

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 30-102-02
JULY 14, 1995***

***Administration and Operations
Regulatory Guidance***

PROCEDURES FOR CLEARANCE OF RULES

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SUMMARY OF REVISIONS:



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20230

July 14, 1995

MEMORANDUM FOR: F - Rollie Schmitt
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F/HP - Tom Bigford
F/IA - Hank Beasley
F/PR - Bill Fox
F/TS - Sam McKeen

FROM: GCF - Maggie Hayes *Maggie*

SUBJECT: Procedures for Clearance of Rules

Attached is an agreement signed by Ginger Lew, DOC General Counsel, and Doug Hall, governing clearance procedures for rules initiated by the National Marine Fisheries Service. It memorializes an earlier "pilot project" begun in the spring of 1994. The agreement classifies all rules as (A) significant or controversial; (B) non-controversial; (C) actions under frameworks; and (D) notices exempt from E.O. 12866 review. The procedures and roles of reviewing offices are different for each category of rule.

Our primary interest in proposing this agreement was to define the role of the DOC Office of General Counsel in reviewing NMFS rules. For significant or controversial rules, DOC/GC reviews "for any substantive changes necessary to ensure compliance with E.O. 12866 and administrative law." Recommended changes must be communicated to NOAA/GC. For categories (B) and (C), "DOC/GC may comment on these rules, but if DOC/GC does not contact NOAA/GC, NOAA will assume DOC/GC has no comments." DOC/GC does not review category (D) actions at all.

GCF requests your assistance in implementing this agreement. In particular, we ask that you remind your staff members who work on regulations that all communications between NMFS and DOC/GC are to be handled through GCF. I realize this may create some awkward moments for your staff, but in the long run the review process will be much smoother and in accordance with the agreement if all communications are lawyer-to-lawyer.

Thanks for your help!

cc: DGC - Jay Johnson
GCF attorneys
Regional Attorneys
Mike Levitt



PROCEDURES FOR CLEARANCE OF
RULES INITIATED BY THE
NATIONAL MARINE FISHERIES SERVICE

The following describes the four categories of rules produced by the National Marine Fisheries Service, the formal clearance process for clearing those rules for publication in the Federal Register, and the roles of the offices involved in clearing the rules.

Ginger Lew 5/15/95
General Counsel Date

Douglas K. Hall 6/19/95
Douglas K. Hall Date
Assistant Secretary
for Oceans and Atmosphere

Category A. All rules designated as significant or controversial (by OMB, DOC, or NOAA).

Significant Rules

Examples: Rules that fundamentally change the agency's management approach such as limiting access to fisheries instead of limiting the fishing gear, annual quotas, or fishing seasons.

Rules that cause major economic dislocation such as by allocating fish to one sector of the industry at the expense of another sector.

Controversial Rules

Examples: Rules issued under Section 306(b) of the Magnuson Act that preempt State fishery management authority.

Rules opposed by a member of a Regional Fishery Management Council who filed a minority report.

Rules opposed by a Member of Congress in a letter to Commerce or NOAA.

Rules likely to result in national news coverage.

New listings, or delistings, under the Endangered Species Act.

Designation of a stock of marine mammals as depleted under the Marine Mammal Protection Act.

Unusual, non-discretionary actions that have resulted from adverse court decisions.

Formal Clearance Process for Significant Rules:

NMFS →→ NOAA/GC
→→ NOAA
→→ DOC/GC →→ NOAA →→→→→ F.R.
→→ Public Affairs
→→ Cong. Affairs

Formal Clearance Process for Controversial Rules:

NMFS →→ NOAA/GC
→→ DOC/GC →→ NOAA →→→→→ F.R.
→→ Public Affairs
→→ Cong. Affairs

Note: Previously, NOAA published proposed Magnuson Act rules without prior OMB review, but subsequent to review by DOC/GC, due to the statutory requirement to publish such rules within 15 days of receipt. However, under the process, developed in compliance with E.O. 12866, to list with OMB on a monthly basis upcoming regulatory actions that NMFS reasonably expects to publish in the succeeding three months, this exception to the normal review process is no longer necessary.

Functions of Reviewing Offices:

NMFS: Draft action and explain proposed agency policy.
NOAA/GC: Ensure enforceability and consistency with underlying law and adequacy of the administrative record to withstand judicial review.
DOC/GC: Monitor progress, review rule for any substantive changes necessary to ensure compliance with E.O. 12866 and administrative law, communicate recommended changes to NOAA/GC, unless otherwise agreed. If appropriate, ensure that either the Secretary or the Chief of Staff has been advised. Issue docket number to authorize *Federal Register* publication.
OMB: Advise on consistency of action with E.O. 12866 if rule has been designated as significant.
NOAA: Ensure action is consistent with the objectives of the Administration.

Category B. Non-controversial rules.

Examples: Implementation of well publicized, non-controversial fishery management regulations that are not likely to result in litigation.

Regulations implementing NMFS financial assistance, seafood inspection, and grant programs.

Regulations establishing administrative procedures for appealing adverse license decisions or enforcement actions.

Regulations adjusting fishing season openings and closings based on industry requests for adjustment.

Regulations revising reporting requirements.

General rulemaking under ESA, including critical habitat designations and reclassification of listings.

Formal Clearance Process:

NMFS → NOAA/GC → NOAA → F.R.
→ DOC/GC (for information and, at the option of DOC/GC, comment.)

Functions of Reviewing Offices:

NMFS: Draft action and explain proposed agency policy.
NOAA/GC: Ensure enforceability and consistency with underlying law and adequacy of the administrative record to withstand judicial review.
DOC/GC: Monitor action through weekly reports and conference calls; receive copy of rule for information. DOC/GC may comment on these rules, but if DOC/GC does not contact NOAA/GC, NOAA will assume DOC/GC has no comments. Issue docket number to authorize Federal Register publication.
OMB: None.
NOAA: Ensure action is consistent with objectives of the Administration.

Category C. Non-controversial rules and rule-related notices established under frameworks with defined parameters.

Examples: Specifications of annual quotas for various species of fish based on biological information.

Formal Clearance Process:

NMFS →→ NOAA/GC →→ F.R.
→→ DOC/GC (for information and, at the option of
DOC/GC, comment.)

Functions of Reviewing Offices:

NMFS: Draft and explain agency action.
NOAA/GC: Ensure consistency with underlying law.
DOC/GC: Monitor action through weekly reports and
conference calls; receive copy of rule for
information. DOC/GC may comment on these rules,
but if DOC/GC does not contact NOAA/GC, NOAA will
assume DOC/GC has no comments. Issue docket
number to authorize *Federal Register* publication.
OMB: None.
NOAA: None, unless requested.

Category D: Rule-related notices exempt from OMB review under
12866 and needing no new docket number.

Example: Routine notices of fishing season openings and closings
based on biological information.

Formal Clearance Process:

NMFS →→ NOAA/GC →→ F.R.

Functions of Reviewing Offices:

NMFS: Draft and explain agency action.
NOAA/GC: Ensure consistency with underlying law.
DOC/GC: Monitor action through weekly reports and
conference calls.
OMB: None.
NOAA: None, unless requested.