

***NATIONAL MARINE FISHERIES SERVICE PROCEDURE 01-123-01***

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To be reviewed on: August 2022

Fisheries Management  
Policy on Regulatory Process, 01-123

Procedures for Complying with Executive Orders 12866 and 13771

**NOTICE:** This publication is available at: <https://www.fisheries.noaa.gov/national/laws-and-policies/policy-directive-system>

**Author name:** Marquez, Rey  
**Office:** SF5

**Certified by:** Risenhoover, Alan  
**Office:** SF

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***SUMMARY OF REVISIONS:***

The initial directive was put into effect on June 7, 1994, and revised to reflect NMFS' current practice for complying with Executive Orders 13771 and 12866. This procedure was renumbered from 30-102-01 to 01-123-01.

Signed \_\_\_\_\_

Alan Risenhoover,  
Director, Office of Sustainable Fisheries

Date \_\_\_\_\_

I. Introduction

Executive Order (E.O.) 12866 is intended to enhance planning and coordination of new and existing regulations. In section 6(a)(3)(A), E.O. 12866 establishes a system whereby agencies are periodically to submit a list of all planned regulatory actions to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). This list is to indicate which of those planned regulations the agency believes are "significant" within the meaning of E.O. 12866. OMB then has an opportunity to concur or not with the Agency's E.O. 12866 determinations. Those regulations designated as "not significant" are not subject to OMB review, and not subject to E.O. 13771's offset and repeal requirements (discussed below). The Office of the Assistant General Counsel for Legislation and Regulation, Department of Commerce (DOC-OGC), has responsibility for coordinating the E.O. 12866 listing process for all rules issued by the Department of Commerce (DOC).

E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” is intended to promote the prudent expenditure of funds, from both public and private sources, and manage costs associated with complying with Federal regulations. In section 2(c), E.O. 13771 requires that agencies offset the incremental costs of all new significant regulations by eliminating existing costs associated with at least two prior regulations. Agencies may comply with the E.O. 13771’s offset and repeal requirements by issuing at least two deregulatory actions to offset the costs of each significant regulatory action.

## II. Objective

This directive describes an updated procedure for how NMFS will process regulations in compliance with these E.O.s; submit E.O. 12866 listing documents to provide OMB with notice of regulations; address E.O. 12866 listing document questions from OMB; and identify, track, and update estimates for potential E.O. 13771 actions.

## III. Guidance

### A. Procedures –

1. The Point of Contact (POC) for the rule completes a Regulatory Information Data form (RID), prepares a E.O. 12866 listing document, and fills out the E.O. 13771 worksheet (to the extent possible, at least 6 months ahead of intended publication of the initial stage of rulemaking)<sup>1</sup>. These documents are all contained on the intranet’s Examples and Checklists webpage. At minimum, listing documents must be submitted to NMFS.Clearance by the last Wednesday of the month prior to the month of the planned publication for the first stage of the rulemaking.
2. General Counsel (GC) reviews and clears the E.O. 12866 listing document.
3. Relevant economist reviews E.O. 13771 worksheet.
4. POC submits 1) RID form, 2) E.O. 12866 listing document, and 3) E.O. 13771 worksheet, with 4) some proof of GC clearance (e.g. email) to *NMFS.Clearance@noaa.gov*<sup>2</sup> copying their relevant Branch Chief (if applicable) and Division Chief or Assistant Regional Administrator.
5. Once the required documents have been submitted, NMFS.Clearance obtains and sends a Regulatory Information Number (RIN) to POC.
6. NMFS.Clearance submits E.O. 12866 listing documents and E.O. 13771 worksheets to the Senior Advisor for Regulatory Programs by the first Monday of each month.

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<sup>1</sup> For critical habitat designation rules, POCs must provide documents for PR3 Division Chief clearance prior to submission to *NMFS.Clearance@noaa.gov*.

<sup>2</sup> West Coast Region’s Groundfish inseason actions are exempt from OMB review but receive a RIN because they make changes to the Code of Federal Regulations. For these types of inseason actions only a RID form will be submitted to *NMFS.Clearance@noaa.gov*.

7. The Senior Advisor for Regulatory Programs:
  - a. Reviews and informs NMFS.Clearance of E.O. 13771 worksheets for rulemakings that preliminarily meet the definition of either “deregulatory” or “regulatory” as defined under E.O. 13771.
  - b. Reviews, edits, and clears E.O. 12866 listing documents and sends them back to NMFS.Clearance.
8. NMFS.Clearance:
  - a. Updates E.O. 13771 tracking sheet with basic information (e.g. title, RIN) of potential “deregulatory” or “regulatory” rulemakings selected under step 7.a., and notifies designated HQ/Regional POC via email that rulemaking has been selected for E.O. 13771 tracking.
  - b. Updates rule abstracts in ROCIS with the final version of the E.O. 12866 listing document.
9. NMFS.Clearance submits E.O. 12866 listing documents to DOC-OGC upon clearance from the Senior Advisor for Regulatory Programs.
10. DOC-OGC submits E.O. 12866 listing documents to OMB.
11. DOC-OGC emails NMFS.Clearance and the Senior Advisor for Regulatory Programs with any determinations or follow-up questions from OMB:
  - a. Upon request from the Senior Advisor for Regulatory Programs, NMFS.Clearance works with POC and appropriate GC office to respond to OMB's questions.
  - b. The Senior Advisor for Regulatory Programs responds to DOC-OGC.
12. DOC-OGC forwards updated E.O. 12866 Report with OMB's responses.
13. NMFS.Clearance checks monthly E.O. 12866 report for each RIN submitted that month, informs POC via email of OMB's significance determination<sup>3</sup>, and follows up with DOC-OGC on any missing E.O. 12866 listing documents.
14. If rulemaking is selected for tracking under step 7.a. above, the designated HQ/Regional POC updates/confirms estimates on the E.O. 13771 tracking sheet<sup>4</sup> at the following times:
  - a. At each rulemaking stage (e.g., before publication of proposed rule and again before publication of the final rule), and
  - b. In January and July of each year (to ensure up-to-date estimates are reported for the semi-annual Unified Agenda data call request), and
  - c. Verify estimates are up-to-date in the E.O. 13771 tracking sheet once cost saving/cost estimates are finalized.

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<sup>3</sup> POC is responsible of keeping track of their EO 12866/13771 status in the Upcoming Decisions report document.

<sup>4</sup> Timely updates from POCs will ensure sufficient time is available for HQ review and submission to DOC-OGC and OMB. Accounting of E.O. 13771 deregulatory and regulatory actions and cost/cost saving estimates is a key component of the semi-annual Unified Agenda submission to OMB.

B. *Content of E.O. 12866 Listing Document* –

1. Title of the rulemaking (avoid mentioning specific stages in the rulemaking process, e.g. proposed rule).
2. Agency’s initial Congressional Review Act determination (e.g. Not Major).
3. Agency’s initial determination of significance for purposes of E.O. 12866.
4. Agency: DOC/NOAA/NMFS.
5. RIN. *\*\*This will be added to the listing document by NMFS.Clearance@noaa.gov \*\**
6. Planned publication date (month and year) of each stage of the rulemaking.
7. Statutory/Judicial deadline, if any.
8. Summary of rulemaking includes:
  - a. Remember the audience is OMB, so the summary should use plain language<sup>5</sup>.
  - b. Describe clearly, concisely, and in paragraph form what the rulemaking proposes to do.
  - c. Specify the authority under which NMFS will implement the rulemaking.
  - d. If applicable, specify if NMFS is proposing the rulemaking in response to a specific event. E.g. a regional Fishery Management Council or interstate Fishery Commission action, an advisory body recommendation, measures taken by an international body to which the United States is a member, a rulemaking petition, court order, etc.
  - e. Briefly discuss the situation that led to the need for this rulemaking (i.e. the “driver”).
  - f. Include an early assessment of the magnitude of the economic impacts, if any, and who is likely to be affected by this rulemaking.
  - g. Keep to no more than 1 to 2 paragraphs in length.

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<sup>5</sup> The cleared summary in the listing document is what will appear in the semi-annual Unified Agenda publication.

- h. At the end of the listing document should be a summary of why the action is “not significant” for purposes of E.O. 12866, working from the following template language below:

*E.O. 12866 Template Language*

NMFS has considered this action under E.O. 12866. Based on that review, this action is not expected to have an annual effect on the economy of \$100 million or more, or have an adverse effect in a material way on the economy. Furthermore, this action would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this E.O.