

Office of Advocacy

**TESTIMONY**

of

**JERE W. GLOVER**

**Chief Counsel**

**Office of Advocacy**

**U. S. Small Business Administration**

**Before the**

**Subcommittee on Fisheries, Conservation, Wildlife & Oceans**

**Committee on Resources**

**U. S. House of Representatives**

**April 29, 1999**

Good morning, Mr. Chairman and Members of the Subcommittee on Fisheries Conservation, Wildlife and Oceans. My name is Jere W. Glover and I am Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration. Thank you for inviting me to testify today on the impact of the Regulatory Flexibility Act of 1980 on fisheries conservation and management and how the RFA has been implemented the National Marine Fisheries Service (NMFS). At the outset, let me state that the views expressed here are my own and do not necessarily reflect the views of the SBA Administrator or the Administration.

Before I address the issues raised in your letter of invitation, it might be helpful to review the mission of the Office of Advocacy. The Office is a creature of Congress. It was established by Congress in 1976 and given the [statutory](#) mission to represent the views of small business before federal agencies and Congress.<sup>(1)</sup> Some of the explicit mandates of the Office include conducting research and reporting on the contribution made by small business to the economy. Some of our most recent studies include [Small Farm Lending in the United States](#); [Small Farm Lending by Bank Holding Companies](#); [Minorities in Business](#); [Women in Business](#); and [Federal Procurement from Small Firms](#). We are very excited about a new database we have created at the Bureau of the Census that will allow us to trace firms through time so that we can accurately measure job generation by firm

size for all sectors of the economy. For the first time, we are adding Community Reinvestment Act (CRA) data to our banking studies so that we can more accurately measure small business lending in each state. Data and research are the forces through which we can identify the need for policy changes, barriers to small business growth and related problems which policy makers can address, either through legislation or regulatory development.

As Chief Counsel of Advocacy, I am also charged with monitoring and reporting annually to Congress on federal agency compliance with the [Regulatory Flexibility Act](#) (RFA)<sup>(2)</sup>, as amended by the [Small Business Regulatory Enforcement Fairness Act of 1996](#) (SBREFA)<sup>(3)</sup>. This will be the focus of my remarks since I do not have the expertise to discuss the impact of the RFA on fisheries conservation and management. NMFS's mission, to preserve the fish stock in order to ensure an adequate fish supply for food and other purposes, and, in the long run, the business of fishing, is extremely important ---- but admittedly complex. How effective NMFS is in carrying out its fish conservation mission is for others to address, those who have more technical knowledge about the science of the fisheries. What I can discuss is how well NMFS is complying with the RFA, whether it is generating the kind of economic data needed by policymakers deliberating conservation options, and whether the fishing industry is playing a meaningful role in the regulatory process.

Before discussing the implementation of the RFA by NMFS, I would like to review briefly the policy underpinnings of the Regulatory Flexibility Act. In adopting the RFA in 1980, Congress made several findings: 1) uniform federal regulations produced a disproportionate adverse economic hardship on small entities; 2) regulations that were designed for large entities were being applied to small entities, even though the problems were not created by small entities; 3) the failure of government agencies to recognize differences in the scale and resources of regulated entities adversely affected competition in the marketplace, discouraged innovation, restricted improvements in productivity, and discouraged entrepreneurship.<sup>(4)</sup> Congress also found that treating all entities equally led to an inefficient use of regulatory agency resources, enforcement problems, and actions that were inconsistent with legislative intent. Congress determined that, in the rulemaking process, agencies should be required to solicit comments from small entities; examine the impact of the proposed and existing rules on small entities; examine regulatory alternatives that achieve the same purposes while minimizing small business impacts; and review the continued need for existing rules.

The RFA addresses these congressional concerns by mandating that regulatory agencies consider the potential impact of their regulations on small entities. More than mere consideration of potential impacts, the RFA mandates that agencies open their deliberations to public scrutiny, requiring them to justify their choice of regulation against the backdrop of economic information about the industry being regulated and the estimated effectiveness of the rule in accomplishing its stated public policy objective. Let it be clear that the RFA does not require special

treatment for small business. It merely requires agencies to ensure a level playing field for small business, consistent with their statutory mission.

Many agencies, initially, simply ignored the RFA by relying on a provision of the law that allows agencies to certify that a regulatory proposal will not have a significant economic impact on a substantial number of small entities. A requirement that the certification be substantiated was ignored. Others performed inadequate regulatory flexibility analyses of the small entity impacts, thus depriving the public of the opportunity to react to meaningful analyses of alternatives.

Since agency compliance with the RFA was not judicially reviewable, agencies could not be held accountable for their noncompliance with the statute. Judicial review was a statutory modification long sought by small business, as recently as the 1995 White House Conference on Small Business.

Congress remedied this deficiency and other ambiguities in the law by amending the RFA in 1996 with enactment of the [Small Business Regulatory Enforcement Fairness Act](#) ("SBREFA"). The 1996 amendments strengthened the requirements of the RFA as to what should be included in a [Final Regulatory Flexibility Analysis \(FRFA\)](#) and what was needed to justify a certification. Most significantly, SBREFA amended the law to allow the courts to review agency compliance with the RFA in appeals brought by small entities from agency final actions.

Specific provisions of the RFA, as amended, are relevant to our discussions today. Agencies are required to prepare and publish an [initial regulatory flexibility analysis](#) and a [final regulatory flexibility analysis](#) for each rule that will have a significant economic impact on a substantial number of small entities. The RFA exempts an agency from these requirements if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

When an agency publishes a regulatory proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The [IRFA](#) is required in order to ensure that the agency has considered all reasonable regulatory alternatives that would minimize the rule's economic impact on affected small entities. In accordance with Section [603\(b\)](#) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate,

overlap or conflict with the proposed rule. If the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, an agency may issue a certification to that effect but must provide the factual basis that justifies the certification.

With that legal detail as background, I now come to the issue before us, namely, how well does NMFS comply with the law.

Throughout the years, the Office of Advocacy has monitored the activities of NMFS since the various sectors of the fishing industry are dominated by small businesses. Our statistics show that 95 per cent of commercial fishing businesses are small.<sup>(5)</sup> Of equal interest to policy makers is the fact that NMFS regulations affect not only the business of fishing, but also the communities that rely heavily on the fishing industry. Entire communities are known to be dependent economically on the industry.

NMFS regularly provides the Office of Advocacy with copies of its proposed regulations, as well as environmental and economic impact information for the proposals. In the last three years, Advocacy has sent several letters to NMFS regarding the need to improve compliance with the RFA. (List attached.) The letters addressed various issues such as the inadequacy of justification for a certification, NMFS's failure to include sufficient information in a summary of an IRFA to facilitate public comment, or the failure to provide details discussion on alternative regulatory options it considered. The major problems we have encountered with NMFS are the data on which NMFS relies; whether NMFS has made an objective analysis of the anticipated impact; whether the information provided is the best information available; whether the information is analyzed properly; whether the agency has properly identified the segment of the industry that will be affected; and whether the agency has truly considered workable alternatives to the proposed action.

It is important to keep in mind that it is not Advocacy's mission to stop regulation – only unwarranted regulation that adversely affects small business and to which there are viable public policy alternatives. The Office of Advocacy has discussed its concerns with NMFS and NMFS has expressed a willingness to work with the Office of Advocacy to assist in furthering NMFS's efforts to comply with the RFA. The Office of Advocacy has also provided NMFS with specific examples of what we can euphemistically call "red flag" issues that need to be addressed in any notice of proposed rulemaking.<sup>(6)</sup> The Office has also provided significant guidance in the kind of regulatory analysis that, in our view, is necessary for compliance with the RFA. In response, NMFS recently hired an economist specifically to address the agency's RFA compliance.

Whenever the Office of Advocacy contacts NMFS about problems in the RFA portion of a particular rulemaking or an NMFS policy, NMFS makes an effort to address Advocacy's concerns. For example, Advocacy has contended that

regulatory impact statement on profit data is a better guideline for determining economic impact than merely impacts on gross revenues. This is particularly important in an industry where profit margins are narrow. Advocacy has discussed this particular issue specifically with NMFS. It is our understanding that NMFS is considering whether this is doable, considering data constraints, and whether those constraints can be overcome.

Although the Office of Advocacy is pleased with the cooperative efforts that NMFS is making towards regulatory flexibility compliance, Advocacy remains concerned about the validity of issues brought to its attention in February of this year when the Office of Advocacy held a roundtable discussion with members of the fishing industry. The Office of Advocacy asked the participants to state their primary concerns about NMFS and the RFA. During the "round robin" discussion, the participants alleged the following:

1. NMFS does not consider viable alternatives to regulations suggested by the industry and other industry experts;
2. NMFS does not abide by the [Regulatory Flexibility Act](#) or consider the true economics of the industry in formulating regulations;
3. NMFS does not consider the cumulative impacts of regulations;
4. NMFS has politicized the process (e.g. preference to recreational fishing);
5. The fishery councils are imposing regulations without considering the comments of the industry;
6. NMFS does not follow economically sound practices with regards to bycatch; and
7. NMFS does not use the best available science when formulating its regulations.

The discussion was not designed to elicit factually substantiated information. It also should be emphasized that Advocacy is not in a position to judge the validity or objectivity of the concerns articulated at the meeting. We recognize that in fiercely competitive industries a strong aversion to any regulation is likely to dominate a large segment of the regulated population. Segments of the fishing industry may very likely fall into that category. Nevertheless, it would be valuable to research the decisions of NMFS to see if in fact it does not alter its regulations in response to reasonable suggestions from the industry and other experts and I so advised the group. Without documentation, their allegations might continue to be disregarded or not given any credence. The industry spokespersons attending the meeting indicated that they have hired attorneys, scientists, and economists to prepare reports to rebut the data and analyses made by NMFS regarding the fishing stock, industry practices, economic impact of proposed regulations, and viable alternatives, which, when provided to NMFS, they claimed were ignored. Whether or not this is true, we have no way of knowing without some independent research.

Discussions Advocacy has had with individuals knowledgeable in the science of conserving fish stock have persuaded us that conservation predictions are difficult. Thus, the task facing NMFS is not problem free and is clearly susceptible to significant debate. However, Advocacy remains concerned that NMFS, at least in its public documents, appears to give exclusive priority to one of its statutory goals, that of conserving the fish stock, to the exclusion of considering the short and long term impact on the industry of its cuts in quotas. There does not appear to be sufficient recognition that the industry has a major interest in remaining viable and that this interest can be used to achieve NMFS' objectives. When NMFS does not provide sufficient analyses in justification for its decisions, nor any comprehensive discussion of alternatives suggested by the industry that it feels will equally preserve the stock while minimizing the adverse impact on small businesses; it is breaking faith with an industry it is obligated to preserve. Regulating a highly competitive industry is not an easy task. It takes special effort to form a partnership with that industry to achieve consensus on what is in the best interests of achieving what appears at the moment to be – but should not be – irreconcilable conflicts in public policy objectives.

Advocacy will continue to hold roundtable meetings with the industry to which NMFS will be invited to determine where we can establish consensus on resolution of the more contentious issues.

In closing it is important to underscore the fact that Advocacy is pleased with NMFS' willingness to work with us and with the steps it has taken to work toward greater compliance with the RFA. Their efforts are in good faith and we applaud them for what they have done thus far. The steps taken by NMFS are all in the right direction.

#### ENDNOTES

1. Public Law 94-305 established the Office of Advocacy as an independent office charged with representing the views and interests of small businesses before the Federal government. The Chief Counsel is appointed by the President and confirmed by the Senate.
2. 5 U.S.C. §601 et seq.
3. Public Law 104-121, 110 Stat. 857 (codified at 5 U.S.C. §601 et seq.).
4. See Pub. L. No . 96-354, SEC. 2(a), 94 Stat. 1164 (findings and purposes) (1980).
5. The Number and Percent of Firms, Establishments, Employment, Annual Payroll, and Estimate Receipts by Industry and Employment Size. United States Census Bureau, Department of Commerce, prepared under contract by the Office of Advocacy, Small Business Administration, Washington, DC, 1995.
6. The Office of Advocacy has informed NMFS that the three areas that are definite "red flags" are the agency's failure to recognize the existence of a particular segment of the industry; the failure to acknowledge a "significant economic impact" when the agency is proposing a drastic action; and the failure to consider alternatives.

\* Last Modified: 6/18/01