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IMPACT OF THE REGULATORY FLEXIBILITY ACT ON THE IMPLEMENTATION AND JUDICIAL REVIEW PROVISIONS OF THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

*M. Jean McDevitt**

I. INTRODUCTION

Through the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),¹ Congress has delegated to the Secretary of Commerce the “broad authority to manage and conserve coastal fisheries.”² The Magnuson-Stevens Act creates eight independent regional fishery management councils to prepare fishery management plans for each region.³ However, the regional councils do not have authority over all species because the Magnuson-Stevens Act assigns responsibility to the Secretary of Commerce for non-Pacific Ocean highly migratory species.⁴ Highly migratory species are defined under the Magnuson-Stevens Act to include tuna species, marlin, ocean sharks, sailfishes, and swordfish.⁵

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1. 16 U.S.C.A. §§ 1801–83 (West 1996 & Supp. 2000). The Act was originally enacted in 1976 and entitled the Fishery Conservation and Management Act. The Sustainable Fisheries Act of 1996 renamed the Act and made other substantive changes. Since its original enactment, the policy focus of the Act has shifted from limiting foreign fishing to regulating domestic fishing. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 430–31 (1999).

2. *Kramer v. Mosbacher*, 878 F.2d 134, 135 (4th Cir. 1989) (holding that statute pertaining to implementation of fishery management plans, rather than statute pertaining to enforcement of Magnuson-Stevens Act, applied to judicial review of Secretary of Commerce’s closure of South Atlantic King Mackerel fisheries).

3. Magnuson-Stevens Act, 16 U.S.C.A. §§ 1852(a)(1)(A)–(H) (West 1996 & Supp. 2000).

4. *Id.* §§ 1852(a)(3), 1854 (g).

5. *Id.* § 1802(20).

In preparing and implementing all fishery management plans under the Magnuson-Stevens Act, the Secretary must consider factors that are aimed at conserving and protecting the fishing industry, including minimizing the disadvantage to domestic fishermen.⁶ Further, the Secretary must comply with ten national standards, applicable to all fishery management plans under the Magnuson-Stevens Act, that require consideration of competing environmental and economic concerns.⁷

The Secretary must also comply with the Regulatory Flexibility Act (RFA),⁸ which was enacted to prevent the inequitable impact of agency rules on small businesses.⁹ Small businesses tend to incur regulatory compliance costs that are disproportionately higher than the costs associated with larger businesses for the same regulatory compliance.¹⁰ Under the RFA, agencies are required to analyze their proposed rules and attempt to reduce their impact on small businesses prior to passage of the rules.¹¹ The RFA requires agencies to prepare and publish in the *Federal Register* an Initial Regulatory Flexibility Analysis (IRFA) describing the effect of a proposed rule on small businesses and discussing significant alternatives that might minimize adverse economic consequences.¹² Publication of the IRFA provides small businesses with an opportunity to publicly comment on the analysis. If an agency decides that a significant impact on small businesses likely exists, then the agency must explore alternatives to the rule that would lessen the potential economic severity. However, if a significant impact is not foreseeable, then the agency may issue the rule, prepare a Final Regulatory Flexibility Analysis (FRFA), and publish it in the *Federal Register*.¹³ The agency may exempt itself from this process by

6. *Id.* § 1854(g)(1)(C).

7. *Id.* § 1851(a).

8. 5 U.S.C.A. §§ 601–12 (West 1996 & Supp. 2000). The original RFA enacted in 1980 precluded judicial review of an agency's failure to comply with RFA requirements. In 1996, the RFA was amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), to provide for judicial review of the mandatory regulatory flexibility analysis. As a result of the SBREFA, courts may provide judicial review of an agency's compliance with the RFA.

9. Michelle Goldberg-Cahn, Note, *Associated Fisheries of Maine v. Daley: A Balanced Approach to Judicial Review Under the Regulatory Flexibility Act*, 51 ADMIN. L. REV. 663, 664–65 (1999).

10. A "small business" is defined under the Small Business Act by the type of business activity, size, number of employees, dollar volume of business, net worth, net income, and any combination of those or other appropriate factors. 15 U.S.C.A. § 632(a) (West 1997).

11. Jennifer McCoid, Comment, *EPA Rulemaking Under the Regulatory Flexibility Act: The Need for Reform*, 23 B.C. ENVTL. AFF. L. REV. 203, 203 (1995).

12. Regulatory Flexibility Act, 5 U.S.C.A. § 603 (West 1996 & Supp. 2000).

13. *Id.* § 604(a).

certifying that the final rule will not “have a significant economic impact on a substantial number of small entities.”¹⁴

Both the RFA and the Magnuson-Stevens Act provide for judicial review of the Secretary’s regulatory actions pursuant to the Administrative Procedures Act (APA).¹⁵ Agency actions under both the RFA and the Magnuson-Stevens Act are to be reviewed for compliance in accordance with the “arbitrary and capricious” standard under the APA.¹⁶ The United States Court of Appeals for the First Circuit has held, under the RFA, that judicial review should be a determination of whether the Secretary employed a “reasonable, good-faith effort” in his consideration of alternative regulation.¹⁷ Essentially, a court reviewing an agency action under the “arbitrary and capricious” standard must determine whether the agency has examined the pertinent evidence, considered the relevant factors, and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made by the agency.¹⁸

II. MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

In response to increased demand on coastal fish stocks from foreign fishing fleets, the United States Congress enacted the Fishery Conservation and Management Act in 1976.¹⁹ The Act in its original form “asserted

14. *Id.* § 605(b).

15. Magnuson-Stevens Act, 16 U.S.C.A. § 1855(f); Small Business Regulatory Enforcement Fairness Act, 5 U.S.C.A. § 611(a)(1); Administrative Procedures Act, 5 U.S.C.A. §§ 701–06 (West Supp. 2000).

16. North Carolina Fisheries Ass’n v. Daley, 27 F.Supp.2d 650, 658 (E.D. Va. 1998). A reviewing court shall “hold unlawful . . . agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.A. § 706(2)(A). A regulation is defeated upon APA review if “the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem.” Southern Offshore Fishing Ass’n v. Daley, 995 F.Supp. 1411, 1425 (M.D. Fla. 1998) (*quoting* Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

17. Associated Fisheries of Maine v. Daley, 127 F.3d 104, 114 (1st Cir. 1997). The First Circuit analogized the RFA requirement to consider significant alternatives with the National Environmental Policy Act and its requirement of preparing an Environmental Impact Statement (EIS). The EIS is meant to inform the public and the agency about possible environmental effects and about potentially less harmful alternatives. The adequacy of an EIS is likewise reviewed under a standard of reasonableness. *Id.*

18. Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43.

19. KALO, *supra* note 1, at 430.

exclusive management authority over all marine life, other than birds, marine mammals, and highly migratory species of tuna," within a 200 mile exclusive fishery conservation zone.²⁰ The Act's original emphasis on requiring foreign fishing vessels to secure U.S. consent soon gave way to new fish stock concerns as the domestic commercial fishing industry boomed. It became evident that the provisions in the Act regarding domestic, commercial, and recreational fishing were insufficient to conserve the stressed fish stocks.²¹ As a result, the Act has been significantly amended since 1976, with major substantive changes coming in the form of the Sustainable Fisheries Act of 1996 (SFA).²² The 1996 SFA renamed the legislation the Magnuson-Stevens Fishery Conservation and Management Act.²³

A primary purpose of the Magnuson-Stevens Act is the establishment of Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of Fishery Management Plans (FMP).²⁴ The States, the fishing industry, consumer and environmental organizations, and other interested persons may participate in and advise on the establishment and administration of such plans, taking into account the social and economic needs of the States.²⁵ The Magnuson-Stevens Act ensures that the national fishery conservation and management program is responsive to the needs of interested and affected States and citizens.²⁶ To accomplish these goals, the Magnuson-Stevens Act creates eight regional fishery management councils, each having responsibility for creating FMPs to regulate commercial fishing within its particular geographic region.²⁷ In addition to the Regional Fishery Management Councils, the Secretary of Commerce may also prepare FMPs in certain circumstances.²⁸

20. *Id.*

21. *Id.*

22. *Id.* at 430-31.

23. *Id.* at 431.

24. Magnuson-Stevens Act, 16 U.S.C.A. § 1801(b)(5) (West 1996 & Supp. 2000).

25. *Id.*

26. *Id.* § 1801(c)(3).

27. *Id.* § 1852.

28. *Id.* § 1854(c). If the Secretary determines that a fishery is overfished and the responsible Regional Fishery Management Council, after notification by the Secretary fails to develop and submit the required FMP to end the overfishing and rebuild the stocks, the Secretary must prepare the FMP. *Id.* § 1854(e)(5). Also, if the Secretary disapproves all or a portion of any FMP and the Council fails to submit a revised FMP then the Secretary must prepare the revised FMP. *Id.* § 1854(e)(7). The Magnuson-Stevens Act gives exclusive FMP and regulatory authority for Atlantic highly migratory species to the Secretary. *Id.* § 1854(g). Highly migratory species include tuna species, marlin, oceanic sharks, sailfishes,

The Secretary must report annually to Congress and the Regional Fishery Management Councils on the status of fisheries within each geographical area.²⁹ The Secretary must identify those fisheries that are overfished or are approaching the condition of becoming overfished within two years.³⁰ Upon determining that a fishery is overfished, the Secretary must notify the appropriate Council and request that it take action to end overfishing in the fishery and implement conservation and management measures to rebuild affected stocks of fish.³¹ Any resulting FMP, amendment, or proposed regulation must specify the time period required to end overfishing and to rebuild the fishery.³² That time period must be "as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem"³³ Overfishing restrictions and recovery benefits must be fairly and equitably allocated among sectors of the fishery.³⁴ The Secretary must review all FMPs, amendments, and regulations at routine intervals of not more than two years.³⁵ If the Secretary finds that an FMP, amendment, or regulation has not resulted in adequate progress toward ending overfishing and rebuilding affected fish stocks, the Secretary must either make immediate revisions necessary to achieve the required progress or notify the appropriate Council to do the same.³⁶

When an FMP is developed by a Regional Fishery Management Council, the Council prepares the FMP and submits it, together with any proposed implementing regulations, to the Secretary for review.³⁷ The Secretary must then evaluate the FMP for consistency with ten national standards³⁸ created by the Act, as well as any other applicable law.³⁹

and swordfish. *Id.* § 1802(20)

29. *Id.* § 1854 (e)(1).

30. *Id.*

31. *Id.* § 1854(e)(2).

32. *Id.* § 1854(e)(4).

33. *Id.*

34. *Id.*

35. *Id.* § 1854(e)(7).

36. *Id.*

37. *Id.* §§ 1852(h), 1853(c)(1).

38. The ten national standards provide general goals for the FMPs and regulations created under the Magnuson-Stevens Act. These standards include: the prevention of overfishing while achieving optimum yield of each fishery; the use of the best scientific information available; a basis on which to allocate fishing privileges; and a provision that conservation and management measures shall take into account the importance of fishery resources to fishing communities, in order to provide for the sustained participation of such

Whether developed by a Regional Fishery Management Council or the Secretary, all FMPs must be consistent with the ten national standards, any regulations implementing recommendations by international organizations in which the United States participates, and any other applicable law.⁴⁰ The Secretary must also evaluate all proposed regulations submitted by a Council for consistency with the accompanying FMP.⁴¹ The Act requires the Secretary to balance or consider the competing interests of promoting the conservation of fish species and protecting the economic interests of United States fishermen.⁴² All regulations proposed by both the Regional Fishery Management Councils and the Secretary, once implemented, are then subject to judicial review.⁴³ However, before a regulation may be challenged in federal court, the administrative remedies must be fully exhausted.⁴⁴

In addition to review of FMP regulations, judicial review is also available for the Act's implementing actions, including fishery closures.⁴⁵ Such challenges are limited to 30 days after publication of the regulation or action.⁴⁶ The judicial review provisions of the Magnuson-Stevens Act provide that any such review is allowable "to the extent authorized by, and in accordance with" the Administrative Procedures Act.⁴⁷ The Secretary's decision is not subject to *de novo* review.⁴⁸ *De novo* is the process of hearing a matter "as if it had not been heard before and as if no decision had been previously rendered."⁴⁹ Rather than hearing the matter anew, the

communities and minimize adverse economic impacts on such communities. *Id.* § 1851(a).

39. *Id.* § 1854(a)(1)(A). The RFA is included in "any other applicable law." *Id.*

40. *Id.* § 1853(a)(1)(C).

41. *Id.* § 1854(b)(1). If the proposed regulation is approved by the Secretary, it must then be published in the *Federal Register*. If the Secretary does not approve the regulation then the Council has an opportunity to revise it and resubmit the revised regulation for review. *Id.*

42. *Id.* §§ 1851(a), 1854(g).

43. *Id.* § 1855(f). This section provides: "Regulations promulgated . . . shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5. . . . *Id.* Title 5 refers to the Administrative Procedures Act.

44. *Midwater Trawlers Co-op. v. Mosbacher*, 727 F. Supp. 12, 16 (D.D.C. 1989) (holding that judicial challenge to optimum yield cap set for ground fish fishery area was barred by challenger's failure to exhaust its administrative remedies, where challenger failed to file formal request with Secretary for amendment, and the Regional Fishery Management Council made no recommendations).

45. 16 U.S.C.A. § 1855(b).

46. *Id.* § 1855(f)(1).

47. *Id.*

48. *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990).

49. BLACK'S LAW DICTIONARY 435 (6th ed. 1990). The court hears the matter as a court

court simply reviews the decision for reasonableness. A court will set aside an FMP or regulation only where the record shows that the Secretary's findings with regard to the challenged FMP or regulation were "arbitrary, capricious, or otherwise contrary to law."⁵⁰

III. REGULATORY FLEXIBILITY ACT

A. *The RFA's Legislative Purpose*

The Regulatory Flexibility Act of 1980 (RFA),⁵¹ as originally enacted, modified the federal executive agency rule-making process by requiring agencies to analyze and seek to lessen the impact of any rules that federal agencies promulgate on small businesses and other small entities.⁵² Congress found that federal agency regulations were applied uniformly to small and large businesses, which Congress found to inhibit the development of small businesses.⁵³ Smaller entities are at a particular disadvantage as their costs to comply with agency regulations are proportionately larger than the costs incurred by large businesses because large businesses are able to spread the cost of compliance over a larger output.⁵⁴ In addition, small businesses tend not to have the legal, economic, and technical personnel or the resources necessary to comply with complicated regula-

of original jurisdiction rather than appellate jurisdiction. *Id.*

50. *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997). See also *Parravano v. Babbitt*, 861 F. Supp. 914, 921 (N.D. Cal. 1994) (finding that the Secretary's action may only be invalidated if challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," quoting 5 U.S.C. § 706(2)(A) (1982)), *aff'd* 70 F.3d 539, 548 (9th Cir. 1995), and *cert. denied*, 518 U.S. 1016 (1996); *Alaska Factory Trawler Ass'n v. Baldrige*, 831 F.2d 1456, 1460 (9th Cir. 1987) (stating that the Secretary's determination that the FMP did not violate the Act's national standards or other applicable law could only be disturbed if such conclusion was arbitrary and capricious or was an abuse of discretion); *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1146 (E.D. Va. 1995) (finding judicial review of agency decisions under Magnuson-Stevens Act to be limited, therefore challenged regulations may be invalidated only if they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law).

51. 5 U.S.C.A. §§ 601-12 (West 1996 & Supp. 2000).

52. McCoid, *supra* note 11, at 203.

53. Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 221 (1982). Small business owners increasingly expressed their concerns that the expansion of federal regulation was adversely affecting the economic prosperity of small entities as a whole. Milton D. Stewart, *The New Regulatory Flexibility Act*, 67 A.B.A.J. 66, 66 (Jan. 1981).

54. Verkuil, *supra* note 53, at 221.

tions.⁵⁵ As a result, small businesses feel the fierce economic impact of agency regulations, decreasing both competition and innovation.⁵⁶

The RFA was passed by Congress as an amendment to the APA.⁵⁷ The APA requires that federal agencies promulgate rational rules based on its standard of disallowing rules that are arbitrary, capricious, or an abuse of discretion.⁵⁸ The RFA is an analytical mechanism that agencies use to reach a rational rulemaking decision.⁵⁹ The RFA requires the agency to undertake a cost-effective analysis in order to determine the least costly method of achieving the statutory objective of the rulemaking agency.⁶⁰ Without such an analysis, federal agencies often do not recognize the impact that such regulations have on small businesses.⁶¹ In addition to reducing the burden on small entities, two not-minor goals of the RFA are to achieve the statutory mandate of the implementing agency at a lower cost and allow the agencies to secure increased overall compliance.⁶² Also of significance is the RFA's overall goal of achieving greater communication between small businesses and agencies through the rulemaking process.⁶³

55. *Id.*

56. McCoid, *supra* note 11, at 204. This negative economic impact on small businesses was particularly distressing in the 1980s. Small businesses generated thirty-nine percent of the U.S. gross national product in 1981. Small businesses constituted the major source of new jobs in the U.S. during the period 1988 to 1990. A sharp increase in the amount of regulation during the 1990s has been claimed to hinder similar job growth during that decade. *Id.* at 203-04.

57. Administrative Procedures Act, 5 U.S.C.A. §§ 551-559, 701-706 (West 1996 & Supp. 2000).

58. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

59. Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMMLAW CONSPECTUS 29, 30 (1997).

60. Verkuil, *supra* note 53, at 219.

61. *Id.* at 221-23.

62. Pineles, *supra* note 59, at 31. Rather than provide small businesses with an open wide exemption from such regulations, Congress desired to make the RFA a process in which the regulated entities would participate. Verkuil, *supra* note 53, at 223; *see also* Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK L. REV. 439, 442 (1989).

63. Verkuil, *supra* note 53, at 229. In addition to the publication of notices and summaries of analyses in the *Federal Register*, the RFA also requires agencies that are promulgating rules to provide adequate notice directly to the affected small business entities, also facilitating their meaningful participation in the rulemaking process. Regulatory Flexibility Act, 5 U.S.C.A. § 609(3) (West 1996 & Supp. 2000).

B. The RFA is a Procedural Statute

The RFA requires federal agencies to conduct thorough analyses of the economic impact of a proposed rule or regulation on small entities.⁶⁴ If the agency determines that a potential significant impact on small entities exists, it must explore alternatives to the regulatory proposal that would minimize the significant economic and regulatory impact on small entities while still accomplishing the stated objectives of the applicable statute.⁶⁵ An agency may avoid performance of a regulatory flexibility analysis if the agency head certifies that the rule or regulation, if promulgated, will not “have a significant impact on a substantial number of small entities.”⁶⁶

1. Certification

The basis of the certification process is that the participating agency has performed some threshold analysis to determine the number of affected small entities and the impact of the proposed rule or regulation on those entities.⁶⁷ However, the RFA does not establish standards for determining how to define “a substantial number of small entities” or a “significant economic impact.”⁶⁸ The Act does provide that “small business” and “small entity” have the same meaning as “small business concern” used under the Small Business Act. The RFA also provides, however, that an agency may determine its own definition of a small entity.⁶⁹ In their own determinations of what constitutes a small entity, agencies take into consideration whether a business is “independently owned and operated” and whether a business is “not dominant in its field.”⁷⁰

Because of the lack of clear standards, an agency should consider a large number of factors before deciding whether a rule or regulation may

64. 5 U.S.C.A. § 603(a). Regardless of whether a rule or regulation impacts small entities, agencies must supplement the usual notice of the proposed rule in the *Federal Register* with a summary that describes any impact and lists significant alternatives to the rule. *Id.* § 553.

65. *Id.* § 603(c).

66. *Id.* § 605(b).

67. Pineles, *supra* note 59, at 32.

68. 5 U.S.C.A. § 605(b) (West 1996 & Supp. 2000).

69. *Id.* § 601(3), (6). Establishing such a definition of small business or entity is done after consultation with the Office of Advocacy of the Small Business Administration and after the definition has been published in the *Federal Register* with an appropriate time period for public comment. *Id.*

70. Verkuil, *supra* note 53, at 233.

be certified.⁷¹ During the course of a certification, the agency should first ascertain the total number of businesses in the industry to be affected, the total number of those businesses that come within the chosen definition of a small entity, the number of those businesses that will be subject to the proposed rule or regulation, the cost for an entity to implement the regulation and the impact of those costs on the profits of a small business.⁷² Based on this analysis, the agency concludes whether the proposed rule or regulation should be certified.⁷³ If certified, then the agency must publish the certification along with a summary explaining the reasons for the certification in the *Federal Register*.⁷⁴ However, if the agency's threshold analysis finds that the proposed rule or regulation will have a significant economic impact upon a substantial number of small entities, then the agency must perform an initial regulatory flexibility analysis.⁷⁵

I. Initial Regulatory Flexibility Analysis

The Initial Regulatory Flexibility Analysis (IRFA) describes the impact of the proposed rule on small entities.⁷⁶ The IRFA must also describe any "significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."⁷⁷ The IRFA must be published in the *Federal Register*.⁷⁸

71. Pineles, *supra* note 59, at 32.

72. *Id.*

73. *Id.* The agency's self-analysis is particularly important because small entities are at a disadvantage due to their lack of legislative sophistication as well as access to and experience with statutes and regulations. Freedman, *supra* note 62, at 441.

74. Regulatory Flexibility Act, 5 U.S.C.A. § 605(b).

75. *Id.* § 603.

76. *Id.* § 603(b). Each IRFA must contain the following: (1) the reasons the agency is taking the regulatory action; (2) a succinct statement of the objectives of and legal basis for the proposed rule; (3) a description and estimate of the number of small businesses affected by the rule; (4) a description of the anticipated reporting, recordkeeping, and other compliance requirements with particularity to the affected small entities; and (5) any duplicative, overlapping, or conflicting federal regulations. *Id.*

77. *Id.* § 603(c). Significant alternatives to be discussed include: "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule or any part thereof, for such small entities." *Id.*

78. *Id.*

Publication of the IRFA has three primary objectives: (1) to notify the affected industry and/or community of the potential impact of a proposed rule or regulation;⁷⁹ (2) to provide the small entities with the information necessary to allow their public comment on the proposal, including the potential impact of the rule on them and other alternatives that the agency may have underestimated;⁸⁰ and, (3) to increase communication between the rulemaking agency and the effected small entities, pursuant to the legislative purpose.⁸¹ Furthermore, publication of the IRFA provides for the solicitation of public comment concerning the proposed rule or regulation.⁸²

2. Final Regulatory Flexibility Analysis

Following the public comment period, the agency must prepare and publish in the *Federal Register* a final regulatory flexibility analysis (FRFA) which incorporates the public comment proceedings from the IRFA.⁸³ The purpose of the FRFA is to provide: (1) a succinct statement of the need for and the objectives of the proposed rule; (2) a summary of the issues raised by the public comments in response to the IRFA, a summary of the agency's assessment of those issues, and a statement of any changes made in the proposed rule resulting from those comments; and, (3) a description of the significant alternatives to the rule and a statement of reasoning as to why each of the alternatives was rejected by the agency.⁸⁴

C. *Judicial Review of Agency Determinations in the 1980 RFA*

The effect of the RFA's requirements on agency rulemaking has not been as beneficial as anticipated by the United States Congress. The failures of the RFA have stemmed largely from the inability of small entities to challenge agency determinations and certifications that do not comply with the RFA's requirements.⁸⁵ The RFA, as originally enacted in 1980, specifically precluded judicial review of agency compliance.⁸⁶

79. *Id.*

80. *Id.* § 603(c).

81. *Id.* § 609.

82. *Id.* § 610(c).

83. *Id.* § 604(a).

84. *Id.*

85. Freedman, *supra* note 62, at 463.

86. 5 U.S.C.A. § 611(b). Congressional unwillingness to allow for judicial review of

Additionally, courts have held that an agency's decision to perform a certification rather than a full regulatory flexibility analysis is not judicially reviewable and is, instead, solely at the discretion of the rulemaking agency.⁸⁷ In essence, an agency was able to completely avoid compliance with the RFA simply by certifying that the Act would not have a "significant economic impact on a substantial number of small entities" as a result of the promulgation of the rule or regulation.⁸⁸ Agencies ignored both "the letter and the spirit of the RFA."⁸⁹

This lack of a meaningful judicial review provision in the RFA meant that compliance with the RFA was left to the individual agency head's personal commitment to the goals of the RFA.⁹⁰ Small business advocates recognized that the threat of litigation and the application of judicial review would be the best forces severe enough to persuade agencies to conduct their decisionmaking processes in compliance with the RFA.⁹¹ Opposition from federal agencies to amending the RFA was strong; essentially, they based their resistance on the belief that a positive judicial review provision would prevent an agency from adopting specific regulatory rules and regulations.⁹² However, as discussed above, the RFA is a procedural statute that allows an agency to follow any course of regulatory action that it chooses, so long as the appropriate regulatory flexibility analyses as to the impact on small business are performed.⁹³

the substantive aspects of the agency decision-making evolved because of the desire to protect such decision-makers from becoming burdened with excessive litigation. The entire period of agency reform in the early 1980s was highly politicized and controversial, and Congress did not want to add fuel to the fire. Goldberg-Cahn, *supra* note 9, at 673; *see also* Howard M. Friedman, *The Oversupply of Regulatory Reform: From Law to Politics in Administrative Rulemaking*, 71 NEB. L. REV. 1169, 1191 (1992).

87. *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986); *see also* *Colorado State Banking Bd. v. RTC*, 926 F.2d 931, 948 (10th Cir. 1991).

88. 5 U.S.C.A. § 605(b).

89. H.R. REP. NO. 104-873, at 5.1 (1996) (West, WESTLAW through 2000 Sess.).

90. *Pineles*, *supra* note 59, at 37.

91. *Id.*

92. *Id.* at 38. Agencies also expressed apprehension about the courts fully comprehending the scientific and economic data that is included in a regulatory flexibility analysis. Goldberg-Cahn, *supra* note 9, at 674-75.

93. *Pineles*, *supra* note 59, at 38.

IV. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

In 1995, the House Committee on Small Business held two hearings focusing on the past performance of the RFA and the need for meaningful reform while strengthening the provisions of the RFA.⁹⁴ In response to pressure from the small business community, Congress eventually passed reforms to the RFA through the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) as part of the Contract with America Advancement Act of 1996.⁹⁵ In approving the legislation, Congress made a number of findings, including the importance of a growing small business sector to the larger economic health of the nation and the fact that government agencies had largely been ignoring the requirements of the RFA, thereby placing greater regulatory burdens on small entities.⁹⁶

Most importantly, the amendments to the RFA strengthened enforcement by providing for judicial review of selected portions of the Act in order to make agencies accountable for their lack of compliance with the Act's required analyses.⁹⁷ New Section 611 provides that "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of [the RFA]."⁹⁸ Judicial review is allowable in determining: (1) whether an

94. H.R. REP. NO. 104-873, at 5.1.

95. See generally, *Public Laws Enacted by the 104th Congress (1995-1996)* (visited Oct. 28, 2000) <<http://rs6.loc.gov/law/usa/us104p13.html>>.

96. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 202, 110 Stat. 857, 857 (codified as amended at 5 U.S.C.A. §§ 601-612 (West 1996 & Supp. 2000)). The specific purposes of the SBREFA were to:

(1) implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of Federal regulations; (2) provide for judicial review of chapter 6 of title 5 [RFA]; (3) encourage the effective participation of small businesses in the Federal regulatory process; (4) simplify the language of Federal regulations affecting small businesses; (5) develop more accessible sources of information on regulatory and reporting requirements for small businesses; (6) create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented; and (7) make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities.

Id. § 203, 110 Stat. at 857-58.

97. H.R. REP. NO. 104-873, at 5.1. The SBREFA also establishes a small business advocacy review panel to provide small business participation in the rulemaking process. *Id.*

98. 5 U.S.C.A. § 611(a)(1). The SBREFA also alters the requirements concerning the preparation of the FRFA. Specifically, the analysis must now contain an estimate of the

agency failed to follow the Act's definitions (e.g. the definition of a small business);⁹⁹ (2) whether the agency's certification that a rule does not substantially impact small entities was appropriate;¹⁰⁰ (3) whether the agency's FRFA met the statutory requirements;¹⁰¹ and, (4) whether the agency has met its obligation to periodically review rules to minimize the effect on small entities.¹⁰²

Small entities may file complaints regarding an agency's analysis up to one year after the agency publishes the final rule.¹⁰³ The court has the discretion to remand the rule to the agency for failure to comply with the provisions of the RFA.¹⁰⁴ A reviewing court may delay enforcement of the rule until the agency has performed the required analysis.¹⁰⁵ The enactment of the SBREFA in 1996 essentially has placed the RFA in the position which it should have taken at its original enactment in 1980. The legislative purpose of the original RFA was severely undercut by not including a judicial review provision. With the amended RFA, it is up to the judicial system to provide the proper interpretation of the judicial review process and to demand agency compliance with the RFA.

V. SIGNIFICANT JUDICIAL DECISIONS

A. *Associated Fisheries of Maine, Inc. v. Daley*

In 1994, the New England Fishery Management Council responded to the overfishing of cod, haddock, and yellowtail flounder by recommending certain amendments to the Northeast Multispecies Fishery Management Plan.¹⁰⁶ In turn, the Secretary of Commerce approved these amendments.¹⁰⁷

number of small businesses that will be subject to a proposed regulation or the reasons why the agency could not make that determination; the actual, legal, and policy reasons why the agency could not take steps to minimize burdens on small entities; and the type of professional skills need to comply with the reporting and recordkeeping requirements. *Id.* § 604(a)(3)-(5).

99. 5 U.S.C.A. § 611(a)(1) *citing* 5 U.S.C.A. § 601).

100. 5 U.S.C.A. § 611(a)(1) *citing* 5 U.S.C.A. § 605(b)).

101. 5 U.S.C.A. § 611(a)(1) *citing* 5 U.S.C.A. § 604).

102. 5 U.S.C.A. § 609(a)(1).

103. *Id.* However, in challenging an agency action under the Magnuson-Stevens Act, a complaint would have to be filed within thirty days of the publication of the final rule because that Act is the governing statute. Magnuson-Stevens Act, 16 U.S.C.A. § 1855(f)(1) (West 1996 & Supp. 2000).

104. 5 U.S.C.A. § 611(a)(4)(A).

105. *Id.* § 611(a)(5).

106. *Associated Fisheries of Maine, v. Daley*, 954 F. Supp. 383, 385 (D.Me. 1997). The

Associated Fisheries of Maine (Associated Fisheries) challenged Amendments 5 and 7 to the Northeast Multispecies FMP.¹⁰⁸ Associated Fisheries' initial challenge was brought following the promulgation of Amendment 5; shortly thereafter, however, it was realized that haddock and yellowtail stocks had collapsed, and cod stocks were near collapse.¹⁰⁹ The Secretary ultimately responded to this information by promulgating Amendment 7.¹¹⁰ Associated Fisheries filed claims under the RFA, the Magnuson-Stevens Act, and the APA, alleging that the FMP Amendments were disastrous for small fishing boats and, in particular, the trawling industry in the Northeast.¹¹¹

1. Magnuson-Stevens Act

Associated Fisheries challenged the Amendments under the Magnuson-Stevens Act on a number of issues, including: (1) the unreliability of the science and the quantitative data that the Secretary used to determine the depletion rates of the groundfish; (2) the economic analysis used to establish that Amendment 7 would have a greater net benefit over Amendment 5 during the next ten-year period; (3) the times of limitations selected rather than other alternatives, for example: the Secretary's decision to use day-at-sea limitations rather than closing certain areas to all boats; and, (4) the fact that Amendment 7 was implemented before the effects of Amendment 5 could be learned.¹¹² The court applied a previously established deferential standard of judicial review to find that the Secretary had neither abused his discretion nor failed to follow the standards set by Congress.¹¹³

New England Fishery Management Council has authority over commercial fishing in the Atlantic Ocean off the coast of New England. 16 U.S.C.A. § 1852(a)(1)(A). The Northeast Multispecies Fishery Management Plan was created in 1985 as a result of the failure of earlier, more lenient measures employed. *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 107 (1st Cir. 1997).

107. *Associated Fisheries of Maine v. Daley*, 954 F. Supp. at 385.

108. *Id.* Amendment 5, promulgated on March 1, 1994, was designed to avoid further depletion of these groundfish stocks. Amendment 7, promulgated on May 31, 1996, was designed to place even tighter restrictions on fishing vessels than those restrictions in Amendment 5. By reducing the groundfish mortality rate to a low number, the stocks would rebuild, rather than just maintain at an even, low amount. *Id.*

109. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 108.

110. *Id.*

111. *Associated Fisheries of Maine v. Daley*, 954 F. Supp. at 385. Plaintiffs also brought related claims under the Omnibus Consolidated Appropriations Act of 1997 and two Executive Orders. *Id.*

112. *Id.* at 389.

113. *Id.* at 388-90.

The Secretary of Commerce, in the exercise of her conservation and management

The court found that the Secretary's conservative approach was definitely appropriate considering the severely depleted state of the fishery and the uncertainty of what effect the rebuilding measures would have on the groundfish stocks.¹¹⁴

2. RFA

Associated Fisheries asserted that the Secretary, through the National Marine Fishery Service (NMFS), violated the RFA in promulgating Amendment 7, because the Secretary failed to perform an adequate FRFA.¹¹⁵ In developing the FRFA, NMFS had combined its IRFA with the public comment it had received in response.¹¹⁶ Associated Fisheries argued that NMFS failed to comply with the requirement that the agency examine the effect of Amendment 7 on small businesses,¹¹⁷ and that it failed to examine alternatives that would have reduced the burden on these small entities.¹¹⁸

From the administrative record, the court determined that the agency had listed the comments received and its responses, as well as explanations as to why alternatives that would reduce the burden on small entities were rejected.¹¹⁹ The court noted that although not every alternative was considered by NMFS, the RFA requires only examination of "significant" alternatives.¹²⁰ Despite noting that Amendment 7 would have a "regrettably . . . harsh effect on the fishing industry, a significant means of support for many coastal families and communities, and part of our social, cultural and economic heritage . . ." the court found that the Secretary had acted within his statutory mandate and had promulgated the Amendments according to the procedures required by the applicable law.¹²¹

authority under the Act, has substantial discretion in selecting the appropriate quota for a given fishery . . . A reviewing court may decide only whether this discretion was exercised rationally and consistently with the standards set by Congress . . . and may not substitute its own judgment as to values and priorities for that of the Secretary. *State of Maine v. Kreps*, 563 F.2d 1052, 1055 (1st Cir. 1977).

114. *Associated Fisheries of Maine v. Daley*, 954 F. Supp. at 390.

115. *Id.* at 386.

116. *Id.* at 386-87.

117. *Id.* at 387. Specifically, the small entities were fishing trawlers and other small fishing boats. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* Although the court stated that it was satisfied that NMFS had met its burden as to this requirement, the court failed to distinguish between significant and non-significant alternatives.

121. *Id.* at 391. Interestingly, following the court's analysis of the Secretary's and NMFS's compliance with the RFA, the court concluded that judicial review was in fact

3. On Appeal

On appeal to the First Circuit from the district court's grant of the government's motion for summary judgment, Associated Fisheries renewed its RFA and Magnuson-Stevens Act claims arguing that the impact from the FMP Amendments would be devastating on the Northeast fishing industry.¹²² The First Circuit considered Associated Fisheries' argument that the judicial review provision, as enacted under the SBREFA in 1996, should have applied retroactively.¹²³ However, the court ultimately concluded that it was unnecessary to decide the question of retroactivity because it could decide the case simply on the merits of Associated Fisheries' arguments.¹²⁴

The First Circuit determined that the legislative purposes of the RFA—to compel agencies to explain the basis for their actions and to ensure that alternative proposals receive serious consideration—should be balanced against the additional legislative goal that the RFA should not be used to undermine other statutorily mandated goals.¹²⁵ Therefore, if the RFA were used to escape the mandates of the Magnuson-Stevens Act, it would not be fulfilling its additional legislative goal.¹²⁶ The court found that the Secretary had made a reasonable, good-faith effort to carry out the mandates of the RFA, recognizing that the Secretary was in the difficult position of balancing the significant adverse impacts that Amendment 7 would have on

unavailable for the Amendments because they had been promulgated prior to the effective date of the SBREFA. *Id.* at 387.

122. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 107–08 (1st Cir. 1997).

123. *Id.* at 112. Associated Fisheries argued on the basis of a Supreme Court decision, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), that a legislative package could be separated and jurisdictional provisions, i.e. the judicial review under the RFA pursuant to the SBREFA, could be given retroactive effect, whereas substantive provisions may not be given effect. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 112. Justice Hornby, in the federal district court in Maine, had refuted this argument stating that, “it would be anomalous to apply the judicial review portion of the 1996 amendments to past agency actions but at the same time not apply the substance of those amendments.” *Id.* (citing *Associated Fisheries of Maine v. Daley*, 954 F. Supp. at 387).

124. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 112–13. “[W]hen an appeal presents a jurisdictional riddle, yet the merits of the underlying issue are readily resolved in favor of the party challenging jurisdiction, a court may sidestep the quandary and simply dispose of the appeal on the merits.” *Id.* (citing *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996)).

125. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 114.

126. Is the court then saying that perhaps the NMFS did not satisfy their required compliance under the RFA, but because the FMP amendments are severely needed in order to cease overfishing and try to rebuild the stocks, then it is acceptable to skirt around compliance?

the industry against the severe depletion plaguing the fishery.¹²⁷ Ultimately, the court found that it was the Secretary's legal obligation to develop an FMP to eliminate overfishing and that Amendment 7 was a rational method of developing such a plan.¹²⁸

4. Commentary

Following the appellate decision in *Associated Fisheries of Maine*, government agencies had reason to be relieved. The court's decision in *Associated Fisheries of Maine* was an indication of the effect that the amended RFA would have on agency rulemaking. Agencies believed that the First Circuit had struck an appropriate balance between its position as reviewer and allowing adequate deference to agency rulemaking.¹²⁹ The opinion's message and words are the same: an agency's good-faith effort to satisfy the RFA requirements will also satisfy the courts, and they will not engage in second-guessing an agency's decision.¹³⁰

B. Will Other Federal Courts Adhere to the First Circuit's Example?

Although *Associated Fisheries of Maine* appears to have a limiting effect on the review of RFA agency compliance, some district courts have been utilizing their judicial review power to examine the suitability of agency certifications in avoiding regulatory flexibility analysis.¹³¹ For example, the Third Circuit engaged in a thorough analysis of the plaintiff's claim that under the RFA, the EPA had improperly certified that a regulatory flexibility analysis was not necessary because there was no significant impact on a substantial number of small entities.¹³²

127. *Associated Fisheries of Maine v. Daley*, 127 F.3d at 118.

128. *Id.*

129. Goldberg-Cahn, *supra* note 9, at 678.

130. *Id.* at 679. This decision should relieve agencies of their concern that the RFA will be an overly burdensome mechanism and will result in endless scrutiny from the judiciary. *Id.*

131. *See infra* Part V(C). In effect, because the First Circuit engaged in such an extensive judicial review of NMFS's compliance under the RFA, the road has actually been paved toward a thorough review even if the ultimate conclusion in *Associated Fisheries of Maine* was to adhere to a good-faith, reasonability standard. Goldberg-Cahn, *supra* note 9, at 679.

132. *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 122–23 (3rd Cir. 1997). The Third Circuit disagreed with the district court's decision in *Associated Fisheries of Maine*, finding that retroactive application of the judicial review provisions enacted by the SBREFA amendments was appropriate. However, because the complaining party failed

Similarly, the Ninth Circuit decided to challenge the Commerce Secretary's allocation of groundfish catches off the Washington coast to four Northwest Indian tribes.¹³³ The plaintiff, Midwater Trawlers Cooperative, argued that the Secretary's regulations, which implemented the allocation, violated the Magnuson-Stevens Act and the RFA.¹³⁴ Midwater's argument as to the RFA claim was essentially that, in the Secretary's certification, that there was no significant economic impact on a substantial number of small entities, the Secretary had utilized the incorrect quantitative measures to determine if small entities had been so severely impacted as to require a regulatory flexibility analysis.¹³⁵ The court engaged in an analysis to determine what figures were used by the Secretary and whether the information needed in order to comply with the RFA could be gleaned from that data.¹³⁶ Ultimately, it was determined that the Secretary's basis for the quantitative date was correct, and the court affirmed the lower court's dismissal of the claim.¹³⁷

C. *Southern Offshore Fishing Association v. Daley*

Domestic fishermen harvest, both recreationally and commercially, at least 73 species of sharks found on the Atlantic coast, the Gulf of Mexico, and the Caribbean Sea.¹³⁸ Shark fishing has increased in recent years as the demand for shark products has risen in both domestic and international markets.¹³⁹ The United States government encouraged the fishing of Atlantic sharks in the 1970s and 1980s because it was an underutilized resource.¹⁴⁰ Shark fishing was also viewed as a means of alleviating fishing pressure on other fish stocks.¹⁴¹ Commercial fishermen commenced shark

to bring the claim of inadequate RFA compliance before the administrative body, the court could not determine a holding on this issue. The court did not go into an in-depth discussion of the RFA's applicability, however. *Id.* at 118-23; *see also* Regulatory Flexibility Act 5 U.S.C.A. § 605.

133. *Washington v. Daley*, 173 F.3d 1158, 1161 (9th Cir. 1999).

134. *Id.*

135. *Id.* at 1171. Midwater argued that the Secretary erred in considering the overall effect on its revenues, rather than the effect on revenue earned only from the sale of whiting. *Id.*

136. *Id.*

137. *Id.*

138. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1415 (M.D. Fla. 1998).

139. *Id.*

140. *Id.*

141. *Id.*

fishing as a result of the government's promotional efforts.¹⁴² While some fishing vessels harvest Atlantic sharks in addition to their harvest of other Atlantic migratory species, some self-employed fishermen devote their commercial fishing solely to the harvesting of Atlantic shark species.¹⁴³ Fishing boats primarily engaged in the shark fishery, having gear and crew that are specialized for shark fishing, are known as "directed shark fishing vessels."¹⁴⁴

A coalition of shark fishermen and shark fishing organizations commenced an action on May 12, 1997,¹⁴⁵ pursuant to the judicial review provisions of the Magnuson-Stevens Act,¹⁴⁶ the RFA,¹⁴⁷ and the APA.¹⁴⁸ The Southern Offshore Fishing Association (Fishing Association) challenged the 1997 commercial harvest quotas for Atlantic large coastal sharks, small coastal sharks, and pelagic sharks, as promulgated by the Secretary through NMFS.¹⁴⁹ NMFS had issued a proposed rule that would reduce the 1997 large coastal shark quota by fifty percent.¹⁵⁰ NMFS also requested comments on the proposed rule.¹⁵¹ The proposal was based on a Shark Evaluation Workshop Committee report which concluded that overfishing was continuing the depletion of large coastal shark stocks.¹⁵² NMFS certified that the quota reduction would not cause significant impact on a substantial number of small businesses and thereby concluded that an IRFA was not required under the RFA.¹⁵³ Despite receiving over 600 written comments in response to the proposed rule, NMFS proceeded to promulgate the unchanged rule, issued an FRFA, and reiterated its conclusion that the reduced commercial quota would not have a significant impact.¹⁵⁴

142. *Id.*

143. *Id.* at 1415-16.

144. *Id.* at 1415.

145. *Id.*

146. Magnuson-Stevens Act, 16 U.S.C.A. § 1855(f) (West 1996 & Supp. 2000).

147. Regulatory Flexibility Act, 5 U.S.C.A. § 611(a)(1) (West 1996 & Supp. 2000).

148. Administrative Procedures Act, 5 U.S.C.A. § 706(2) (West 1996).

149. Southern Offshore Fishing v. Daley, 995 F. Supp. at 1424.

150. *Id.* at 1423.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1423-24. Commercial fishermen submitted comments explaining their dependence on sharks and the punitive effect that the quota would have on their livelihood. The Small Business Administration (SBA), the RFA watch-dog, strongly criticized NMFS's certification that there would be no significant impact. The SBA argued that the directed shark fishermen's conversion to fishing other species would be costly and probably not feasible. The SBA declared that it was clear that NMFS should have prepared an IRFA.

In February 1998, the court entered an order upholding the reduced quotas based on the scientific evidence, but held that NMFS's conclusion that the quota reduction would have no significant economic effect on commercial shark fishermen was arbitrary and capricious.¹⁵⁵ The Secretary's certification and FRFA were held to fail the APA standards and RFA requirements.¹⁵⁶ The court remanded NMFS's RFA determinations to the Secretary with instructions to rationally consider the economic effects and potential alternatives to the 1997 quotas.¹⁵⁷ It also retained jurisdiction over the matter so as to review the economic analyses that the Secretary would conduct pursuant to the court's order.¹⁵⁸ The court maintained the 1997 Atlantic shark quotas pending further order of the court because of the public interest in the fishery.¹⁵⁹

Between February 1998 and June 1999, NMFS made several submissions to the court and the court issued orders, furthering good-faith settlement negotiations.¹⁶⁰ The court reiterated on numerous occasions that, during the remand period, the existing quotas would remain in effect without any new regulations regarding catch quotas.¹⁶¹ However, on June 3, 1999, the court was alerted that NMFS had promulgated new regulations, effective July 1, 1999, that would again substantially reduce the Atlantic shark quotas from the 1997 levels.¹⁶² NMFS's new regulations immediately

however, NMFS refused to comply. The FRFA that NMFS did prepare, entitled "Final Environmental Assessment and Regulatory Impact Review/Final Regulatory Flexibility Analysis," added little to their "no significant impact" certification. The court found the FRFA to be a feigned attempt at good faith statutory compliance. *Id.* at 1434-36.

155. *Id.* at 1436-37.

156. *Id.* at 1436. The purpose of the FRFA is to summarize significant issues raised by public comment in response to the IRFA and a summary of any changes made to the proposed rule in response to the public comment. Regulatory Flexibility Act, 5 U.S.C.A. § 604(a)(2) (West 1996 & Supp. 2000). The court points out that NMFS could not possibly have complied with Section 604 of the RFA because it could not summarize or comment on an IRFA that it had never prepared. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. at 1436.

157. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. at 1437.

158. *Id.*

159. *Id.*

160. *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d 1336, 1339-42 (M.D. Fla. 1999). NMFS finally recognized that the 1997 quotas "may have a significant economic impact on a substantial number of small entities." *Id.* at 1339.

161. *Id.* at 1342. The court issued an order on November 4, 1998 cautioning NMFS specifically "against presuming that quota adjustments remain outside the realm of permissible remedies available to the Court," putting NMFS on specific notice that the 1997 quotas were to remain in effect until the court reviewed the negotiations and assessed NMFS's good faith conduct. *Id.* at 1344.

162. *Id.* at 1342. NMFS also instituted new and much more restrictive fish management

recognized that the quotas and other regulatory measures “may result in the elimination of the directed shark fisheries for large coastal sharks, and may substantially impact commercial fisheries for pelagic sharks and small coastal sharks in the U.S. exclusive economic zone.”¹⁶³ In response to the “imminent violation” of the court’s orders, the court entertained responses showing cause why injunctive relief and fines should not be issued against NMFS.¹⁶⁴

NMFS argued that its actions were consistent with the court’s orders because, following a report to Congress in October 1997 that shark stocks were being overfished, NMFS was obligated under the Magnuson-Stevens Act to design and implement new regulations to rebuild stocks.¹⁶⁵ Fishing Association argued that NMFS had violated both the spirit and the letter of the court’s rulings by implementing the 1999 regulations.¹⁶⁶ The court agreed with Fishing Association that the 1999 regulations were in violation of the court’s orders.¹⁶⁷ NMFS should have informed the court of its regulatory intentions and sought the court’s leave to implement new quotas rather than circumventing “the judicial process [to] achieve its desired goals at the expense of justice and fair play.”¹⁶⁸ The court also observed that NMFS had recently exhibited similar conduct in other cases where the agency pursued its objectives without recognizing applicable congressional and judicial limitations.¹⁶⁹ The court enjoined the Secretary and NMFS

and fish-counting methods. *Id.*

163. 64 Fed. Reg. 29,090, 29,130 (1999).

164. Southern Offshore Fishing Ass’n v. Daley, 55 F. Supp. 2d at 1342. Southern Offshore Fishing Association also filed a new law suit which challenged the 1999 regulations. *Id.* at 1343.

165. *Id.* at 1343. The Magnuson-Stevens Act requires that rebuilding plans be developed within one year of identifying species as overfished. Magnuson-Stevens Act, 16 U.S.C.A. § 1854(e)(3) (West 1996 & Supp. 2000).

166. Southern Offshore Fishing Ass’n v. Daley, 55 F. Supp. 2d at 1343.

167. *Id.*

168. *Id.*

169. *Id.* at 1344–45. In *North Carolina Fisheries Ass’n v. Daley*, 27 F. Supp. 2d 650 (E.D.Va. 1998), the court held that NMFS failed to comply with RFA requirements when it set the 1997 summer flounder fishery quota. The court found that NMFS acted arbitrarily and capriciously in failing to make a good faith attempt at conducting the analysis mandated by the RFA and Magnuson-Stevens Act. *Id.* at 666. The analysis that NMFS prepared completely failed to consider the effect on fishing communities and small entities. *Id.* at 667. The NMFS actions were solely in the interest of protecting the fish and they lacked consideration of the fishermen, fishing communities, and small businesses, contrary to the requirements of both the RFA and Magnuson-Stevens Act. *Id.* at 668. The regulations would, in effect, devastate the flounder fishermen. *Id.* Similarly, the court in *Atlantic Fish Spotters v. Daley*, 8 F. Supp. 2d 113 (D. Mass. 1998), held that NMFS had acted arbitrarily and capriciously in preparing regulations that banned the use of “spotter” aircraft to harvest

from enforcing its 1999 regulations pertaining to the Atlantic shark commercial catch quotas and fish-counting methods and maintained the 1997 quota levels.¹⁷⁰

The full impact of the RFA on the implementation and judicial review provisions of the Magnuson-Stevens Act has yet to be determined because the issues have not been fully litigated. Only two circuit courts have looked at the amended RFA, and no circuit court decisions have been issued that are directive in application of the RFA.¹⁷¹ Some federal district courts seem to be taking a hard-line approach in scrutinizing NMFS's certification procedure and regulatory analyses.¹⁷² As the court noted in *North Carolina Fisheries Ass'n v. Daley*,¹⁷³ the NMFS analysis was conducted as if the economics of the reduced quotas would not affect actual fishermen.¹⁷⁴ Likewise, NMFS's stalwart position in *Southern Offshore Fishing Ass'n v. Daley*¹⁷⁵ indicated their unwillingness to recognize that their regulations actually affected a large number of fishermen and their generally meager

Atlantic Bluefin Tuna. *Id.* at 118. Following the ruling by the federal district court, NMFS promulgated new regulations with essentially the same effect as those rules that the court had proscribed. *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d at 1345 n.4. Because the rules were not yet final, the court in *Atlantic Fish Spotters* did not issue sanctions, but it did announce that contempt proceedings would convene if, and when, the regulations became final. *Id.*

170. *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d at 1346–47. The court noted that “setting aside the 1997 quotas in favor of earlier, less restrictive quota levels would have the improper effect of punishing an incautious and perhaps overzealous governmental agency at the expense of the public and the species.” *Id.* at 1347.

171. The First Circuit's holding in *Associated Fisheries of Maine v. Daley*, 127 F.3d 104 (1st Cir. 1997) was issued under the original RFA, nonetheless, the court analyzed compliance with the RFA finding that the Secretary followed the RFA requirements. Golberg-Cahn, *supra* note 9. The First Circuit essentially gave great deference to the rulemaking authority of NMFS, although it made a thorough review of the record, thus accepting its role as to judicial review of the agency action. The Third Circuit has exercised its judicial review under the RFA pursuant to action taken by the Environmental Protection Agency (EPA). *Southwestern Penn. Growth Alliance v. Browner*, 121 F.3d 106 (3rd Cir. 1997). Although the Third Circuit upheld the EPA's certification under the RFA because the petitioner there failed to raise its argument in a timely manner, the court appeared to say that it would have remanded the certification back to the EPA for further review. *Id.* at 118.

172. *See, e.g., supra* note 170; *see also* *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) (remanding RFA certification for further review because agency certification was inappropriate due to the incorrect definition of “small entity”). *But see* *A.M.L. Int'l v. Daley*, 107 F. Supp.2d 90, 105–06 (D. Mass. 2000) (finding that agency RFA analysis met all the requirements of the RFA when it considered, yet rejected, at least twelve significant alternatives to the proposed rule at issue).

173. *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D.Va. 1998).

174. *Id.* at 667.

175. *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

livelihoods.¹⁷⁶ The judicial review provisions under the RFA mandate more stringent application of the RFA's procedural requirements and small businesses are increasingly challenging agency authority. However, from the current state of litigation, it appears that the greatest effect of the RFA will lie with the implementation provisions.

In April 1999, the Assistant Administrator for Fisheries for NMFS testified before the House Committee on Resources regarding the implementation of the RFA. In her testimony, the Administrator recognized the importance of the RFA in the agency's consideration of economic impacts of conservation and management measures on small entities.¹⁷⁷ The Administrator also described the impact that the RFA had imposed on NMFS decisionmaking. Specifically, she stated that, through the process of RFA analysis, certain management actions would be selected over others, based on the receipt of comments after publication in the *Federal Register*.¹⁷⁸ Such explicit comments from NMFS indicate that the RFA is having its desired impact of making agencies at least consider the economic impacts of their actions on small entities. Perhaps the most that can be gained from the RFA is a heightened awareness of and sensitivity to the needs of small businesses engaged in industries such as fishing. From the statements of the NMFS Administrator, it appears that some headway has been made towards this pursuit.

The requirements of the RFA should not have a negative impact on the effectiveness of the Magnuson-Stevens Act if NMFS is able to discern from judicial review exactly what is expected of the agency and how best the agency may comply with judicial determinations. The current period of testing by NMFS is to be expected in response to the amended RFA, and it is necessary for NMFS to establish how much deference will be extended to its decisions. This is not to say that NMFS's discretion will not, or should not, change in response to the amended RFA. Rather, the amended RFA was enacted in response to concerns from small businesses that their existence was jeopardized by overzealous agencies and regulations with which the small businesses could not feasibly comply. Because of the RFA requirements, agencies are more likely to listen to comments from small businesses. The judicial review provisions safeguard the period of notice

176. *Id.* at 1340.

177. *Implementation of the Regulatory Flexibility Act, Before the Subcomm. on Fisheries Conservation, Wildlife & Oceans, of the House Comm. on Resources, 106th Cong. (1999)* (testimony of Penelope D. Dalton, Assistant Administrator for Fisheries, National Marine Fisheries Service), available in 1999 WL 261349.

178. *Id.*

and comment by reviewing agency certifications under the arbitrary and capricious standard.

VI. CONCLUSION

The requirements of the RFA will force NMFS to at least acknowledge and consider the potential devastation that severe regulations may have on fishing communities and their small businesses. Following the procedures of issuing an IRFA, FRFA, and review of comments, NMFS may then promulgate a rule if the agency continues to find the regulation necessary to fulfill its mandate under the Magnuson-Stevens Act. Essentially, the RFA requirements and judicial review provisions prevent agencies from skirting the analysis process by simply certifying that the final rule will not “have a significant economic impact on a substantial number of small entities.”¹⁷⁹ The RFA could prove to be a helpful balancing mechanism to the Magnuson-Stevens Act as the sustainability of the fishing industry is challenged by the increasing scarcity of resources.

179. Regulatory Flexibility Act, 5 U.S.C.A. § 605(b) (West 1996 & Supp. 2000).

