

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RECREATIONAL FISHING ALLIANCE, INC.,
Plaintiff,

Case No. 3:09-cv-1187-HES-JRK

v.
THE NATIONAL MARINE FISHERIES SERVICE,
Defendant.

**SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

Plaintiff, Recreational Fishing Alliance, Inc., Inc. (RFA), by and through its undersigned counsel, brings this action against Defendant, National Marine Fisheries Service (NMFS), and alleges:

INTRODUCTION AND JURISDICTION

1. This Court has subject-matter jurisdiction over this action and the parties under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"); and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 U.S.C. § 1801 et seq. (hereafter referred to as the "MSA"). District Courts of the United States have exclusive jurisdiction over any case or controversy arising under the MSA, 16 U.S.C. §1861(d). The MSA provides that regulations promulgated under the statute shall be subject to judicial review "if a petition for such review is filed within thirty [30] days of the date on which the regulations are promulgated or action is published in the Federal Register, as applicable." 16 U.S.C. § 1855(f) (1). The APA provides that: "persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof." 5 U.S.C. §702. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in 1 court are subject to judicial review." 5 U.S.C. §704. In an APA suit, the reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions to be found (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . (C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; [or] (D) without observance of procedure required by law. . . ." 5 U.S.C. § 706(2).

2. The Recreational Fishing Alliance is a New Jersey corporation is a marine conservation group with members throughout the United States. The RFA's membership consists of recreational and commercial fishermen, conservationists, bait and tackle store owners, dive shop operators, fishing equipment manufacturers, marina owners, boat retailers, boat repairmen, and divers. A number of RFA's members live along the South Atlantic Ocean and fish its waters. Many of its members seek to catch Red Snapper and other Snapper/Grouper species, and RFA has been actively involved in the management of various South Atlantic fisheries including Red Snapper since its inception. It has participated in the development of many of the regulations and measures governing the Atlantic now in place and has generally supported efforts to enact recovery plans for at-risk fish in the Atlantic Ocean. RFA's members are directly and adversely affected by the actions of which it complains.

3. Defendant NMFS is an agency of the United States government with primary responsibility for management of marine fisheries. NMFS manages those fisheries by administering the Magnuson-Stevens Act and performing NEPA compliance on its Magnuson-Stevens Act actions. NMFS, under the Magnuson-Stevens Act has been

delegated the responsibility to manage the United States marine fisheries through Fishery Management Plans ("FMP"), FMP amendments and regulations implementing those FMPs and FMP amendments. Since NMFS is responsible for the Snapper Grouper Fishery Management Plan which governs the Red Snapper fishery, NMFS has final management authority over Red Snapper in the Atlantic Ocean. NMFS is the federal agency that approved the Red Snapper Amendment 17A, which is the subject of this Complaint. NMFS is a sub-agency of NOAA within the United States Department of Commerce.

4. The Red Snapper fishery is conducted off the South Eastern coast of the United States in the EEZ. The Red Snapper fishery is both a commercial and recreational fishery.

5. Amendment 4 in 1991 set the present minimum size limit of 20" and bag limit of 2 per person, per day.

FACTUAL BACKGROUND

6. The recreational take of Red Snapper in the Atlantic Ocean in federal waters (beyond 3 nautical miles) is governed by a Fishery Management Plan ("FMP"), which are amended from time to time based in part on stock assessments. FMPs must balance the needs of fishery users against conservation principles by reference to ten national standards ("National Standards"). 16 U.S.C. §1851(a). Regional councils submit FMPs to the Secretary of Commerce, who acts through NMFS. NMFS solicits public comment and reviews the FMPs to ensure they are consistent with the National Standards and other applicable laws. 16 U.S.C. §§1852(h)(1), 1854(a)(1)-(2). The National Standard guidelines

promulgated to assist in development of FMPs and amendments to FMPs state that “[t]he national standards are statutory principles that must be followed in any fishery management plan.” 50 C.F.R. §600.305. If a FMP plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. §1854(a)(3).

7. The present controversy arises in connection with the enactment of Amendment 17A which took effect on December 3, 2010 and is set to be published on December 9, 2010 requiring a closure of the Red Snapper fishery effective immediately and closing a 4,800 square mile area off of the Florida and South Georgia Atlantic coast. This closure is for all bottom fishing from 98’ to 240’ from the 28 degree line to the 31 degree line. The bottom fishing closure has been suspended by an interim rule until June 1, 2011.

8. The fundamental flaw in Amendment 17A is that NMFS wants the power and flexibility to close fisheries when an ACL is reached without meeting the preconditions Congress has imposed on such an expansive power. In the MSRA, Congress delayed the requirements for ACLs and AMs until 2010 based on the notion that NMFS would be basing decisions on vastly-improved sources of data by January 1, 2009. NMFS is attempting to cherry-pick those portions of the MSA and the National Standards that it likes, while ignoring the portions that do not fit its predetermined goals. This a la carte usage of the MSA and the National Standards is another clear example of the arbitrary and capricious methods used by NMFS in enacting this Amendment 17A and the general practices it uses in management of the fisheries.

9. The MSRA was signed into law and went into effect on January 12, 2007. See Public Law 100–479, 120 Stat. 3575. The MSA, in the form as originally enacted in

1976, required that NMFS collect statistics for measuring effort and total catch. NMFS commenced the Marine Recreational Fishing Statistical Survey ("MRFSS") program in 1979, which relies on dock intercepts and random telephone surveys.

10. MRFSS was not designed to provide real-time data to determine whether a quota is exceeded or an ACL is reached. NMFS has acknowledged that the MRFSS system was never intended to be used for such purposes and its data is flawed.

11. In 2006, Congress found that MRFSS was flawed and required NMFS to take very specific actions to correct it by January 1, 2009. See 16 U.S.C. § 1881(g) ("The Secretary shall complete the program under this paragraph and implement the improved Marine Recreational Fishery Statistics Survey not later than January 1, 2009")

The MSA requires in pertinent part:

(A) Improvement of the Marine Recreational Fishery Statistics Survey. Within 24 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 [enacted Jan. 12, 2007], the Secretary, in consultation with representatives of the recreational fishing industry and experts in statistics, technology, and other appropriate fields, shall establish a program to improve the quality and accuracy of information generated by the Marine Recreational Fishery Statistics Survey, with a goal of achieving acceptable accuracy and utility for each individual fishery.

(B) The NRC concluded that:

The designs, sampling strategies, and collection methods of recreational fishing surveys do not provide adequate data for management and policy decisions. Unknown biases in the estimators from these surveys arise from

reliance on unverified assumptions. Unless these assumptions are tested and the degree and direction of bias reasonably estimated, the extent to which the biases affect final estimates will remain unknown. The statistical properties associated with data collected through different survey techniques differ and are often unknown. The current estimators of error associated with various surveys products are likely to be biased and too low. It is necessary at a minimum to determine how those differences affect survey results that use differing methods.

(National Research Council, Review of Recreational Fisheries Survey Methods (2006))

(C) NRC report recommendations. The program shall take into consideration and, to the extent feasible, implement the recommendations of the National Research Council in its report Review of Recreational Fisheries Survey Methods

(2006), including—

- (i) redesigning the Survey to improve the effectiveness and appropriateness of sampling and estimation procedures, its applicability to various kinds of management decisions, and its usefulness for social and economic analyses; and*
- (ii) providing for ongoing technical evaluation and modification as needed to meet emerging management needs*

16 U.S.C. 1881(g)(3)

12. Cornell Professor Dr. Patrick Sullivan, Chairman of the National Research Council review of the MRFSS system mandated by Congress and co-author of the report deemed MRFSS “fatally flawed” in the report.

13. The Congressional requirement to fix the broken MRFSS system has not been accomplished as required. A proposed system called the Marine Recreational Information Program (MRIP) is the NMFS response to this and was released by NMFS on December 23, 2008. The implementation has not occurred and will not be effective until some unknown date and data from the system will not be available for a considerable time after that date.

14. The requirement of a system that provides reliable data is central to the time requirements of the MSA for the implementation of new regulations and the deadlines imposed. In ignoring the deadlines imposed by Congress, NMFS has shown its contempt for the requirements of the MSA and has acted arbitrarily and capriciously in continuing to implement regulations based upon what has been proven to be incomplete and incorrect data. The closure of fisheries as contained in Amendment 17A will force businesses to close and cost thousands of Americans who rely on those businesses for their livelihood their jobs and cripple communities.

15. NMFS is not in compliance with section 1881(g) and should be prohibited from implementing the accountability measure contained in Amendment 17A unless the data on which it is based meets the standards set forth under the MSA.

16. The data improvements mandated by the MSA are clear:

Unless the Secretary determines that alternate methods will achieve this goal more efficiently and effectively, the program shall, to the extent possible, include—

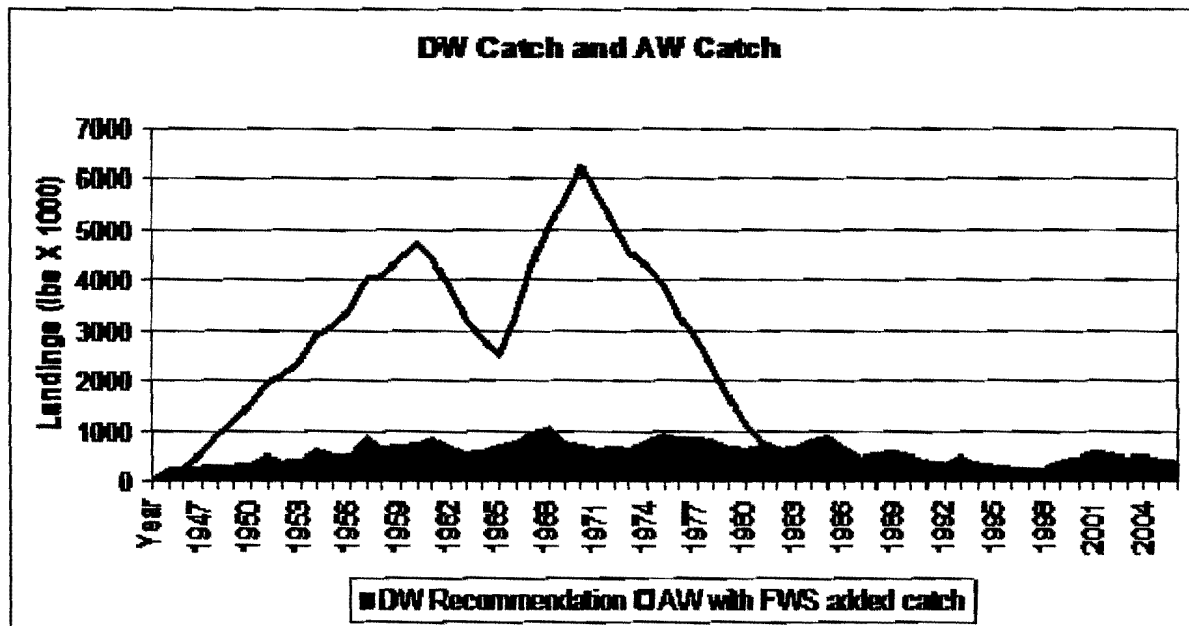
- (i) an adequate number of intercepts to accurately estimate recreational catch and effort;*
- (ii) use of surveys that target anglers registered or licensed at the State or Federal level to collect participation and effort data;*
- (iii) collection and analysis of vessel trip report data from charter fishing vessels;*
- (iv) development of a weather corrective factor that can be applied to recreational catch and effort estimates; and*
- (v) an independent committee composed of recreational fishermen, academics, persons with expertise in stock assessments and survey design, and appropriate personnel from the National Marine Fisheries Service to review the collection estimates, geographic, and other variables related to dockside intercepts and to identify deficiencies in recreational data collection, and possible correction measures.*

16 U.S.C. § 1881.

17. Even without the mandate of the MSA to improve the quality of the data on which FMPs are based, Amendment 17A and the underlying Red Snapper stock assessment are not based on the best available science in that it is based on the now discarded SEDAR 15 and not on the new benchmark SEDAR 24.

18. The National Standards in the MSA required that that “conservation and management measures . . . be based upon the best scientific information available.” 16 U.S.C. §1851(a)(2).

19. Dr. Frank Hester has provided testimony to the South Atlantic Fishery Management Council regarding the errors in the data and analysis. This clearly shows that the best available science was not used in drafting Amendment 17A. The following chart clearly shows the serious flaws in the historical data and the errors that were made in the extrapolation of the data by the NMFS. There is no reasonable data to defend the spike that has been set as peaking in 1960's and 1970's.



The Chart above shows that the error was made in the extrapolation of the Red Snapper stocks prior from 1980 to 1945. The spiked top line shows the erroneous NMFS extrapolation, the straight bottom line shows Dr. Hester's analysis.

20. The Fisheries Management Plan (FMP) for South Atlantic Red Snapper is not based on the best available science.

a) The Sustainable Fisheries Act requires that Fisheries Management Plans be based on the best available science. The agency has certified (Federal Register /Vol. 74, No. 232 / Friday, December 4, 2009 /Rules and Regulations 63673, DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration, 50 CFR Part 622 [Docket No. 090508900–91414–02] RIN 0648–AX75, Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Red Snapper Closure) that this fisheries management plan for South Atlantic Red Snapper is based on the best available science. This is false.

b) This FMP is the product of three workshops conducted during SEDAR 15. The first of these workshops was the Data Workshop (DW) during which biologists and fishery scientists familiar with the available data and its quality recommended what data should be used in the assessment for this stock.

c) The second of these workshops was the Assessment Workshop (AW) during which mathematicians and statisticians conducted the actual assessment and prepared the stock status benchmarks and the projections for various future management scenarios.

d) The third these workshops was the Review Workshop (RW) during which independent scientists reviewed the assessment to assure it met the terms of reference for SEDAR 15, that the assessment was technically correct, and to request clarification if deemed necessary and make recommendations for any changes that they believed were required.

e) One of the recommendations made by the DW was that data for the years 1960, 1965 and 1970 derived from polling surveys of US recreational fisheries by the US Fish and Wildlife Service (FWS) should not be used because the data collection methodology was flawed. However, the AS decided to use these data regardless of this recommendation by the DW.

f) The reason was that the AW desired to begin the assessment with the year 1945. Data on catch-at-age for the fishery was completely lacking prior to 1972. In order to conduct the assessment beginning in 1945, it was necessary to fabricate an input table of catches-at-age for fish in the period prior to 1972. The AW did this by using the three years of survey data from FWS,

g) The FWS data sets provides estimates for a number of components of the national recreational fisheries by species, area, fishing type, numbers of anglers, and annual total catch in weight and in number. Of interest to SEDAR 15 were catch in weight and number of red snapper for each of the three years.

To prepare catch-at-age tables, the AW modeled part of the FWS data set for the estimated weight of the catches for the 1960, 1965, and 1970, using a theoretical distribution of ages in the stock for each year and extrapolated and interpolated to prepare a catch-at-age table for the early three decades when there were no data. In doing this, they ignored the second half of the FWS catch data for red snapper, which was catch in numbers of fish. These numbers were not needed to prepare the table; however, customary scientific best practice would have required that the number of fish in each of the three years that were estimated by the model using

the catch by weight be compared to the numbers in the FWS data as a check on the modeling.

h) This clearly was not done because the actual results were very different from the numbers provided by the Fish and Wildlife Service for catch by number. (See tables.) The failure to make the comparison may have been due to carelessness or the comparison was made and deliberately ignored is uncertain. Whatever the reason, the review workshop also failed to make the comparison. Thus, the assessment and FMP preceded using only one half of the FWS data set, and the benchmarks are clearly wrong.

When this mistake was discovered over a year later during an outside review of the assessment for the clients, the National Marine Fisheries Service responded to the revelation by stonewalling the problem. They have refused official comment on the contention that the South Atlantic Red Snapper FMP is not based on the best available science. The unfortunate result is that the entire South Atlantic bottom fisheries for all species will be shut down beginning in January 2010 despite the fact that the FMP is fatally flawed, and despite the fact that recent preliminary analyses conducted by NMFS indicate that such draconian measures are unnecessary

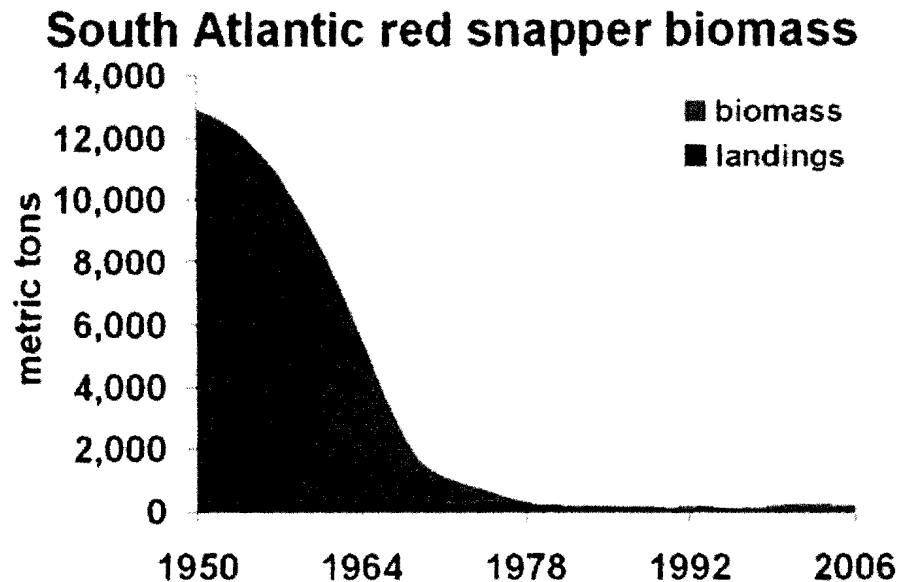
21. The Assessment Workshop modeling is flawed in that:

a. The selectivity used for all sectors in the fishery from 1945 until the first size limit in 1983 assumed that all fish age two or older are equally vulnerable to all sectors in the fishery: Commercial Handline, Headboats, Charter Boats and Private Boats.

- b. The Assessment Workshop ignored the fact that there is no size data before 1972, and therefore there is no way to know how well model results represent the actual size and age composition of the population in any of these early years
- c. The Assessment Workshop made additional baseless assumptions about the ratio of yellowtail to red snapper in the catch for and obtained numbers for 1960
- d. The Assessment Workshop ignored the numbers provided in the FWS survey regarding the number of fish caught in addition to total weight.

22. The FWS data was used to set the benchmarks without addressing the the discrepancies between catch weights and catch numbers, the discrepancies need to be resolved or the FWS data not included in the assessment as was the original recommendation by the Data Workshop.

23. The following chart shows the error in the mathematical analysis in the calculations of the extrapolation of Red Snapper biomass prior to 1980. The error is reflected in the massive reduction in the biomass while the landings stay relatively consistent.



(source: NOAA Fishwatch January 2010)

24. Recreational fishing effort has declined since 2004.
25. The Red Snapper stock assessment (SEDAR 15) completed in 2008 was based on MRFSS' estimate of fishing effort from 2006 and before.
26. NMFS ignored evidence that the reduction in take for Red Snapper had already been achieved before Amendment 17A was finalized.
27. During public hearings, the Council received testimony that a large percent of reduction has already been achieved through reductions in recreational effort due to high fuel prices, economic downturn and other factors, but a reliable value to assign to this reduction could not be determined.
28. The Red Snapper stock assessment is erroneous in that it overestimates dead discards and release mortality by the recreational sector. The NMFS has arbitrarily set a 40% release mortality figure without any scientific basis, this method has been criticized by the NRC when it stated "Unknown biases in the estimators from these surveys arise from reliance on unverified assumptions"

29. NMFS has failed to comply with the MSA's requirements to generate and utilize better data that do not produce fatally flawed results. NMFS should not be permitted to pass regulations until such time as it has complied with the MSA requirements.

30. The methodology of the NMFS is inherently flawed in that it is a designed closed loop system with little to no oversight.

1. NMFS screens council nominees submitted by Governor's
2. NMFS recommends appointments to the Secretary of Commerce
3. NMFS conducts or pays selected grantees for desired research
4. NMFS interprets the research submitted to them
5. NMFS chooses the members of the science and Statistical Committees
6. NMFS helps draft proposed regulations
7. NMFS interprets the regulations
8. NMFS recommends regulations through the council process
9. NMFS approves or rejects council proposed regulations
10. NMFS enforces the regulations
11. NMFS Administrative Judges sentence violators of NMFS regulation.
12. There is no peer review process for the science or analysis.

31. The NMFS and the SAFMC failed to conduct any economic studies or assessment to determine the economic impact on the South Atlantic area communities from the possible alternatives to the enacted regulations as required by the Magnusson Stevens Act. In fact, the SAFMC has not conducted any surveys of the impact on the South Atlantic communities of the closure mandated by Amendment 17A.

32. The NMFS has ignored National Standard 8 in selecting the alternative that maximizes the adverse economic impact on the communities that rely upon fishing for their livelihoods, instead of selecting an alternative that would minimize the economic impact as required by National Standard 8.

National Standard (8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

VIOLATION OF THE APPROVAL PROCEDURE OF SECTION 304 AND

ILLEGAL DELEGATION OF DUTIES

33. Plaintiff realleges paragraphs 1 through 32.

34. MSRA requires the Secretary of Commerce to take specific actions when a proposed rule is promulgated by the SAFMC as set forth below.

35. NMFS violated the MSRA section 304 by preempting the Secretarial review requirements prior to the adoption of Amendment 17A. Secretary Locke's "delegating" his authority to Dr. Roy Crabtree for final approval of Amendment 17A and the fact that Amendment 17A was ultimately approved not by Secretary Locke but by Samuel D. Rauch III., the Deputy Assistant Administrator for Regulatory Programs with the NMFS.

36. Secretary Locke's failure to sign off on Amendment 17A and the approval by Mr. Rauch is in clear violation of the provisions of the MSRA as set forth below.

37. In a November 16, 2010 email (Exhibit A) Roy Crabtree admitted the clear violation of the MSRA:

NOAA Fisheries has been delegated the authority to approve all fishery management plans and amendments; not just Snapper-Grouper FMP Amendment 17A. This delegation of authority has been in place for many years and applies to FMPs and amendments prepared by all eight regional fishery management councils. As a result, Secretary Locke did not sign any paperwork related to Amendment 17A and will not do so in the future. Instead, NOAA Fisheries approved the amendment on his behalf. This delegation of authority is not specified in the Magnuson-Stevens Act but, rather, in agency policy and procedural directives. We have requested electronic copies of these directives from our HQ office and will forward them to you when they arrive.

Regulations implementing the FMPs/amendments that NOAA Fisheries approves on the Secretary's behalf are reviewed by attorneys at NOAA and the Department of Commerce before they are published in the Federal Register. We expect the regulations implementing Amendment 17A to publish later this month.

38. The procedure for the review of an amendment is set forth in Section 304 of the MSRA:

Magnuson Stevens Reauthorization Act

*Section 304. ACTION BY THE SECRETARY 16 U.S.C. 1854
104-297*

(a) REVIEW OF PLANS.—

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b), the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan

amendment, or proposed regulation that the Council characterizes as final.

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(b) REVIEW OF REGULATIONS.—

(1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c), the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and—

(A) if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register, with such technical changes as may be necessary for clarity and an explanation of those changes, for a public comment period of 15 to 60 days; or

(B) if that determination is negative, the Secretary shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, this Act, and other applicable law.

(2) Upon receiving a notification under paragraph (1)(B), the Council may revise the proposed regulations and submit them to the Secretary for reevaluation under paragraph (1).

(3) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (1)(A). The Secretary shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations.

97-453, 99-659, 104-297

(c) PREPARATION AND REVIEW OF SECRETARIAL PLANS.—

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if—

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment; or

(C) the Secretary is given authority to prepare such plan or amendment under this section.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea. The Secretary shall also prepare such proposed regulations as he deems necessary or appropriate to carry out each plan or amendment prepared by him under this paragraph.

(2) In preparing any plan or amendment under this subsection, the Secretary shall—

(A) conduct public hearings, at appropriate times and locations in the geographical areas concerned, so as to allow interested persons an opportunity to be heard in the preparation and amendment of the plan and any regulations implementing the plan; and

(B) consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

109-479

(3) Notwithstanding paragraph (1) for a fishery under the authority of a Council, the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system, including any limited access privilege program unless such system is first approved by a

majority of the voting members, present and voting, of each appropriate Council.

(4) Whenever the Secretary prepares a fishery management plan or plan amendment under this section, the Secretary shall immediately—

(A) for a plan or amendment for a fishery under the authority of a Council, submit such plan or amendment to the appropriate Council for consideration and comment; and

(B) publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(5) Whenever a plan or amendment is submitted under paragraph (4)(A), the appropriate Council must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 60-day period referred to in paragraph (4)(B). After the close of such 60-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, information, or comments submitted under paragraph (4)(B), may adopt such plan or amendment.

(6) The Secretary may propose regulations in the Federal Register to implement any plan or amendment prepared by the Secretary. In the case of a plan or amendment to which paragraph (4)(A) applies, such regulations shall be submitted to the Council with such plan or amendment. The comment period on proposed regulations shall be 60 days, except that the Secretary may shorten the comment period on minor revisions to existing regulations.

(7) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (6). The Secretary must publish in the Federal Register an explanation of any substantive differences between the proposed and final rules. All final regulations must be consistent with the fishery management plan, with the national standards and other provisions of this Act, and with any other applicable law.

39. The Secretary of Commerce failed as required by the MSRA to:
- a. immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law.
 - b. consult with the Secretary of State with respect to foreign fishing
 - c. consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

40. A prior Secretary of Commerce has attempted to delegate to NOAA such duties via Department Organization Order 10-15 effective May 28, 2004, which reads:

aa. The functions prescribed in the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq. and other miscellaneous provisions), except that the Under Secretary/ Administrator shall advise the Secretary before any final action is taken with respect to the following functions:

- 1. Establishing guidelines to assist in the development of fishery management plans under subsection 301(b) of the Act;*
- 2. Appointing or removing members of the Regional Fishery Management Councils under subsection 302(b)(2) or (5) of the Act;*
- 3. Issuing preliminary fishery management plans and implementing regulations under subsection 201(h) of the Act, if the Under Secretary/Administrator considers the action to be controversial; and*
- 4. Approving, disapproving, partially disapproving, or issuing a fishery management plan or amendment, or issuing implementing or emergency regulations, under Sections 304 and 305 of the Act, if the Under Secretary/Administrator considers the action to be controversial.*

41. On July 28, 1995 NOAA had delegated authority to the Regional Director in this case Roy Crabtree

DELEGATIONS OF AUTHORITY TO THE REGIONAL DIRECTOR, SOUTHEAST REGION

- 1. Authority under the Magnuson Fishery Management and Conservation Act 16 U.S.C. 1801 et seq with the concurrence of the Assistant Administrator for Fisheries, to approve, disapprove, or partially disapprove fishery management plans (FMPs) and amendments, except for FMPs covering highly migratory species. This authority may be redelegated only to the Deputy Regional Director.*

42. This places the total and absolute authority in the hands of one individual, the Regional Director of the Southeast Region, to form and approve any Fishery Management Plan or regulation without approval, oversight or other restrictions.

43. NOAA Southeast Regional has used this power to draft and enact Amendment 17A without approval of the Secretary of Commerce as required by the MSRA.

44. This delegation of absolute power to one individual is clearly in violation of Section 304 of the MSRA.

VIOLATIONS OF NATIONAL STANDARD 2 - BEST AVAILABLE SCIENCE

45. Plaintiff realleges paragraphs 1 through 32.

46. National Standard 2 requires

“(2) Conservation and management measures shall be based upon the best scientific information available.”

47. Amendment 17A is solely based upon SEDAR 15 which has been discredited and SEDAR 24 has been done as a new “benchmark study” of Red Snapper replacing SEDAR 15.

48. Despite the existence of SEDAR 24, NMFS chose not to use SEDAR 24 to develop Amendment 17A even though it now claims SEDAR 24 to be the best available science at this time.

49. Both SEDAR 15 and SEDAR 24 are based upon data that NMFS has fabricated for the dates of 1945 through 1980.

50. There is no reliable data available for the years 1945 through 1980 and what data is available prior to 1980 is antidotal at best.

51. SAFMC and NMFS arbitrarily set the benchmark date for Red Snapper data to 1945 with the full knowledge that there was no reliable data available prior to 1980.

52. National Standard 2 requires the use of the best available science and NMFS setting the benchmark date to a date when it was known at the time that there was no reliable data available violates the MSRA and its National standards.

53. The MSRA required NMFS to replace the MRFSS system with a program that would provide reliable data pursuant to the recommendations of the National Research Council by January 1, 2009. (16 U.S.C. 1881(g)(3))

54. NMFS failed to meet the requirement of Congress and has instead arbitrarily and capriciously pressed forward with Amendment 17A with the full knowledge that the data and analysis is not the best available science.

55. NMFS has to this date not complied with the Congressional mandate to correct the errors in the system prior to January 1, 2009.

VIOLATION OF NATIONAL STANDARD 3

56. Plaintiff realleges paragraphs 1 through 32.

57. SEC. 301. NATIONAL STANDARDS FOR FISHERY 16 U.S.C. 1851

CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

58. Amendment 17A violates National Standard 3 by closing 72 species of grouper and snapper in 4800 square miles off of portions of the Florida and South Georgia coast.

59. NMFS in promulgating Amendment 17A failed to set forth any rationale for targeting a only a portion of the Atlantic coast to close to bottom fishing when all of the species live from Key West, Florida to the North Carolina/Virginia border.

60. There has been no analysis showing that the area targeted for closure is in any way a special risk to any of the affected species.

VIOLATION OF NATIONAL STANDARD 4

61. Plaintiff realleges paragraphs 1 through 32.

62. SEC. 301. NATIONAL STANDARDS FOR FISHERY 16 U.S.C. 1851

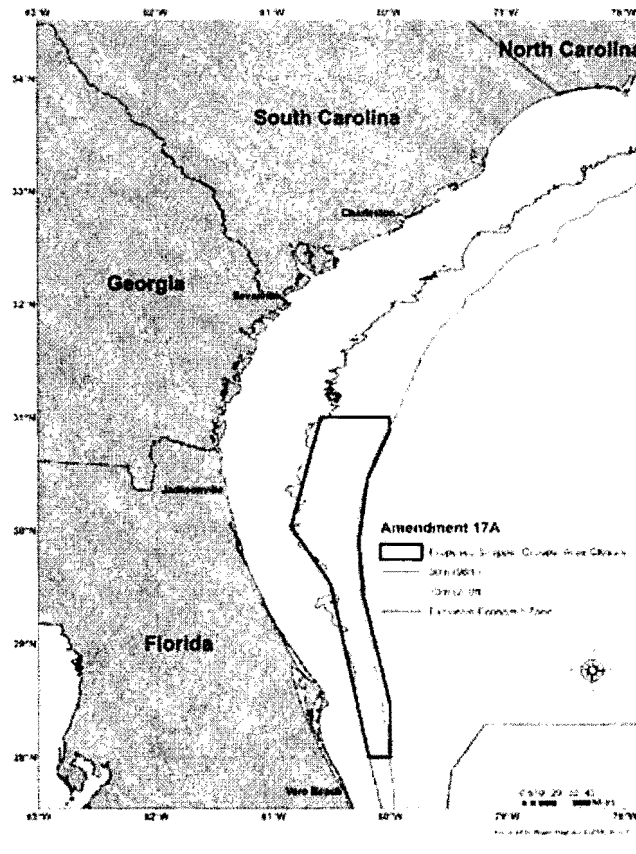
CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

63. The MSRA requires that science and not politics be the determining factor in regulations. Amendment 17A violates this in that the closure area has been reduced and contorted to close an area that does not include waters that would prohibit any SAFMC council member from fishing. The Northern border was recently reset to the 31 degree line which is just south of Duane Harris' homeport and the Southern border was set to the 28 degree line which is just North of George Geiger's homeport. Obviously, the SAFMC and NMFS does not believe that any crises in the Red Snapper fishery, real or imagined, is of sufficient magnitude to require any council member be inconvenienced by the bottom closure.

64. The smaller closed area will cause an undue hardship on the affected areas and force the closure to continue longer to reach the required goals.



VIOLATION OF NATIONAL STANDARD 4

65. Plaintiff realleges paragraphs 1 through 32.

66. SEC. 301. NATIONAL STANDARDS FOR FISHERY 16 U.S.C. 1851

CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

67. NMFS failed to do an economic analysis and to take into account the

reduced fishing pressure due to the economic downturn, despite having data supplied by various sources.

68. The reduced fishing pressure caused by the economic downturn and rise in the price of fuel has caused a significant reduction in fishing activity and pressure, however NMFS has failed to take these variations into account in formulating Amendment 17A.

VIOLATION OF NATIONAL STANDARD 8

69. Plaintiff realleges paragraphs 1 through 32.

70. SEC. 301. NATIONAL STANDARDS FOR FISHERY 16 U.S.C. 1851

CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

71. NMFS failed to do an economic impact study of the potential impact on the South Atlantic communities that will be affected by Amendment 17A and instead merely used a study from the Gulf of Mexico.

72. Amendment 17A will adversely affect coastal communities within the closure areas and this is further exacerbated by the fact that only a portion of the South Atlantic region will be closed to bottom fishing which will serve to magnify the effect upon the

communities within the closures areas. The most adversely affected communities will be Port Canaveral, Ponce Inlet, St Augustine and Jacksonville, Florida.

VIOLATION OF NATIONAL STANDARD 9

73. Plaintiff realleges paragraphs 1 through 32.

74. SEC. 301. NATIONAL STANDARDS FOR FISHERY 16 U.S.C. 1851
CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

75. The NMFS is also acting inconsistently in its management of the fisheries by favoring one group, commercial shrimpers, to the detriment of recreational anglers, commercial fishermen, charter boats and headboats.

*§ 622.19 South Atlantic rock shrimp limited access off Georgia and Florida.
(a) Initial applicability.*

(1) The measures in paragraph (a) of this section are applicable on November 2, 2009 through January 26, 2010.

(2) For a person aboard a vessel to fish for rock shrimp in the South Atlantic EEZ off Georgia or off Florida or possess rock shrimp in or from the South Atlantic EEZ off Georgia or off Florida, a limited access endorsement for South Atlantic rock shrimp must be issued to the vessel and must be on board.

(3) A limited access endorsement for South Atlantic rock shrimp is valid only for the vessel and owner named on the permit/endorsement. To change

either the vessel or the owner, a complete application for transfer must be submitted to the RA. An owner of a vessel with an endorsement may request that the RA transfer the endorsement to another vessel owned by the same entity, to the same vessel owned by another entity, or to another vessel with another owner. A transfer of an endorsement under this paragraph will include the transfer of the vessel's entire catch history of South Atlantic rock shrimp to a new owner; no partial transfers are allowed. No transfer of a limited access endorsement for South Atlantic rock shrimp will be allowed after November 2, 2009.

(4) The RA will not reissue a limited access endorsement for South Atlantic rock shrimp if the endorsement is revoked or if the RA does not receive a complete application for renewal of the endorsement within 1 year after the endorsement's expiration date.

(b) Subsequent applicability.

(1) The measures in paragraph (b) of this section are applicable on and after January 27, 2010.

(2) For a person aboard a vessel to fish for rock shrimp in the South Atlantic EEZ off Georgia or off Florida or possess rock shrimp in or from the South Atlantic EEZ off those states, a Commercial Permit for Rock Shrimp (South Atlantic EEZ) must be issued to the vessel and must be on board.

(3) Applications. No applications for additional Commercial Vessel Permits for Rock Shrimp (South Atlantic EEZ) will be accepted, except as follows:

(i) Failure to renew. An owner of a vessel may apply for a Commercial Vessel Permit for Rock Shrimp (South Atlantic EEZ) and such permit will be issued provided the owner, (A) Had a limited access endorsement for South Atlantic rock shrimp;

(B) Failed to request renewal of his or her endorsement within 1 year after the endorsement's expiration date; and

(C) Renewed his or her commercial vessel permit for rock shrimp within 1 year after its expiration date.

(ii) Inactive endorsement. An owner of a vessel may apply for a Commercial Vessel Permit for Rock Shrimp (South Atlantic EEZ) and such permit will be issued provided the owner,

(A) Has a commercial vessel permit for rock shrimp;

(B) Had a limited access endorsement for South Atlantic rock shrimp and;

(C) Was unable to renew the endorsement because the endorsement was "inactive" for a period of 4 consecutive calendar years. "Inactive" means that the vessel with the endorsement did not land at least 15,000 lb (6,804 kg) of rock shrimp from the South Atlantic EEZ in a calendar year.

76. Shrimp Amendment 7 has increased the number of Rock Shrimp boats fishing in the South Atlantic by allowing effectively doubled the number of rock shrimp boats in the South Atlantic. If there is truly a need for the preservation of the Red Snapper

in the South Atlantic the NMFS would not be proposing to double the number of Rock Shrimpers which kill juvenile Red Snapper, remove their forage through the bycatch of 8 to 10 pounds of bycatch for every pound of Rock Shrimp caught and by destroying habitat.

77. Shrimp Amendment 7 is also in clear violation of National Standard 9 which states:

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

78. Doubling the number of boats, doubles the amount of bycatch, which is inconsistent with the goal of Red Snapper Amendment 17A and allows the bycatch of one industry to destroy the ability of another user group to fish for Red Snapper? This is also in violation of National Standard 4 by being fundamentally unfair to recreational anglers and is does not promote conservation, but is one of the most destructive measures the NMFS could take to the Red Snapper fishery.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

79. NMFS claims that there is a requirement to close the areas from 98' to 240' totally from fishing, yet has passed regulations favoring the Rock Shrimp commercial fishery to continue to fish the same waters.

MIXED STOCK EXCEPTION

80. Plaintiff realleges paragraphs 1 through 31.

81. NMFS refused to consider the "Mixed Stock Exception" in formulating Amendment 17A. Amendment 17A closes fishing for 72 additional which are not undergoing overfishing.

82. The mixed stock exception requires an analysis to be performed before the closure of additional fishing stocks to prevent overfishing of one stock in particular.

83. Neither the SAFMC or NMFS conducted the required analysis prior to closing 4,800 square miles off of the Florida coast to bottom fishing from 98' to 240' and prohibit fishing for approximately 72 additional species, most of which are not considered undergoing overfishing or being overfished.

CLAIM FOR INJUNCTIVE RELIEF

84. NMFS should be enjoined from implementing Amendment 17A until Secretary Locke has fulfilled the requirements of Section 304 of the MSRA.

85. NMFS should be enjoined from implementing Amendment 17A until such time as SEDAR 24 is used as the basis for the Amendment.

86. NMFS should be enjoined from implementing any further regulations until such time as it has complied with the Congressional mandate to replace the MRFSS system with a system that can provide reliable data.

87. NMFS should be enjoined from enacting any regulation that only closes a portion of the South Atlantic without a showing of a scientific basis for such restricted area.

88. Declare the Department Organization Order 10-15 and the Delegation of Authority to the Regional Director, Southeast Region in violation of the MSRA, negate and void this and all prior FMPs or regulations that were enacted using these illegal delegations of authority and enjoin NMFS from their further use.

CLAIMS FOR RELIEF

89. NMFS should be enjoined from implementation of Amendment 17A until and unless the National Marine Fisheries Service complies with its duties under the MSA to collect relevant data to manage the Red Snapper fishery as required by Congress.

90. The Red Snapper stock assessment (SEDAR 15) completed in 2008 should be rejected as the product of the fatally flawed MRFSS program and agency redisposition and bias. SEDAR 15 assessment did not employ the best available science and improperly rejected better and available information that the desired reduction in Red Snapper take was achieved by Amendment 4 without any further action by the NMFS.

91. The closure of the Red Snapper fishery is an abuse of discretion in that the NMFS has failed to factor weather conditions into its assessments. The closures for 2010 and beyond should be rejected until and unless weather-adjusted data mandated by the MSA is collected, analyzed and factored into the decision making process for Amendment 17A.

92. The NMFS should be prohibited from passing the most restrictive of regulations until such time as it has exhausted less draconian regulations to manage the fishery.

93. Plaintiff should be permitted to engage in discovery regarding the claim that NMFS was predisposed to close the recreational take of Red Snapper regardless of the state of the fishery and permitted this bias to infect the 2008 stock assessment (SEDAR 15) and the content of Amendment 17A.

94. The NMFS should be directed to set the benchmark date for data to be used in all Red Snapper assessments to January 1, 1980 or later based upon the fact that there is no reliable and actual historical data prior to that date. The use of computer models to extrapolate data has led to fundamental errors in the present assessments and NMFS should be required to do a new reassessment of the stock using only data that has been collected since 1980.

95. The NMFS should be prohibited from the implementation of the any rule or regulation closing any stock until such time as there has been a new assessment that has been conducted and peer reviewed by an outside group of scientists.

96. The NMFS should be prohibited enacting this and any new regulations closing all recreational fishing in an area while allowing the commercial Rock Shrimping industry to fish in the same areas that NMFS claims need to be closed to all fishing.

97. Award the Plaintiff attorney fees pursuant to 28 U.S.C. § 2412(d)(EAJA) and 5 U.S.C. § 704 (APA)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter an Order granting the claims for relief and for such additional relief as the Court deems equitable, just and proper under the circumstances as required by the APA and the MSA.

Respectfully submitted,

/s/ David R. Heil

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