rule is published until it takes effect.

9.2 Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) of 1972 (16 U.S.C. 1451 et seq.) encourages state and federal cooperation in the development of plans that manage the use of natural coastal habitats, as well as the fish and wildlife those habitats support. When proposing an action determined to directly affect coastal resources managed under an approved coastal zone management program, NOAA Fisheries is required to provide the relevant state agency with a determination that the proposed action is consistent with the enforceable policies of the approved program to the maximum extent practicable at least 90 days before taking final action.

9.3 Data Quality Act

The Data Quality Act (DQA) (Public Law 106-443), which took effect October 1, 2002, requires the government for the first time to set standards for the quality of scientific information and statistics used and disseminated by federal agencies. Information includes any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, cartographic, narrative, or audiovisual forms (includes web dissemination, but not hyperlinks to information that others disseminate; does not include clearly stated opinions).

Specifically, the Act directs the Office of Management and Budget (OMB) to issue government wide guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by federal agencies." Such guidelines have been issued, directing all federal agencies to create and issue agency-specific standards to 1) ensure Information Quality and develop a pre-dissemination review process; 2) establish administrative mechanisms allowing affected persons to seek and obtain correction of information; and 3) report periodically to OMB on the number and nature of complaints received.

Scientific information and data are key components of FMPs and amendments and the use of best available information is the second national standard under the MSFCMA. To be consistent with the Act, FMPs and amendments must be based on the best information available, properly reference all supporting materials and data, and should be reviewed by technically competent individuals. With respect to original data generated for FMPs and amendments, it is important to ensure that the data are collected according to documented procedures or in a manner that reflects standard practices accepted by the relevant scientific and technical communities. Data should also undergo quality control prior to being used by the agency.

9.4 Endangered Species Act

The Endangered Species Act (ESA) of 1973 (16 U.S.C. Section 1531 et seq.) requires that federal agencies use their authorities to conserve endangered and threatened species, and that they ensure actions they authorize, fund, or carry out are not likely to ham the continued existence of those species or the habitat designated to be critical to their survival and recovery. The ESA requires NOAA Fisheries, when proposing a fishery action that “may affect” critical habitat or endangered or threatened species, to consult with the appropriate administrative agency (itself for most marine species, the U.S. Fish and Wildlife Service for all remaining species) to determine the potential impacts of the proposed action. Consultations are concluded informally when proposed actions “may affect but are not likely to adversely affect” endangered or threatened species or designated critical habitat. Formal consultations, including a biological opinion, are required when proposed actions may affect and are “likely to adversely affect” endangered or threatened species or designated critical habitat. If jeopardy or adverse modification is found, the consulting agency is required to suggest reasonable and prudent alternatives.

On April 28, 1989, NOAA Fisheries Southeast Region (SERO) completed a formal consultation, including a Biological Opinion (Opinion), on the effects of commercial fishing activities in the Southeast Region on threatened and endangered species. Caribbean fisheries were reviewed for their impacts on ESA-listed species as part of that consultation. The reef fish and spiny lobster trap fisheries and haul seines and beach fisheries in the U.S. Caribbean were identified in the list of Southeast fisheries that may adversely affect sea turtles. However, the Opinion concluded that commercial fisheries are not likely to jeopardize the continued existence of any listed species. Further, consultations on Caribbean FMPs and amendments since that time have concluded that the proposed actions are not likely to adversely affect ESA-listed species.

NOAA Fisheries Office of Sustainable Fisheries has requested initiation of a Section 7 consultation with the SERO’s Division of Protected Resources for this amendment. Although ESA-listed species may benefit from some of the additional management measures proposed, NOAA Fisheries believes the impacts of continued operation of Caribbean fisheries on ESA listed species warrant reassessment. The results of the consultation will be complete before the Secretary makes a decision on the approvability of the amendment.

9.5 Executive Orders

9.5.1 E.O. 12612: Federalism

The Executive Order on federalism requires agencies in formulating and implementing policies that have federalism implications, to be guided by the fundamental federalism principles. The Order serves to guarantee the division of governmental responsibilities between the national government and the states that was intended by the framers of the Constitution. Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people. This Order is relevant to FMPs and amendment given the overlapping authorities of NOAA Fisheries, the states, and local authorities in managing coastal resources, including fisheries, and the need for a clear definition of responsibilities. It is important to recognize those components of the ecosystem over which fishery managers have no direct control and to develop strategies to address them in conjunction with appropriate state, tribes and local entities (international too).

9.5.2 E.O. 12866: Regulatory Planning and Review

Executive Order 12866: Regulatory Planning and Review, signed in 1993, requires federal agencies to assess the costs and benefits of their proposed regulations, including distributional impacts, and to select alternatives that maximize net benefits to society. To comply with E.O. 12866, NOAA Fisheries prepares a Regulatory Impact Review (RIR) for all fishery regulatory actions that either implement a new fishery management plan or significantly amend an existing plan. RIRs provide a comprehensive analysis of the costs and benefits to society associated with proposed regulatory actions, the problems and policy objectives prompting the regulatory proposals, and the major alternatives that could be used to solve the problems. The reviews also serve as the basis for the agency's determinations as to whether proposed regulations are a "significant regulatory action" under the criteria provided in E.O. 12866 and whether proposed regulations will have a significant economic impact on a substantial number of small entities in compliance with the RFA. A regulation is significant if it is likely to result in an annual effect on the economy of at least \$100,000,000 or has other major economic effects.

9.5.3 E.O. 12630: Takings

The Executive Order on Government Actions and Interference with Constitutionally Protected Property Rights, which became effective March 18, 1988, requires that each federal agency prepare a Takings Implication 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. Clearance of a regulatory action must include a takings statement and, if appropriate, a Takings Implication Assessment. Management measures limiting fishing seasons, areas, quotas, fish size limits, and bag limits do not appear to have any taking implications. There is a takings implication if a fishing gear is prohibited, because fishermen who desire to leave a fishery might be unable to sell their investment, or if a fisherman is prohibited by federal action from exercising property rights granted by a state.

9.5.4 E.O. 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

This Executive Order requires that federal agencies conduct their programs, policies and activities in a manner to ensure that individuals or populations are not excluded from participation in, or denied the benefits of, or subjected to discrimination because of their race, color, or national origin. In addition, and specifically with respect to subsistence consumption of fish and wildlife, federal agencies are required to collect, maintain and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Impacts of commercial and recreational fishing on subsistence fishing is a concern in fisheries management.

9.5.5 E.O. 12962: Recreational Fisheries

This Executive Order requires federal agencies, in cooperation with states and tribes, to improve the quantity, function, sustainable productivity, and distribution of U.S. aquatic resources for increased recreational fishing opportunities through a variety of methods including, but not limited to, developing joint partnerships; promoting the restoration of recreational fishing areas that are limited by water quality and habitat degradation; fostering sound aquatic conservation and restoration endeavors; and evaluating the effects of federally-funded, permitted, or authorized actions on aquatic systems and evaluating the effects of federally-funded, permitted, or authorized actions on aquatic systems and recreational fisheries, and documenting those effects. Additionally, it establishes a seven member National Recreational Fisheries Coordination Council responsible for, among other things, ensuring that social and economic values of healthy aquatic systems that support recreational fisheries are considered by federal agencies in the course of their actions, sharing the latest resource information and management technologies, and reducing duplicative and cost-inefficient programs among federal agencies involved in conserving or managing recreational fisheries. The Council also is responsible for developing, in cooperation with federal agencies, states and tribes, a Recreational Fishery Resource Conservation Plan - to include a five-year agenda. Finally, the Order requires NOAA Fisheries and the U.S. Fish and Wildlife Service to develop a joint agency policy for administering the ESA.

9.5.6 E.O. 13084: Consultation and Coordination With Indian Tribal Governments

This Executive Order recognizes and reaffirms the U.S. governments responsibility for continued collaboration and consultation with tribal governments in the development of federal policies that have tribal implications. This Order relates to indigenous fishing.

9.5.7 E.O. 13089: Coral Reef Protection

The Executive Order on Coral Reef Protection requires federal agencies whose actions may affect U.S. coral reef ecosystems to identify those actions, utilize their programs and authorities

to protect and enhance the conditions of such ecosystems; and, to the extent permitted by law, ensure that actions they authorize, fund or carry out not degrade the condition of that ecosystem. By definition, a U.S. coral reef ecosystem means those species, habitats, and other national resources associated with coral reefs in all maritime areas and zones subject to the jurisdiction or control of the United States (e.g., federal, state, territorial, or commonwealth waters).

9.5.8 E.O. 13158: Marine Protected Areas

Executive Order 13158 requires federal agencies to consider whether their proposed action(s) will affect any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural or cultural resource within the protected area. The broad definition of MPAs will include many sites in the U.S. EEZ as part of the National MPA System.

9.5.9 E.O. 13186: Responsibilities of Federal Agencies to Protect Migratory Birds

Executive Order 13186 directs each federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations to develop and implement a MOU with the United States Fish and Wildlife Service (USFWS) to conserve those bird populations. The MOU will address actions taken by NOAA Fisheries that have, or are likely to have, a measurable negative effect on migratory bird populations. In the instance of unintentional take of migratory birds, NOAA Fisheries would develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the USFWS. Additionally, the MOU would ensure that NEPA analyses evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern.

The required MOU is currently being developed, which will address the incidental take of migratory birds in commercial fisheries under the jurisdiction of NOAA Fisheries. NOAA Fisheries must monitor, report, and take steps to reduce the incidental take of seabirds that occurs in fishing operations. The United States has already developed the U.S. National Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, and many potential MOU components are already being implemented under that plan. Development of the plan was a collaborative effort between NOAA Fisheries, USFWS, and the Department of State, carried out in large part by the Interagency Seabird Working Group consisting of representatives from those three agencies.

9.6 Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 et seq.), originally enacted in 1972, established a moratorium, with certain exceptions, on the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, and on the importing of marine mammals and marine mammal products into the United States. The Secretary of Commerce is responsible for

the conservation and management of all pinnipeds, other than walruses; the Secretary of the Interior for all other marine mammals. This responsibility includes maintaining populations of marine mammals at optimum levels, defined as "...the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element," and developing conservation plans for populations that fall below this threshold level. Marine mammal stock assessments, take reduction plans for stocks reduced or depleted as a consequence of interacting with commercial fisheries, and studies of pinniped-fishery interactions are all components of a new system established by the 1994 amendments to the MMPA to control marine mammal mortality in commercial fisheries. Under this new system, all U.S. commercial fishing operations are characterized as one of three types based on their levels of incidental and serious injury of marine mammals. At a minimum, vessel owners must register for an Authorization Certificate and may also be required to carry fishery observers.

Under section 118 of the MMPA, NOAA Fisheries must publish, at least annually, a List of Fisheries that places all U.S. commercial fisheries into one of three categories based on the level of incidental serious injury and mortality of marine mammals that occurs in each fishery. The Final Rule for the 2003 List of Fisheries classifies all U.S. Caribbean commercial fisheries under the Caribbean Fishery Management Council's jurisdiction as Category III fisheries, meaning that the annual mortality and serious injury of a stock resulting from each fishery is less than or equal to 1% of the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (68 FR 41725). The 2004 Proposed List of Fisheries was published on April 13, 2004 (69 FR 19365).

9.7 Migratory Bird Treaty Act

Under the Migratory Bird Treaty Act (MBTA), it is unlawful to pursue, hunt, take, capture, kill, possess, trade, or transport any migratory bird, or any part, nest, or egg of a migratory bird, included in treaties between the United States and Great Britain, Mexico, Japan, or the former Union of Soviet Socialist Republics, except as permitted by regulations issued by the Department of the Interior. Violations of the MBTA carry criminal penalties; any equipment and means of transportation used in activities in violation of the MBTA may be seized by the United States government and, upon conviction, must be forfeited to it. To date, the MBTA has been applied to the territory of the United States and coastal waters extending three miles from shore. Furthermore, Executive Order 13186 (see Section 9.5.9) was issued in 2001, which directs federal agencies, including NOAA Fisheries, to take certain actions to further implement the MBTA.

9.8 National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) requires federal agencies to consider the environmental and social consequences of proposed major actions, as well as alternatives to those actions, and to provide this information for public consideration and comment before selecting a final course of action. Under NEPA and its

implementing regulations, NOAA Fisheries is required to prepare environmental impact statements for major fishery actions that significantly affect the quality of the human environment.

9.9 National Marine Sanctuaries Act

Under the National Marine Sanctuaries Act (NMSA) (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 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 NOAA. The Act provides authority for comprehensive and coordinated conservation and management of these marine areas. The National Marine Sanctuary Program currently comprises 13 sanctuaries around the country, including sites in American Samoa and Hawaii. These sites include significant coral reef and kelp forest habitats, and breeding and feeding grounds of whales, sea lions, sharks, and sea turtles. A complete listing of the current sanctuaries and information about their location, size, characteristics, and affected fisherie can be found at <http://www.sanctuaries.nos.noaa.gov/oms/oms.html>. No national marine sanctuaries are located in the U.S. Caribbean.

9.10 Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) regulates the collection of public information by federal agencies to ensure that the public is not overburdened with information requests, that the federal government's information collection procedures are efficient, and that federal agencies adhere to appropriate rules governing the confidentiality of such information. The PRA requires NOAA Fisheries to obtain approval from the Office of Management and Budget before requesting most types of fishery information from the public.

9.11 Regulatory Flexibility Act

The purpose of the Regulatory Flexibility Act (RFA) is to ensure that federal agencies consider the economic impact of their regulatory proposals on small entities, analyze effective alternatives that minimize the economic impacts on small entities, and make their analyses available for public comment. The RFA does not seek preferential treatment for small entities, require agencies to adopt regulations that impose the least burden on small entities, or mandate exemptions for small entities. Rather, it requires agencies to examine public policy issues using an analytical process that identifies, among other things, barriers to small business competitiveness and seeks a level playing field for small entities, not an unfair advantage.

After an agency determines that the RFA applies, it must decide whether to conduct a full regulatory flexibility analysis (IRFA or Final Regulatory Flexibility Analysis) or to certify that the proposed rule will not "have a significant economic impact on a substantial number of small entities. In order to make this determination, the agency conducts a threshold analysis, which has the following 5 parts: 1) Description of small entities regulated by proposed action, which

includes the SBA size standard(s), or those approved by the Office of Advocacy, for purposes of the analysis and size variations among these small entities; 2) Descriptions and estimates of the economic impacts of compliance requirements on the small entities, which include reporting and recordkeeping burdens and variations of impacts among size groupings of small entities; 3) Criteria used to determine if the economic impact is significant or not; 4) Criteria used to determine if the number of small entities that experience a significant economic impact is substantial or not; and 5) Descriptions of assumptions and uncertainties, including data used in the analysis. If the threshold analysis indicates that there will not be a significant economic impact on a substantial number of small entities, the agency can so certify.

9.12 Small Business Act

Enacted in 1953, the Small Business Act requires that agencies assist and protect small-business interests to the extent possible to preserve free competitive enterprise.