



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D. C. 20503

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ADMINISTRATOR  
OFFICE OF  
INFORMATION AND  
REGULATORY AFFAIRS

John J. Sullivan, Esq.  
General Counsel  
US Department of Commerce  
1401 Constitution Avenue NW  
Suite 5870  
Washington, DC 20230

Dear Mr. Sullivan,

On May 29, 2007, the Department of Commerce submitted for Executive Order 12866 review a draft proposed rule entitled "Amendment 12 to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP)." In this proposed rule, the National Oceanic and Atmospheric Administration (NOAA) would prohibit the commercial fishing of krill within the Exclusive Economic Zone of the United States off the Pacific coast, implementing the recommended amendments to the fishery management plan developed by the Pacific Fishery Management Council.

In the course of reviewing this proposal and the analysis supporting it, OIRA staff have raised concerns that the draft does not meet several of the provisions (specified below) of Executive Order 12866, as amended by Executive Order 13422. We greatly appreciate the work that NOAA has agreed to do to remedy these omissions, and, pursuant to section 6(b)(3) of Executive Order 12866, we are returning the draft proposed rule while additional analysis is conducted.

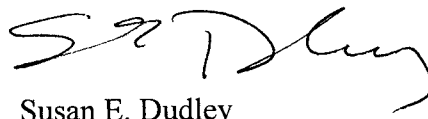
Section 1(a): Regulatory Philosophy. "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." However, the stated purpose of this rule, as described in the supporting analysis and against which alternatives are identified and evaluated, is not consistent with NOAA's authority to regulate the fishery under the Magnuson-Stevens Act. OIRA recognizes that in cases where there are no clear ownership rights to a natural resource, users of the resource are likely to overexploit it. However, in this case, where the resource is completely unexploited, and for which there are no known plans for exploitation, explicit identification of the core problem to be addressed is essential to the development of effective regulatory and non-regulatory solutions.

Section 1(b)(3): Identification and Assessment of Alternatives. The draft rule and analysis consider only the status quo, the preferred alternative (prohibition on the fishery), and a third alternative that would have identical long-term effect to the preferred alternative (closure of the fishery with no provisions for access). The limited alternatives identified but not assessed were evaluated strictly on their effectiveness in prohibiting all fishing.

Section 1(b)(8): Performance Objectives. The draft rule and analysis dismiss the use of performance objectives for the krill fishery, such as those used in almost all other fisheries to establish benchmarks for economically- and environmentally-sound exploitation. The foundation for rejection of performance objectives – the administrative difficulties of NOAA’s usual regulatory process and the lack of scientific data – is inadequate. NOAA should reconsider the use of performance objectives in favor of strict prohibitions, even in light of limited scientific data.

We appreciate NOAA staff’s willingness to examine these important questions, and are returning this rule to allow them time to do that. OIRA staff stand ready to work with your staff, and I would be happy to discuss these issues with you.

Sincerely,

A handwritten signature in black ink, appearing to read "S. E. Dudley", written in a cursive style.

Susan E. Dudley  
Administrator  
Office of Information  
and Regulatory Affairs