

A Summary of Laws and Executive Orders: Information for the False Killer Whale Take Reduction Team (FKWTRT)

Introduction

The following is a list of many of the applicable laws and Executive Orders that must be complied with by NMFS during the development of both proposed and final rulemaking packages. It is intended to give FKWTRT members and interested parties a general understanding of the complex and comprehensive analyses that NMFS must conduct during the development, proposal, and finalization of a regulatory action.

Marine Mammal Protection Act (MMPA)

What is it?

The MMPA was enacted by Congress in 1972 largely in response to concern over the thousands of dolphins and porpoises killed each year by the commercial tuna purse seine fisheries and the clubbing of young harp seals in Canada. However, the legislative history for the MMPA also indicates that many other issues concerning the well-being of marine mammals prompted Congress to take action.

To whom does it apply?

The MMPA has broad application to both the activities prohibited under the Act and those to whom the prohibitions apply. In general, the provisions contained in the MMPA reflect two major conservation principles: preservation and resource management. The concept of preservation is reflected in the MMPA's permanent prohibition on the "taking" and importation of marine mammals. Under the MMPA, "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Due to the compelling interest in promoting the preservation of marine mammals throughout their range, these provisions apply to "any person," including the Federal government. The concept of resource management is reflected in the MMPA's exceptions to the taking prohibition and also in the authority of the Secretaries of Commerce (for whales, porpoises, dolphins, seals, and sea lions, but not walruses) and of Interior (for all other marine mammals, such as walruses, polar bears, sea otters, and manatees), to authorize takings of marine mammals as long as it is not to the disadvantage of the species or population stock affected.

How does it relate to the FKWTRT?

The Secretary of Commerce has delegated most of its authority under the MMPA to NMFS. The Secretary of Interior has similarly delegated authority to the U.S. Fish and Wildlife Service. NMFS is the primary Federal agency responsible for implementing, enforcing, and executing the provisions of the MMPA that pertain to cetaceans and pinnipeds (except walrus). The 1994 amendments to the MMPA included several provisions related to the FKWTRT. In fact, all Take Reduction Teams owe their creation to the 1994 amendments. First, these amendments require NMFS to prepare and revise annually a list of commercial fisheries that have frequent (Category I), occasional (Category II), or remote likelihood (Category III) of incidental mortality and serious injury of marine mammals. This list is published every year in the Federal Register as The List of Fisheries. Second, the 1994 amendments require NMFS to prepare stock assessments on all marine mammal stocks that occur in U.S. waters. In addition, the status of the stock must be categorized as either "strategic" or as being at a level of human-caused mortality

and serious injury that is not likely to cause the stock to be reduced below its optimum sustainable populations. The stock assessment must also indicate a “potential biological removal” (PBR) level for the marine mammal stock. The PBR level is the maximum number of animals, not including natural mortalities, which may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The short-term goal of a TRP is to reduce incidental mortality and serious injury to below PBR within 6 months of implementation and the long-term goal is, within 5 years, to insignificant levels approaching a zero mortality and serious injury rate (ZMRG), taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.

The publication of the List of Fisheries and the preparation of the marine mammal stock assessment report are directly related to the FKWTRT because NMFS is required to develop take reduction plans to assist in the recovery or prevent the depletion of each strategic stock that interacts with a Category I or II fishery (i.e., fisheries that have frequent or occasional incidental mortality and serious injury of marine mammals). The MMPA describes types of expertise that take reduction team members must possess and the types of interest groups that must be represented on any take reduction team. It provides the major elements that must be included in each take reduction plan. In addition, the MMPA provides a process that includes the team’s submission of the draft take reduction plan to NMFS, NMFS’ consideration of the draft plan, and NMFS’ publication of the final plan and its implementing regulations. However, when developing a take reduction plan, NMFS must comply with all the statutes and Executive Orders discussed in this document. For example, the process for implementing fishery management measures to prevent or reduce serious injury and mortality to false killer whales requires agency rulemaking under the Administrative Procedure Act (APA). In addition, the potential impacts to the environment from such rulemaking must be analyzed and considered under the National Environmental Policy Act (NEPA), either through the preparation of an EA or an EIS. Therefore, the development and implementation of the FKWTRT is both labor intensive and time consuming, and requires multiple layers of analysis throughout the process.

Administrative Procedure Act (APA)

What is it?

Passed by Congress in 1946, the APA responded to the proliferation of Federal agencies during the New Deal by establishing uniform rules for the exercise of administrative power. In general, the APA divides the realm of administrative action into two decision making categories, rulemaking and adjudication. The APA provides public notice and comment procedures for informal rulemaking and sets a limited “arbitrary and capricious” standard of judicial review.

To whom does it apply?

The APA applies to Federal agencies, which are defined as each authority of the Government of the United States, whether or not it is within or subject to review by another agency (5 U.S.C. 552(1)).

How does it relate to the FKWTRT?

As a Federal agency, NMFS must comply with the APA. For example, in issuing or amending regulations to implement a False Killer Whale Take Reduction Plan (FKWTRP), NMFS must

generally publish notice of a proposed rule in the Federal Register, provide reasonable time for submission of written comments from the public, and publish the final rule with at least a 30 day period before it takes effect. This process is often referred to as notice-and-comment rulemaking.

National Environmental Policy Act (NEPA)

What is it?

Enacted by Congress in 1969 and signed into law by President Nixon in 1970, NEPA responded to an overwhelming public belief that Federal agencies should assume a leadership role in environmental protection. NEPA is regarded as the nation's basic charter for environmental responsibility because it establishes an environmental policy (note that the "P" in NEPA stands for "policy" and not "protection") for the nation, provides an interdisciplinary framework for environmental planning by Federal agencies, and contains action-forcing procedures to ensure that Federal agency decision makers take environmental factors into account. NEPA is often referred to as a procedural statute because it requires Federal agencies to analyze and consider the environmental effects of their actions.

To whom does it apply?

NEPA applies to all Federal agencies that intend to carry out, fund, or approve a proposed action. NEPA and its implementing regulations require Federal agencies to prepare an Environmental Impact Statement (EIS) for proposals for legislation and other major federal actions significantly affecting the quality of the human environment. In other words, a Federal agency must determine whether the proposed action may significantly affect the quality of the human environment, which would require the agency to prepare an EIS. NEPA, its implementing regulations, and NOAA guidelines have established a process for Federal agencies to make their determination in a systematic fashion, which may include the preparation of an Environmental Assessment (EA). The purpose of the EA is to provide the Federal agency with an initial analysis of the environmental resources that could possibly be affected by the proposed action. If the agency concludes, based on the EA, that there will be no significant impact on the human environment from the proposed action, then that determination is summarized in a Finding of No Significant Impact (FONSI). If, on the other hand, the agency concludes, based on the EA, that the proposed action will have significant impact on the human environment, then the agency must proceed with an EIS and make notice of its intention to do so through the publication of a Notice of Intent (NOI) in the Federal Register. It is worth noting that an agency may proceed directly to an EIS without first preparing an EA.

The analyses contained in a NEPA document assess the biological, social, and economic impacts of the preferred (if any) Federal action as well as reasonable alternatives, including a no action or "status quo" option. Accordingly, due to the potential range of alternatives and associated impacts included in the analysis, developing and drafting a NEPA document is a labor intensive process requiring the expertise of and coordination among economists, biologists, sociologists, and policy makers.

How does it apply to the FKWTRT?

In issuing regulations to implement a Take Reduction Plan, NMFS must conduct a NEPA analysis.

Endangered Species Act (ESA)

What is it?

Congress passed the ESA in 1973 to prevent the extinction of wildlife and plants and to protect the ecosystems upon which they depend. Many species of marine mammals are protected under the ESA and the MMPA. However, there are a couple notable differences between the two statutes. First, under section 7 of the ESA, all Federal agencies must insure that their actions do not jeopardize the continued existence of any endangered or threatened species. To meet this mandate, every Federal agency proposing an action that may affect an endangered or threatened species must consult with either NMFS or the U.S. Fish and Wildlife Service or both to ensure that the action does not jeopardize the ESA listed species. Second, under section 4 of the ESA, both NMFS and the U.S. Fish and Wildlife Service must designate critical habitat concurrently with the listing of an endangered or threatened species. Critical habitat is defined as the specific areas within the geographic area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection.

To whom does it apply?

Similar to the MMPA, the ESA protects wildlife by prohibiting a broad range of both public and private activities that could constitute a “take” of the protected species. The ESA’s definition of “take” is similar to the MMPA’s definition with one important distinction - the ESA definition includes the term “harm.” The regulations that define the term “harm” as encompassing “significant habitat modification or degradation” have been upheld by the U.S. Supreme Court. In 1998, NMFS published its definition of the ESA’s “take” prohibitions for its listed species. Under these regulations, an action that changes or degrades the habitat of a listed species where it actually kills or injures the species by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, and sheltering, is considered a “take” under the ESA.

How does it relate to the FKWTRT?

False killer whales are not currently listed under the ESA. In early 2010, NMFS initiated a status review of the insular population of Hawaiian false killer whales to determine if listing under the ESA is warranted.

Regulatory Flexibility Act (RFA)

What is it?

In response to public concerns that Federal agency actions were inhibiting economic innovation and expansion, the Regulatory Flexibility Act (RFA) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden.

To whom does it apply?

The RFA applies to any rule subject to notice and comment rulemaking under section 553(b) of the Administrative Procedure Act (APA) or any other law. This includes most rules issued under the MMPA, such as a FKWTRP and its implementing regulations, if any.

How does it relate to the FKWTRT?

NMFS is generally required to analyze the economic effect of the proposed action and its alternatives on small entities, to explain how the agency has considered those effects, and to explain what steps have been taken to minimize any significant economic impacts on small entities. While the analyses contained in these documents are distinct and prepared separately, the agency has generally incorporated the RFA review process into its NEPA analysis. As a result, unless NMFS can certify, based on an analysis, that the proposed action will not have a significant economic impact on a substantial number of small entities, each draft EA or EIS contains a section for the corresponding RFA analysis, which is called an Initial Regulatory Flexibility Analysis (IRFA). The RFA also requires Federal agencies to prepare a Final Regulatory Flexibility Analysis (FRFA) when the final rule is published and this analysis can be found in the final EA or EIS. Because the IRFA and FRFA are integrated into the NEPA process, there is a high degree of cooperation and collaboration between those staff members involved in the development and drafting of these documents.

Paperwork Reduction Act (PRA)What is it?

In response to public concerns about the burden of Federal paperwork, the Paperwork Reduction Act (PRA) of 1995 requires that agencies obtain Office of Management and Budget (OMB) approval before requesting most types of information from the public. "Information collections" include forms, interview, recordkeeping requirements, and a wide variety of other things.

To whom does it apply?

OMB clearance must be requested by the "sponsor" of the collection. Under the PRA, a sponsor can be: the entity that the information is being gathered for, even if the collection itself is done by a contractor or another Federal or State agency; the entity is paying someone to collect specific information; or the entity is requiring that information be submitted or disclosed to anyone else.

How does it relate to the FKWTRT?

When NMFS requires fishermen to keep records, or submit information, the agency must request clearance from OMB because that requirement is considered an information collection under the PRA. Once the agency determines that a proposed action triggers the PRA, a clearance request needs to be submitted to OMB on or before the date the proposed rule is published in the Federal Register. Incorporating the PRA clearance process into the agency's rulemaking process is extremely important because the publication of a proposed rule will be delayed if the agency fails to obtain clearance. After OMB receives the request, it has 60 days to review and act upon it, and, except for special emergency submissions, OMB is prohibited from acting for the first 30 days to allow time for public comment. Therefore, the agency expects the OMB clearance process to take between 30 to 60 days.

Data Quality Act (DQA)What is it?

In 2001, Congress enacted Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (known as Section 515 or the Data Quality Act). The DQA requires that federal agencies "ensure and maximize" the "quality, objectivity, utility, and integrity" of all

disseminated information. The law also permits affected parties to seek correction of information that does not meet the law's quality standards. The DQA directed the Office of Management and Budget (OMB) to establish government-wide guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies." In turn, each federal agency was directed by OMB to issue their own guidelines and procedures for affected individuals to seek and obtain correction of information that does not comply with the OMB or agency guidelines.

To whom does it apply?

The DQA applies to all federal agencies.

How does it relate to the FKWTRT?

Pursuant to the DQA and OMB guidelines, NOAA has developed guidelines of its own to ensure the quality, objectivity, utility, and integrity of disseminated information. Similar to other statutory mandates, NMFS has incorporated DQA compliance into its rulemaking procedures that are covered by the guidelines.

Coastal Zone Management Act (CZMA)

What is it?

In 1972, Congress enacted the Coastal Zone Management Act (CZMA) to deal with the increasing stresses on the nation's coastal areas. Administered by NOAA, the statute created a unique, voluntary partnership between federal and state governments to reduce conflicts between land and water uses in the coastal zone and conserve coastal resources.

At the national level, NOAA promotes the joint federal-state interest in coastal management by assisting states with development and implementation of Coastal Zone Management (CZM) programs; allocating federal funds on a 50/50 matching basis to implement the program; and ensuring that state CZM interests are represented at the national level and that the national interest is adequately represented in these state programs. NOAA also encourages states to improve their CZM programs by recommending improvements through periodic evaluation of state programs.

To whom does it apply?

The Department of Commerce, primarily through NOAA's Office of Ocean and Coastal Resource Management (OCRM), administers the federal CZMA program and approves or disapproves individual state programs. In addition, the CZMA provides federal funding for states to develop such programs according to the guidelines found in the Act. The federal consistency requirement is another incentive for state cooperation in reaching coastal management goals because it assures a state that, with certain exceptions, any federal agency activity or federally sponsored activity affecting the coastal zone will be consistent with the state-created and federally-approved coastal management plan.

How does it relate to the FKWTRT?

The CZMA emphasizes the primacy of state decision-making regarding the state's coastal zone. Specifically, section 307 of the CZMA (16 USC § 1456), called the Federal Consistency

provision, requires that Federal agency activities that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone (also referred to as coastal uses or resources and coastal effects) must be consistent to the maximum extent practicable with the enforceable policies of a coastal State's federally approved Coastal Management Program (CMP).

Marine resource management regulations, such as those that may be implemented under a FKWTRP, are Federal actions that require NMFS to make a consistency determination that must be submitted to the affected states for concurrence. Therefore, during the preparation of a proposed rulemaking package, NMFS sends a letter to the respective state coastal zone management officials. This letter indicates whether the agency had determined that a specific action is consistent with the coastal state's CMP and asks the state officials to respond within 60 days.

Executive Orders (EOs)

An "Executive order" is an order or regulation issued by the President or some administrative authority under his direction for the purpose of interpreting, implementing, or giving administrative effect to a provision of the Constitution or of some law or treaty. To have the effect of law, such orders must be published in the Federal Register.

E.O. 12866

What is it?

In 1993, Executive Order 12866, "Regulatory Planning and Review," was signed by President Clinton in response to public concerns that the regulatory system was imposing unacceptable and unreasonable costs on society. In addition, E.O. 12866 stated that regulatory policies should recognize that the private sector and private markets are the best means for economic growth and that the regulations themselves should be effective, consistent, sensible, and understandable.

To whom does it apply?

Executive Order 12866 applies to all executive branch agencies, such as NMFS. Therefore, before a regulation can become law, NMFS must comply with several mandated procedures. First, the agency must assess the general economic costs and benefits of the proposed regulation. Second, for any "significant" rules (e.g., those with an impact of \$100 million or more), a Regulatory Impact Analysis (RIA) must be completed that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the chosen approach. Third, if a rule is determined to be "significant," the agency must submit it to OMB for review and wait until OMB clears the action before filing for publication in the Federal Register. Fourth, the agency must submit an annual plan to OMB in order to establish regulatory priorities and improve coordination of the Administration's regulatory program. Finally, the agency must periodically review existing rules.

How does it relate to the FKWTRT?

NMFS has incorporated the analysis required under E.O. 12866 into the analyses required under NEPA and the RFA. As a result, NMFS prepares a Regulatory Impact Review (RIR) to provide the basis for determinations required under those laws and this Executive Order. In addition, a separate document is prepared for OMB review that classifies the action as either "significant" or

“not significant” as the term is defined by E.O. 12866.

E.O. 13132

What is it?

In 1999, President Clinton signed Executive Order 13132 to “ensure that the principles of federalism established by the Framers [of the Constitution] guide the executive departments and agencies in the formulation and implementation of policies.” In other words, this Executive Order is designed to avoid conflict or potential conflicts between state and federal laws by prohibiting federal agencies from preempting state law except where a statute expressly allows for such preemption or where the exercise of state authority conflicts with the exercise of federal authority under a federal statute.

To whom does it apply?

Executive Order 13132 applies to those authorities of the United States that are defined as “agencies” under 44 U.S.C. 3502(1), such as NMFS.

How does it relate to the FKWTRT?

In general, the MMPA specifically preempts state laws relating to the takes of marine mammals within state waters. Additionally, the authorization to incidentally take marine mammals during commercial fishing operations, provided by section 118 of the MMPA, applies in state waters. However, in order to comply with the requirements of E.O. 13132, NMFS must consult with State and local officials during the process of developing a proposed regulation to ensure meaningful and timely input by State and local officials. Therefore, a letter is prepared for designated elected officials in the affected states during the development of a proposed rule that explains the nature of the action, indicates that the proposed action will not impose any substantial direct compliance costs on state and local governments and invites the state to participate in the public comment process.