RECORD NO. 07-5389

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

NORTH CAROLINA FISHERIES ASSOCIATION, INC.; JEFF ODEN; JOSEPH ANDREW HIGH; AVON SEAFOOD,

Plaintiffs - Appellants,

v.

CARLOS GUTIERREZ, HONORABLE,
in his official capacity as Secretary of Commerce,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAGE PROOF REPLY BRIEF OF APPELLANTS

David E. Frulla
Shaun M. Gehan
KELLEY DRYE & WARREN, LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8400

Counsel for Appellants

Dated: September 12, 2008

THE LEX GROUP DC ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATION

OTHER AUTHORITY

* Authorities upon which we chiefly rely are marked with asterisks.

I. INTRODUCTION

Appellee, the Secretary of Commerce ("Secretary"), offers no defense to the substantive legal arguments advanced by Appellants North Carolina Fisheries Association, Andrew Joseph High, Jeff Oden, and Avon Seafood (collectively "Appellants" or "NCFA"). Rather, Appellee argues merely that NCFA's claims are moot, while also insinuating that NCFA is now raising issues that were not before the court below. In both these contentions, the Secretary is wrong, and as a result, this Court should vacate the district court's order on remedy and provide Appellants an effective remedy for Appellee's continuing statutory violation.

II. ARGUMENT

A. SUMMARY OF ARGUMENT

In its Memorandum Opinion and Order of August 17, 2007, the district court found, after the Secretary conceded, that the Secretary violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") by failing to develop "rebuilding plans" for snowy grouper and black sea bass. The district court then asked the parties to brief the issue of an appropriate remedy for this violation. *NCFA v. Gutierrez*, Civ. No. 07-1815 Memorandum Op. at 57-59 (Aug. 17, 2007) (JA __) (District Court Docket No. 34) (hereafter "Mem. Op."); Order (Aug. 17, 2007) (JA __) (District Court Docket No. 33). The parties ultimately each presented a proposed remedy, and the lower court adopted Appellee's formulation

in its entirety. In so doing, the lower court made a legal determination regarding what elements comprise a legally-compliant rebuilding plan. Appellants have appealed this decision of the lower court. Thus, the question as to what constitutes a lawful rebuilding plan under the MSA was—and is—squarely at issue.

NCFA did not, as the Secretary suggests, propose that the court below mandate that the Secretary adopt any specific measures.[1] *See* Appellant's Br. at 15. Rather, as Appellants have argued here, NCFA's remedy submission outlined the requirements of MSA section 304(e), 16 U.S.C. § 1854(e), with respect to the required elements of a lawful rebuilding plan, and requested that the court below order, in addition to those elements proposed by the Secretary, that the rebuilding plan include some means and measures to meet the MSA mandate that a rebuilding plan "allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery." *Id.* § 1854(e)(4)(B). NCFA also discussed changes to the MSA that the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 102 Stat. 3575-3665 (Jan. 12, 2007) ("Reauthorization Act") effected to strengthen the

[1] The measures NCFA discussed were illustrative of practicable measures of the type that could help meet the statutory requirements. *See*, *e.g.*, NCFA's Remedy Br. at 10-11 (JA __) (Sept. 17, 2006) (District Court Docket No. 36). They were included as examples because they represent measures that had been discussed by the South Atlantic Fishery Management Council during the development of Amendment 13C (at suit below). NCFA did not, however, request that the district court order Defendant-Appellee to implement any of the specific measures.

economic and social protections afforded commercial fishermen and their communities. *See* NCFA's Remedy Br. at 5-7 (JA __).

Certainly, the district court "did not and could not predetermine what those plans would have to look like," Appellee's Br. at 17, if the issue were one of establishing specific management measures. The lower court, however, had ample authority to specify the *elements* that must be addressed in a rebuilding plan, which is exactly what it did when it adopted the Secretary's proposed remedy. NCFA's contention is simply that the court below in its remedial order erred by omitting a key element of a legally compliant rebuilding plan, and thus failed to accord Appellants the full measure of relief to which they are entitled.

This case is not mooted by the mere fact that the Secretary ostensibly adhered to the terms of a flawed remedial order. The issue in this case is whether the court below erred as a matter of law (or, in the alternative, abused its discretion), by ordering an incomplete and unsatisfactory remedy, given the legal defect found and the plain terms of the MSA with respect to the constituent elements of a lawful rebuilding plan. Accordingly, the question in this case is not, as Appellee would have it, "Did the Secretary faithfully implement the relief ordered?" Rather, the question is, "Did the Court order full and lawful relief?"

Appellants' injury stems from the Secretary's initial failure to promulgate a rebuilding plan for the two species at issue. Mem. Op. at 63 (JA __). NCFA

continues to be injured because the court below failed to order an adequate remedy for the violation it found, and also because the court below failed to explain accurately the Secretary's legal duty. This injury is independent from Appellee's promulgation of an incomplete rebuilding plan in response to the district court's remedy order.

This Court has the authority to relieve Appellants' injury in this case by remanding it with instructions to the district court to order the Secretary to develop and implement this one missing (fairness and equity) element of legally-compliant rebuilding plans for snowy grouper and black sea bass.

B. NCFA's CASE IS NOT MOOT

"The burden of establishing mootness rests on the party that raises the issue. It is a 'heavy' burden." *Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458-59 (D.C. Cir. 1998) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625 631 (1979)) (first citation omitted). "An issue becomes moot if intervening events leave the parties without 'a legally cognizable interest' in our resolution of those issues." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (quoting *Powell v. McCormack*, 395 U.S. 486, 469 (1969)).

In this matter, the Secretary asserts that because Appellee's designee, the National Marine Fisheries Service ("NMFS"), "has … issued the missing [rebuilding] plans," that "action corrected the legal violation and mooted this

case." Appellee's Br. at 18. To support this claim of mootness, the Secretary "has the burden of proving that, because 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,'" Appellants lack a legally cognizable interest in present action. *Kennecott Utah*, 88 F.3d at 1207.

The Secretary has not carried this "heavy burden." A finding for Appellants in this case will rectify the district court's error of law in prescribing the scope of the remedy, erase infirm legal precedent, and provide relief to Appellants in the form of a rulemaking[2] to finalize implementing a fully lawful rebuilding plan that, among other required elements, "allocate[s] both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery." 16 U.S.C. § 1854(e)(4)(B). Currently, by contrast, the rebuilding plan Appellee promulgated only contains the elements he asserted, and the court below erroneously agreed, were all that were required under law.

Specifically, the Secretary argued in his remedy submission below that "rebuilding plans typically include 'four key elements': '(1) An estimate of the average spawning biomass ("B_{MSY}"); (2) a rebuilding time period; (3) a rebuilding MSY trajectory; and (4) a transition from rebuilding to more optimal management.'" Secretary's Remedy Proposal at 4-5 (Sept. 19, 2006) (District

[2] At this stage, such a rulemaking would presumably be in addition to the one Appellants have undertaken to comply with the lower court's incomplete remedial order.

Court Docket No. 35) (JA __) (quoting NMFS's "Technical Guidance On the Use of Precautionary Approaches to Implementing National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act" at 4 (hereafter "Technical Guidance")). The Secretary disclaimed any responsibility to include measures to allocate fairly the benefits and burdens of rebuilding as part of the plan, and the court below did not require any. *See* Secretary's Remedy Proposal at 9-10 (JA __); Remedy Order at 5 (JA __) (Oct. 2, 2007) (District Court Docket No. 37) (adopting the Secretary's remedy proposal) (hereafter "Remedy Order"). A live controversy exists that this Court can and should settle.

Furthermore, Appellants agree with Appellee that equity should determine the scope of the remedy. *See* Appellee's Br. at 17 (citing *United States v. District of Columbia*, 897 F.2d 1152, 1157 (D.C. Cir. 1990) (the "scope of an equitable remedy is determined by violation"). In terms of equitable considerations, it is appropriate to note that Appellee has raised a suggestion of mootness with respect to NCFA's claims for the first time in his opposition brief, rather than through a motion to dismiss this appeal. This decision forced the small business Appellants[3] to fully brief the appeal on its merits, and absorb the costs associated therewith,

[3] *See* Mem. Op. at 23-24 (JA __) (affirming that Plaintiffs in the case below are "'small entities'" within the meaning of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612).

rather than being able to address this narrow and potentially dispositive issue in opposition to a motion to dismiss.

Furthermore, in the government's view of the case, the only course available to Appellants to address this unlawful remedy order would have been a full-on challenge to the new rulemaking undertaken in response to the remedy order. In essence, Appellee suggests that NCFA should have filed and prosecuted another original lawsuit in district court – potentially before the same judge whose order is before this Court on review – absorbing additional tens, if not hundreds of thousands of dollars in costs and fees, rather than asking this Court to adjudge the legality and adequacy of the remedial order. By logical extension, in that new case, Appellants, as plaintiffs, would be forced to argue that, even though Appellee did what Judge Bates ordered him to do in that court's remedial order (at least in terms of the elements of a rebuilding plan), the Secretary violated the law in following that order.

As a prudential matter, this Court should not abet the Secretary's tactics. If the Secretary was going to take this position, he should have raised the suggestion of mootness earlier. If this Court had agreed that NCFA's remedy lay in challenging the rulemaking resulting from that order, which it should not, then Appellants' course would have been clear. Rather, the Secretary potentially "ran

out the clock" on NCFA's ability to challenge Amendment 15A[4] – the rule promulgated to meet the district court's order, *see* Appellee's Br. at 14 – and now asserts that NCFA is completely without recourse.

The record shows, moreover, that Appellee has tried to set up a "heads, I win; tails you lose" situation for these Appellants. Even if NCFA had challenged new Amendment 15A in addition to (or in lieu of) prosecuting this appeal, the Secretary established the rulemaking record in a way that would allow him to claim such a challenge is preempted by the very appeal that he now suggests is moot. Also, if NCFA had abandoned this appeal and chose solely to challenge the circumscribed rebuilding plan implemented by Amendment 15A for failure to include all legally required elements, the Secretary would have asserted the remedial order as a defense. The Secretary's planned gambit is clear in his response to NCFA's claim on this point in the preamble to the Federal Register notice announcing Amendment 15A. NMFS stated: "Amendment 15A is intended to ... satisfy a United States district court ruling that found a plan to rebuild snowy grouper and black sea bass should have been included in Amendment 13C to the

[4] Under the MSA, parties have only thirty days after "[r]egulations [are] promulgated by the Secretary under this Act" to file a petition for review of those regulations. 16 U.S.C. § 1855(f)(1). As the notice of availability and approval of Amendment 15A were promulgated on March 20, 2008, the thirty day window of opportunity has passed. *But see infra* at 9-10.

[fishery management plan] because the two species were overfished." 73 Fed. Reg. 14942, 14942 (Mar. 20, 2008).

The Secretary's approach is simply untenable for the small businesses bringing this appeal.[5] The expense of maintaining two parallel judicial actions would effectively foreclose the possibility of NCFA being able to pursue any relief whatsoever. Moreover, Appellee's approach would invite exceedingly complex litigation as the government would, as suggested above, undoubtedly whipsaw Appellants between the district court and this Court.[6]

Appellants appear to have posited this false choice for an additional jurisdictional reason, as well: it is not at all clear that NCFA could challenge Amendment 15A. Unlike the other amendments challenged by the North Carolina Fisheries Association, cited in Appellee's Brief at 19-20, Amendment 15A was

---

[5] This Circuit has recognized the needs and constraints of small businesses. *Cf. U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (enjoining rule as against small entities after agency failed to follow applicable procedures).

[6] Running these plaintiffs from pillar to post is not, unfortunately, an uncommon litigation approach by Appellee. In the case below, for instance, the Secretary insisted in briefs and at oral argument that he had no duty to develop a rebuilding plan in conjunction with an amendment to end overfishing, only to reverse course when Judge Bates requested supplemental briefs on the issue of deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

accompanied by no implementing regulations.[7] *See* 73 Fed. Reg. at 14942 ("Amendment 15A establishes the rebuilding plans but does not contain measures with direct regulatory effect …."). Thus, it is entirely unclear that, were such a second suit to have been brought, it would have withstood a motion to dismiss on the grounds that it was neither a challenge to "[*r*]*egulations* implemented by the Secretary" nor "actions taken by the Secretary under regulations which implement a fishery management plan."[8] 16 U.S.C. § 1855(f)(1), (2) (emphasis added).

No matter how the issue is sliced, the facts, equities, and practicality of the situation suggest that this Court should decide this appeal on the merits.

---

[7] In fact, the Federal Register filing is styled as a "notice of agency action" rather than a final rule. 73 Fed. Reg. at 14942.

[8] *Cf. Cape Cod Commercial Hook Fishermen's Ass'n v. Daley*, 30 F. Supp. 2d 111, 114 (D. Mass. 1998) (finding no jurisdiction under 16 U.S.C. § 1855(f) to decide a challenge to notice of issuance of an "experimental fishing permit" because "it is not an action that has been 'approved' by the Secretary and put into effect 'by regulation'") (citing 16 U.S.C. § 1855(d), relating to the Secretary's regulatory authority); *see also Tutein v. Daley*, 43 F. Supp. 2d 113, 122 (D. Mass. 1999) (holding that a challenge to the advisory guidelines issued pursuant to 16 U.S.C. § 1851(b) was not proper under MSA section 1855(f) because they were not "regulations").

C. THE SECRETARY'S AUTHORITIES DO NOT SUPPORT A FINDING OF MOOTNESS IN THIS MATTER

The legal authorities relied upon by the Secretary to bolster his argument that this case is moot are entirely unavailing, as they deal with essentially procedural violations. *In re International Union, United Mine Workers*, 231 F.3d 51 (D.C. Cir. 2000), involved an action to compel the Mine Safety and Health Administration to undertake a rulemaking. *Id.* at 52. This Court found that upon issuance of two notices of proposed rulemaking addressing all the concerns raised by the union, the claim of unreasonable delay in promulgating the rules became moot. *Id.* at 53-54. In contrast, the case at bar relates to the adequacy of the remedy ordered by the court below as a substantive matter. The issue of whether that remedy met all of the elements required by law is still very much in controversy.

Similarly, in *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422 (D.C. Cir. 1984), this Court found that a challenge to withdrawal of a rule without the opportunity for comment was mooted by subsequent promulgation of a new rule that provided for notice and comment. *Id.* at 1431. The plaintiffs' ability to comment on the new rule covering the same subject matter provided them with "the opportunity to participate meaningfully in the rulemaking process," which they claimed had been previously denied. *Id.* at 1432. Promulgation of the new rule was found to have "'completely and irrevocably eradicated the effects of the

alleged violation.'" *Id.* at 1431-32 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). By contrast, in this matter, Amendment 15A did not contain any conservation and management measures to insure fairness and equity[9]; nor, more pertinently, did the district court order the Secretary to promulgate any.

Finally, *Gulf of Maine Fisherman's Alliance v. Daley*, 292 F.3d 84 (1st Cir. 2002), is in the same mold as the first two cases cited by Appellee. In that matter, regulations that were subject to judicial challenge on procedural grounds had been superseded by other regulations covering the same subject matter which did not share the procedural infirmities identified in the suit. *Id.* at 88. This matter, by contrast, presents a live dispute over the adequacy of the remedy the lower court ordered, and the scope of a legally adequate rebuilding program. This issue is not

[9] As noted *supra* at 9-10, the "notice of agency action" announcing Appellee's approval of Amendment 15A clearly states that the Amendment contained no regulatory measures. *See* 73 Fed. Reg. at 14942. This rulemaking was strictly confined to the subjects NMFS had outlined in its Remedy Proposal and adopted by the lower court as a remedial order. *See id.* (stating that "Amendment 15A updates management reference points" for the stocks in question, and includes other technical elements such as rebuilding strategies and schedules). The Secretary alleges that resort to the administrative record is necessary to judge whether that amendment is "arbitrary and capricious, or otherwise contrary to the Magnuson-Stevens Act." Appellee's Br. at 20. While that is not the question in this appeal, this Court is fully capable of finding that Amendment 15A followed the narrow mandate of the lower court's order by simple reference to the Federal Register notice. *Cf. American Bankers Ass'n v. National Credit Union Admin*, 271 F.3d 262, 266-67 (D.C. Cir. 2001) (challenges to consistency of regulations with statutes can be decided without reference to the administrative record) (citing cases).

mooted by Appellee's promulgation of Amendment 15A, in response to and in a manner consistent with an infirm district court order.

D. THE COURT BELOW DID DETERMINE THE "METES AND BOUNDS" OF THE REBUILDING REQUIREMENT IN HIS UNLAWFUL ORDER

The context and course of proceedings below are relevant to the issues on appeal. Judge Bates found a violation of the MSA in the Secretary's failure to develop rebuilding plans for snowy grouper and black sea bass, a determination to which Appellee belatedly acceded. Mem. Op. at 50-51 (JA __). Then, to provide the parties an "opportunity for input," the court "order[ed] the parties to confer and … to submit either a joint proposal or separate proposals advocating a particular remedy and explaining why that remedy is appropriate." *Id*. at 64 (JA __).

After engaging in ultimately fruitless discussions with the Secretary's designees, NCFA prepared a detailed and reasoned brief carefully explaining the MSA's requirements and changes to the law that would guide the development of the rebuilding plan prepared to rectify the legal error. To correct the legal shortcomings, NCFA recommended that the court order, in addition to the technical elements of a rebuilding plan, NMFS to consider and adopt management measures to effectuate a fair and equitable allocation of the benefits and burdens of

the rebuilding plan among the sectors of the fishery, in accordance with the rebuilding requirements of the MSA.[10]

For his part, the Secretary offered a technical proposal setting forth certain clear and unambiguous elements, based on reference to his designees' "Technical Guidance," that he argued would constitute complete rebuilding plans for the two species, including a timeline for rebuilding, management "reference points" or guideposts to measure progress, and a strategy for rebuilding the stocks. His proposal made no provision, however, for measures designed to fulfill the purposes of MSA section 304(e)(4)(B). Judge Bates considered both proposals, and adopted the Secretary's proposal in its entirety, save for an alteration to the timing of the final amendment.

Specifically, the lower court held:

> Defendant's proposal is directly responsive to the Court's instruction "timely to remedy the absence of a rebuilding plan." Moreover, the proposed rebuilding plan is consistent with NMFS's general rebuilding plan criteria as defined in the agency's own "Technical Guidance" specifications. Additionally, the putative rebuilding plan calls for the maximum allowable time to rebuild the stocks in question, which minimizes -- to the extent

[10] NCFA's proposal, also contained two ancillary requirements: that NMFS hold at least one "scoping hearing" to allow the public to recommend management alternatives to be considered and a reversion of the snowy grouper and black sea bass trip limits pending development. This latter provision was designed to provide some temporary relief, while meeting the district court's stated desire to impose relief that would be both "meaningful" and "'hold the agency's feet to the fire'" so it would act expeditiously. *See* Mem. Op. at 64-65 (JA __) (quoting Prelim. Tr. at 59); *see also* NCFA's Remedy Br. at 15 (JA __).

> possible -- the adverse impact on plaintiffs and the rest of the regulated community. In sum, defendant's proposal addresses the chief legal infirmity that this Court identified in its Memorandum Opinion, and it does so promptly and in a manner that is consistent with the agency's own guidelines for developing an adequate rebuilding plan.

Remedy Order at 2-3 (JA __) (citations omitted). This was a substantive adoption of the Secretary's proposal that was made even more explicit in the district court's order: "**ORDERED** that the Court adopts Defendant's *Remedy Proposal* …."[11] *Id.* at 5 (emphasis added).

In contrast, the Secretary mistakenly argues here that "[t]he district court only directed NMFS to prepare rebuilding plans; it did not and could not predetermine what those plans would have to look like to survive judicial scrutiny." Appellee's Br. at 17 (citing Remedy Order at 2 (JA __)). Save for the concluding clause opining on "judicial scrutiny," however, this is exactly what the lower court did. It substantively adopted, as the "metes and bounds" of a lawful rebuilding plan, those elements precisely specified in the Secretary's remedy proposal.

---

[11] The Secretary's characterization of the remedial order is rather misleading at times. He implies that the court entered the Secretary's "concise" order "'that Defendant shall implement rebuilding plans for snowy grouper and black sea bass by [date certain]'" Appellee's Br. at 12-13. Appellee is more forthcoming in the next paragraph, where he correctly notes that the district court "adopted NMFS's *proposed remedy*." *Id*. at 13 (emphasis added).

That partial and, Appellants maintain, legally inadequate remedy is exactly the one implemented by the Secretary in reliance on the lower court's order. *See supra* n.9 (describing the elements of Amendment 15A). In brief, the court below accepted the Secretary's recommendations as detailed in his proposal, while denying NCFA's request that the court further order the Secretary also to include management measures required by MSA section 304(e) to "allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery." 16 U.S.C. § 1854(e)(4)(B); *see also* NCFA's Opening Br. at 25-27.

Nor, finally, are Appellants asking for a judicial order that is anymore prescriptive than the remedy order the district court imposed. Judge Bates's remedy order did not presume to suggest how long the rebuilding period should be for each species, nor did it determine the appropriate stock level needed to be achieved in order to consider the fishery to be rebuilt. But the court below *did* order the Secretary to make those determinations. Conversely, NCFA did not ask the court below to order implementation of a state quota allocation system or ban the sale of recreationally caught fish (that is, measures that could potentially ensure fair and equitable distribution of rebuilding burdens). Instead, NCFA asked the court to order NMFS to consider and implement measures that would address any allocative disparities among the sectors arising from the rebuilding plan. The

district court erroneously chose not to enter such an order, even though it was fully empowered to do so.

The lower court's remedy order constitutes only a partial remedy for the violation found because it does not ensure Appellee's implementation of the letter of the law. The development of "management reference points," rebuilding timelines, or technical rebuilding strategies in Amendment 15A (as announced in 73 Fed. Reg. at 14942) are important requirements of MSA section 304(e)(4)(A).[12] They do not, however, address likely inequities between the commercial, recreational, and charterboat sectors of the fishery arising from implementation of

---

[12] Which reads:

> For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations prepared pursuant to paragraph (3) . . . for such fishery shall
>
> (A) specify a time period for ending overfishing and rebuilding the fishery that shall –
>
> > (i) 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; and
> > (ii) not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;

16 U.S.C. § 1854(e)(4)(A).

the rebuilding plan. The MSA requires that all these elements be included as part of a rebuilding plan.[13] Having failed to give effect to these unambiguous terms of the law, the court committed legal error and abused its discretion.

Finally, the lower court's ostensible finding that "the putative rebuilding plan calls for the maximum allowable time to rebuild the stocks in question, which minimizes – to the extent possible – the adverse impact on plaintiffs and the rest of the regulated community," Remedy Order at 2-3 (JA __), appears both inappropriate and irrelevant to the concerns of the MSA provisions requiring fairness and equity in rebuilding plans. *Supra* n. 13. First of all, there was nothing more than the word of the Secretary that the rebuilding timeline in then-proposed Amendment 15 would end up being the "maximum allowable," *see* Remedy Order at 2-3 (JA __); *see also* Appellee's Br. at 11, which is a thin reed on which the lower court based its legal determination. More to the point here, is the fact that even assuming this to be true, an extended rebuilding period does not fulfill the necessary allocative task the Secretary is required to undertake through a

---

[13] In addition to MSA section 304(e)(4)(B), section 303(a), which details all the "essential elements" of a lawful fishery management plan, *see* Mem. Op. at 58 (JA __) (citing *Oceana, Inc. v. Evans*, Civ. A. No. 04-0811, 2005 U.S. Dist. LEXIS 3959, at *143 (D.D.C. March 9, 2005)), also mandates that "to the extent that *rebuilding plans* or other conservation and management measures which reduce the overall harvest in a fishery are necessary, *allocate*, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery *benefits fairly and equitably among the commercial, recreational, and charter fishing sectors* in the fishery …." 16 U.S.C. § 1853(a)(14) (emphasis added).

rebuilding plan. While a putatively longer rebuilding timeframe is potentially ameliorative, as it theoretically could allow for higher annual landings than might be allowed if NMFS was trying to rebuild faster, that timeframe affects all relevant sectors – commercial, recreational, and charterboat – equally. Thus, it does not "allocate" the rebuilding restrictions and benefits "among sectors of the fishery" as Sections 1854(e)(4)(B) and 1853(a)(14) require. Without the conscious allocation the law requires, inequities could, and most likely will, persist.

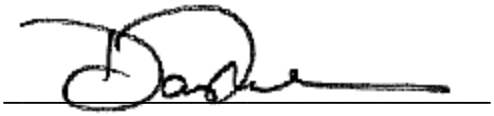
In a nutshell, as NCFA detailed at length in its opening brief, the law is clear: in instances where a fishery is declared overfished, the Secretary has a nondiscretionary duty to develop a rebuilding plan that contains all MSA-required elements. *See* NCFA's Br. at 25-29. As the Secretary has conceded, he failed to develop rebuilding plans for snowy grouper and black sea bass. Appellee Br. at 10. Because he failed to develop such a plan, the Secretary could not have crafted any management measures to allocate the benefits and burdens of such a rebuilding program fairly and equitably, as required by 16 U.S.C. § 1854(e)(4)(B). Moreover, the lower court's order did not require that this provision be addressed, nor did the Secretary choose to address it *sua sponte* in his rulemaking on remand. Thus, even under the abuse of discretion standard, the court below abused its discretion by rectifying the legal wrong it identified by ordering a remedy that is less extensive than what the law absolutely requires. This constitutes reversible error.

III. CONCLUSION

For the reasons stated above, the current action is not moot. Further, as explained above and in much greater detail in NCFA's opening brief, Appellants are entitled to judgment in this case. NCFA, therefore, respectfully requests that this Court vacate the lower court's order with instructions to ensure the Secretary to develops a legally-sufficient rebuilding plan for snowy grouper and black sea bass.

Dated: September 12, 2008

Respectfully submitted,



David E. Frulla
Shaun M. Gehan
KELLEY DRYE & WARREN LLP
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400

CERTIFICATE OF COMPLIANCE

This Page Proof Reply Brief of Appellants has been prepared using:

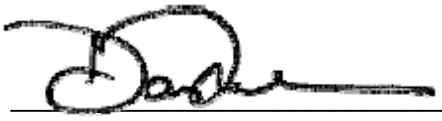
Microsoft Word;

Times New Roman;

14 Point type Space.

EXCLUSIVE of the Table of Contents, Table of Authorities, the Certificate of Filing and Service and this Certificate of Compliance, this Brief contains 4,841 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.



David E. Frulla

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 12, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand-delivery, the required copies of the foregoing Page Proof Reply Brief of Appellants, and further certify that I served via United States Mail, postage pre-paid, the required copies of the same to the following:

Sambhav Nott Sankar
Aaron P. Avila
U.S. Department of Justice
Environment and Natural Resources
Post Office Box 23795
L'Enfant Plaza Station
Washington, DC 20026
(202) 514-2110

R. Craig Lawrence
U.S. Attorney's Office
555 4th Street, NW
Washington, DC 20530
(202) 514-7159

Counsel for Appellee

The necessary filing and service upon counsel were performed in accordance with the instructions given me by counsel in this case.

_____

The LEX Group
1750 K Street, N.W.
Suite 475
Washington, D.C. 20006
(202) 955-0001