UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE FISHING RIGHTS ALLIANCE, INC.,

Plaintiff,

v. **Case No. 8:09-cv-1544-T-30AEP**

THE NATIONAL MARINE FISHERIES SERVICE,

Defendant.

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PLAINTIFF'S REPLY BRIEF AS TO THE MRFSS ISSUE

Plaintiff is entitled to partial judgment with respect to Defendant's failure to implement improvements to MRFSS as of January 1, 2009.

I. WHY MRFSS MATTERS

The NRC Report captured the nature of the dispute when it observed:

> Among the recreational fishing community, there is a widespread lack of support and appreciation for the current MRFSS administered by the National Marine Fisheries Service (NMFS). This lack of support is related, in part, to the evolution of the use of the MRFSS data. Since its inception, the MRFSS data have been applied to other purposes, most notably stock assessment and management decisions for particular species, which were not the original intent of the MRFSS.

AR Supp. 000132. Currently, NMFS uses MRFSS data as a real-time quota monitoring device to close-down fisheries. This is not government for the people;

rather, it is gross mismanagement and dereliction of duty. And worse yet, it appears intentional.[1]

There is evidence that MRFSS grossly overestimates recreational saltwater fishing activity and creates a *de facto* regulatory fishing surplus, at the expense of the recreational angler. MRFSS was "fatally flawed" both with respect to design and inference and improperly allowed to masquerade as science:

> The NRC found that current recreational surveys that rely on random telephone contacts with residents of coastal county households to collect marine recreational fishing activity data result in significant survey over-coverage because relatively few households include active anglers. The panel also determined that the current sampling methodology results in survey under-coverage because some anglers do not live in coastal counties or they live in coastal counties but do not have landline telephones. The NRC advised that over-coverage results in severe sampling inefficiency and that under-coverage may lead to serious bias in the resultant estimates, since anglers from non-coastal counties are likely to have different fishing habits than those from coastal counties.

AR Supp. 00294.

In 2008, a fishing scientist employed with the State of Connecticut, Dr. Victor Crecco, found that data generated by MRFSS, as currently formulated, "grossly overestimates" fishing effort and the number of trips taken along the Atlantic coast. http://www.asmfc.org/meetings/winter09Mtg/documents/AtlanticStripedBassManagementBoard.pdf. Dr. Crecco compared MRFSS effort data to that generated by the U.S. Fish and Wildlife Service within the U.S. Department of the Interior, which has conducted regular surveys of salt-water fishing effort every five (5) years since 1955.

[1]A person intends the probable consequences of their conduct.

The Fish and Wildlife Service, a conservation agency, has reported in the 2006 National Survey, an ongoing decrease in salt-water fishing effort between 1996 and 2006. http://wsfrprograms.fws.gov/Subpages/NationalSurvey/2006_Survey.htm. The remedial phase of this case should focus on the extent to which MRFSS has cheated recreational anglers out of their access to the fishery.

Common sense dictates that anglers from non-coastal counties are less likely to fishing relative to those from coastal counties. Yet, MRFSS has ascribed fishing habits from coastal residents to those of non-coastal residents, resulting in an over-estimation of fishing trips.

II. SETTING THE RECORD STRAIGHT

The final NRC Report released in April 2006 found, "Both the telephone and access components of the current approach have serious flaws in design or implementation and use inadequate analysis methods that **need to be addressed immediately**." AR Supp. 00019-20 (bolding added). Prior to release of the final NRC report, NMFS was fully aware of the recommendations which were being made, including the creation of a registry of salt-water anglers (See Briefing Document, http://www.nmfs.noaa.gov/ocs/mafac/meetings/2006_02/docs/Pro%20and%20Con%20Fishing%20License.pdf").

In September 2006, the Bush administration sponsored re-authorization of the Magnuson-Stevens Act and knew what the act entailed. President Bush signed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575, on January 12, 2007). Under 16 U.S.C.

§ 1881(g)(3)(A), the Secretary was obligated to establish a program to improve the quality and accuracy of information generated by the MRFSS "[w]ithin 24 months after" re-enactment. Defendant adopted MRIP in October 2008.

Subsequently, "[w]ithin 24 months after establishment of the program, the Secretary shall submit a report to Congress that describes the progress made toward achieving the goals and objectives of the program." See 16 U.S.C. § 1881(g)(4). NMFS now has roughly one month to submit a report to inform Congress whether the improved survey has achieved the goals of MRIP – to achieve "**acceptable accuracy and utility for each individual fishery**." 16 U.S.C. § 1881(g)(3)(A) (bolding added).[2] The goal of the program was not to create an eventual program – it is to accurately gauge fishing effort through an improved survey. Yet, NMFS proudly proclaims in its Memoranda that its ongoing efforts to date comport with 16 U.S.C. § 1881(g)(3)(A). NMFS is wrong.

Because MRIP is in the design and testing phase and currently has zero utility, the report that will be submitted to Congress will undoubtedly be filled with multiple excuses for non-compliance. This Court should give zero weight to the delay tactics of a government agency whose work was thoroughly discredited by the National Academy of Science. NMFS employees who mismanaged MRFSS from 1979 through the present – whose livelihoods were tied to its existence – now oversee and participate in its overhaul. It should not take 5 years to overhaul MRFSS. This was not the intent of Congress.

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[2]A system of survey not even close to implementation cannot be deemed accurate or acceptably accurate.

III. DEFENDANT'S POST-LITIGATION CONSTRUCTION OF THE FIRM DEADLINE WITHIN 16 U.S.C. § 1881 IS DISINGENUOUS AND IN BAD-FAITH

On the NOAA website is the following admission: "The Magnuson-Stevens Reauthorization Act of 2006 requires that a program be established to improve the quality and accuracy of information generated by Marine Recreational Fisheries Statistics Survey (MRFSS). **The program must be implemented by January 1, 2009**. A National Registry Program for Marine Recreational Fishing must also be created." http://www.nmfs.noaa.gov/msa2007/mrip.htm (bolding added).

The NRC Report recommended both (1) a firm deadline for the implementation of improvements to MRFSS and (2) ongoing monitoring and technical evaluation after the deadline:

> After the revision is complete, provision should be made for ongoing technical evaluation and modification, as needed, to meet emerging management needs. To improve the MRFSS, **the committee further recommends that the existing MRFSS program be given a firm deadline linked to sufficient program funding for implementation of this report's recommendations**.

AR Supp. 00020. Defendant had a duty to adopt a program to evaluate and modify MRIP once implemented. MRIP was not timely implemented, and the existence of an ongoing program for future improvement is not at issue here. What is at issue is the "firm deadline" recommended by the NRC and ordered by Congress.

The implementation deadline contained in 16 U.S.C. § 1881(g)(3)(D) is clear and unambiguous and ends the inquiry. Christensen v. Harris County, 529 U.S. 576, 588 (2000).[3] No deference is due to NMFS' failure to read the statute correctly. "To

[3]Defendant concedes that 16 U.S.C. § 1881 is unambiguous.

the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate").

The plain language of the deadline provision under review required the Secretary to "complete the **program** under this paragraph **and implement** the **improved** Marine Recreational Fishery Statistics Survey **not later than January 1, 2009**" 16 U.S.C. § 1881(g)(3). Defendant ignored all of the statutory language after the word "**and.**"[4] "Congress presumably used the word "and" conjunctively, such that it means 'in addition to," or "as well as.' N.C. Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62, 98 (D.D.C. 2007).

There is no conflict between the "within 24 months" provision and the "not later than January 1, 2009" deadline for implementation of the improved survey. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.'" Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29, 77 S. Ct. 787 (1957). Nothing in 16 U.S.C. § 1881(g)(3)(A) relieves Defendant of its duty to complete the program and

[4]Plaintiff anticipated and addressed this very argument in its Initial Brief when it wrote: "Calling the improved 'survey' a "program" did not confer Defendant with an indefinite deadline."

implement an improved survey by January 1, 2009. The very specific obligations detailed in 16 U.S.C. § 1881(g)(3) control over any general language "within 24 months." Congress may well have thought the MSA would be signed well before it was, but Congress clearly specified when the improvements to the survey needed to be implemented.

Defendant also correctly understood the January 1, 2009 deadline when it issued the Proposed National Registry Rule and the Press Release for the Proposed Rule. (AR Supp. 00327; AR Supp. 00329 ("The registration requirement would become effective January 1, 2009"). NOAA had originally proposed that registration be required beginning Jan. 1, 2009, but granted states one additional year without Congressional assent in the final rule (AR Supp. 00337). Defendant perceived the risk of litigation associated with the final rule to be "low." (AR Supp. 00337). Defendant admits in its 2009-10 MRIP Update, "The Act directs the Department of Commerce to implement an improved recreational fisheries survey program by January 1, 2009." AR Supp. 00316.

Defendant's change in position regarding what acts were required before the deadline is further reason to reject its current argument. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view. Watt v. Alaska, 451 U.S. 259, 273 (1981). "We do not generally give credence to such post hoc rationalizations, but rather 'consider only the regulatory rationale actually offered by the agency during the development of the regulation.' " Gerber v. Norton, 294 F.3d 173, 184 (D.C. Cir. 2002) (quoting, Grand Canyon Air Tour Coalition v. FAA, 332 U.S.

App. D.C. 133, 154 F.3d 455, 469 (D.C. Cir. 1998)).

If Congress has spoken directly to the precise question in issue, and its intent is clear, that ends the inquiry because both the agency and the court "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 2781-82 (1984). It is the elementary rule of statutory construction that courts initially look to the plain language of the statute to determine the meaning of legislation. McBarron v. S & T Industries, Inc., 771 F.2d 94, 97 (6th Cir. 1985). A “statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” Hibbs v. Winn, 542 U.S. 88, 101, 124 S. Ct. 2276 (2004). A statute is to be read as a whole. Massachusetts v. Morash, 490 U.S. 107, 115, 109 S. Ct. 1668 (1989). In order to construe a statute contrary to the plain meaning of its text, the government must show a clear contrary intent by Congress that supports its construction. Garcia v. United States, 469 U.S. 70, 75, 105 S. Ct. 479 (1984) ("Only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language.").

Defendant claims its only obligation as of January 1, 2009 was to develop and adopt an outline of a “program,” i.e., MRIP. From there, NMFS asserts the statute envisions a limitless period for NMFS to study and document existing rules, re-evaluate whether the MRFSS has biases, form committees and sub-committees, hold various meetings, write new rules, grant itself one-year extensions on the National Registry and give misleading updates. This is not what Congress intended. Congress

wanted action by January 1, 2009. Defendant had from 2006 until January 1, 2009 to achieve "**implementation**" of an **improved** MRFSS **survey**. By definition, a survey is not implemented unless it generates data that informs the calculation of fishing effort. NMFS knows what implementation requires. On its website, MRIP's chairman explains in pertinent part:

> We are making great progress on **developing the new Marine Recreational Information Program** with the help of our partners and constituents, and **we get a lot of questions about when the new program will be implemented**. Meeting today's demands for data through the MRFSS while simultaneously creating a new Marine Recreational Information Program that anticipates tomorrow's data needs is no small challenge. . .

https://www.st.nmfs.noaa.gov/mrip_new/newsroom/latestnews_001.html. If it is still in development, this is at least an admission that no "program" existed as of January 1, 2009.

The MSA did not permit phase-in of the improved survey after the deadline. The very NMFS employees who mismanaged MRFSS from 1979 to 2006 now oversee its overhaul and have dragged their feet, making a mockery of Congress. It is apparent to the undersigned and it should be to this Court that NMFS has delayed implementation of the new, improved survery to conceal MRFSS' systemic overestimation of recreational fishing effort for a decade or longer. NMFS has continued to rely on an unlawful method of survey to skew the results in its factor. The Secretary and his subordinates have no right to omit information in order to skew the results. Commonwealth of Massachusetts v. Daley, 10 F. Supp. 2d 74 (D. Mass.1998).

IV. THE REMEDY

The Administrative Procedure Act mandates that the reviewing court shall "hold unlawful and set aside agency action" found to be arbitrary and capricious. 5 U.S.C. § 706(2)(A). United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497 (2001) (courts cannot, in their discretion, reject the balance that Congress has struck in a statute). The members of Plaintiff "are currently working under a regulatory regime that is legally infirm in an important way. They are entitled to a meaningful remedy responsive to the infirmity identified. The APA, which the MSA incorporates, certainly authorizes the broader forms of relief that plaintiffs seek, instructing that unlawful agency action be "set aside." 5 U.S.C. § 706(2)." N.C. Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62, 103 (D.D.C. 2007).

"In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14, 91 S. Ct. 814 (1971).

Any closures on or after January 1, 2009 predicated on MRFSS data should be enjoined until NMFS complies with its statutory obligations. See Southern Offshore Fishing Ass'n v. Daley, 55 F. Supp. 2d 1336 (M.D. Fla. 1999) (enjoining unlawful agency action). Even if no injunction is issued, the "agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review." Food Mktg.

Inst. v. ICC, 587 F.2d 1285, 1290 (D.C. Cir. 1978). The notion that the only remedy which can be imposed for unreasonable delay by an agency is further delay is absurd.

The Court should consider an evidentiary hearing on the remedy to be imposed, with both sides permitted to elicit expert testimony. Such a hearing should consider whether and to what extent MRFSS overstates fishing effort and recreational catch data. Based on the answers to these questions, the Court should enjoin accountability measures that rely on fatally flawed MRFSS data.

In the case of Amberjack, a closure occurred in October 2009 and one was scheduled for late August 2010 before the BP oil disaster affected the Gulf of Mexico. http://sero.nmfs.noaa.gov/sf/pdfs/Greater_AJ_FAQS_June_2010.pdf. In the case of grouper, closures should be enjoined to the extent that such closures rely on inflated estimates of effort, both before and after January 1, 2009. Such a closure for gag grouper is planned to commence January 1, 2010 via Interim Rule.

The hearing should also force agency officials (rather than their lawyers) to explain under oath how they could have misread a clear statutory command. Plaintiff believes that Defendant has delayed implementation because it knows that effort is overstated by MRFSS. An agency which has an agenda different from Congress must answer for such actions in Court. The following support an inference of bad faith, e.g., an anti-recreational fishing agenda:

- Environmental groups have not insisted on implementation of MRIP but at least one such group, Environmental Defense Fund, has pushed catch-shares to attempt to lock in commercial allocations, and commodify important species of

fish for profit;

- Congress was forced to mandate changes to MRFSS by law;
- NMFS has acknowledged the weaknesses in MRFSS for years but failed to act until ordered by Congress;
- If MRFSS understated effort, NMFS would have pushed for changes on its own;
- Why are major differences between the findings of MRFSS and the Fish and Wildlife Service as to the direction of fishing effort;
- Why has NMFS never formally studied whether MRFSS overstates fishing effort; and
- Why has NMFS failed to develop a weather-corrective factor or form a team to develop one.

WHEREFORE, Plaintiff's Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16, 2010, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to: Mark Brown, Esq.

/s/ Craig L. Berman
Attorney