

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

RECREATIONAL FISHING ALLIANCE, INC.,  
Plaintiff,

Case No. 8:11-CV-00705-T-30AP

v.  
THE NATIONAL MARINE FISHERIES SERVICE,  
Defendant.

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**RECREATIONAL FISHING ALLIANCE'S OBJECTION TO REPORT AND  
RECOMMENDATION**

Plaintiff, Recreational Fishing Alliance, Inc., Inc. (RFA), by and through its undersigned counsel, hereby files its objection to the Report and recommendation.

**THE SECRETARY OF COMMERCE AND NOAA VIOLATED 16 USC 1854(1), (2)  
& (3) BY ILLEGALLY DELEGATING AUTHORITY TO THE NATIONAL MARINE  
FISHERIES SERVICE IN APPROVING AMENDMENT 17A**

In the instant case the Secretary of Commerce has illegally used Department Operating Order 10-15 dated April 28, 2005 (R 662) to attempt to delegate his authority under the MSRA to NOAA, NOAA has also illegally used a May 31, 1993 (R 675) Delegation of Authority to attempt to further delegate the authority to National Marine Fisheries Service.

The Report and Recommendation finds that the National Marine Fisheries Service (NMFS) did not violate the provisions of the Magnuson Stevens Reauthorization Act (MSRA) when the Secretary designee delegated his authority once again delegated his authority to promulgate regulations. This second delegation to lesser officials is not within the provisions of the MSRA as the Report and Recommendation finds. The NMFS could

not legally expand the authority under the MSRA and it is not within the province of this court to condone the illegal expansion of the MSRA.

**THE NATIONAL MARINE FISHERIES SERVICE VIOLATED OF NATIONAL  
STANDARD 2 BY IGNORING THE BEST AVAILABLE SCIENCE AND BY USING  
MRFSS INSTEAD OF THE MANDATED MRIP PROGRAM**

The Report and Recommendation finds that the NMFS has "implemented" the MRIP system as required by Congress. However, the evidence is crystal clear that there has not been the required "implementation" of MRIP. We are now over 3 years past the Congressional deadline and the MRIP system has not produced any data to support the regulations.

*16 U.S.C. 1881(g)(3)(D) DEADLINE.—The Secretary shall complete the program under this paragraph and implement the improved Marine*

Congress had previously sanctioned a study of the MRFSS system by the Committee on the Review of Recreational Fisheries Survey Methods by the National Research Council. The review drew as one of its conclusions:

*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.*

*The MRFSS (as well as many of its component or companion surveys conducted either indirectly or independently) should be completely redesigned to improve its effectiveness and appropriateness of sampling and estimation procedures, its applicability to various kinds of management decisions, and its usefulness for social and economic analyses. 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.*

(R 0694 et seq)

The Chair of the Review Dr. Patrick J. Sullivan of Cornell University declared the MRFSS system as being "fatally flawed".

The knowledge that there is not sufficient information provided has been known to all involved, SAFMC, NOAA and NMFS. In a plea for help Chairman Duane Harris wrote to Secretary Locke on April 6, 2010:

*"Fisheries management in the South Atlantic suffers from a chronic, yet well-documented, lack of basic data which hampers scientists' abilities to evaluate exploited populations and managers' abilities to develop and ensure accountability with management measures."*

*"the Council does not believe that a sufficient data delivery system is in place to properly implement the system of ACLs and AMs that the Council is establishing in Amendments 17A and 17B and the Comprehensive ACL Amendment."* (Chairman Duane Harris letter to DOC (4/6/10) (Attachment A) Chairman Harris' plea for help fell on deaf ears in Washington.

NOAA and NMFS have since claimed that the timeline is not practical and have been foot dragging in regard to completion as required even though it has not been able to justify this assertion. The law is quite clear that there is a heavy duty placed on an agency for the inability to complete the requirements of Congress.

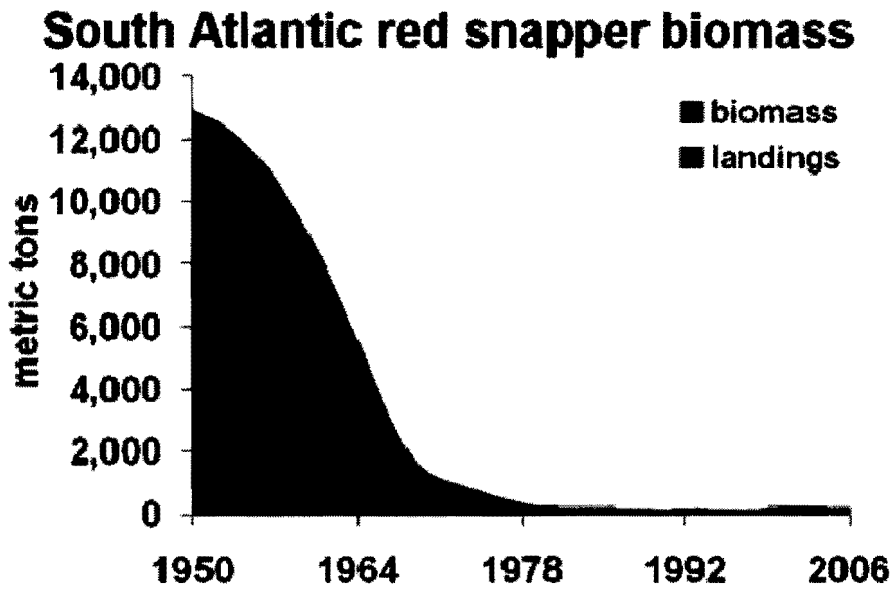
*The burden on an agency of establishing impossibility or infeasibility of issuing regulations within the statutory time frame is heavy. New York v. Ruckelshaus, 172\*172 21 Env't Rep.Cas. (BNA) at 1723. It is especially heavy where, as here, the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years. Sierra Club v. Thomas 658 F. Supp 165, 172 (N.D.Cal. 1987).*

There also can be no deference to NOAA to unilaterally establish an alternative timeline for completing the MRIP program or in this case not even being able to come with a timeline at all.

*Where "Congress has established a clear time frame for regulatory action, deferring to the agency [as to an alternative time frame] is inappropriate." Sierra Club v. Thomas, 658 F.Supp. 165, 171, n.6 (N.D.Cal. 1987).*

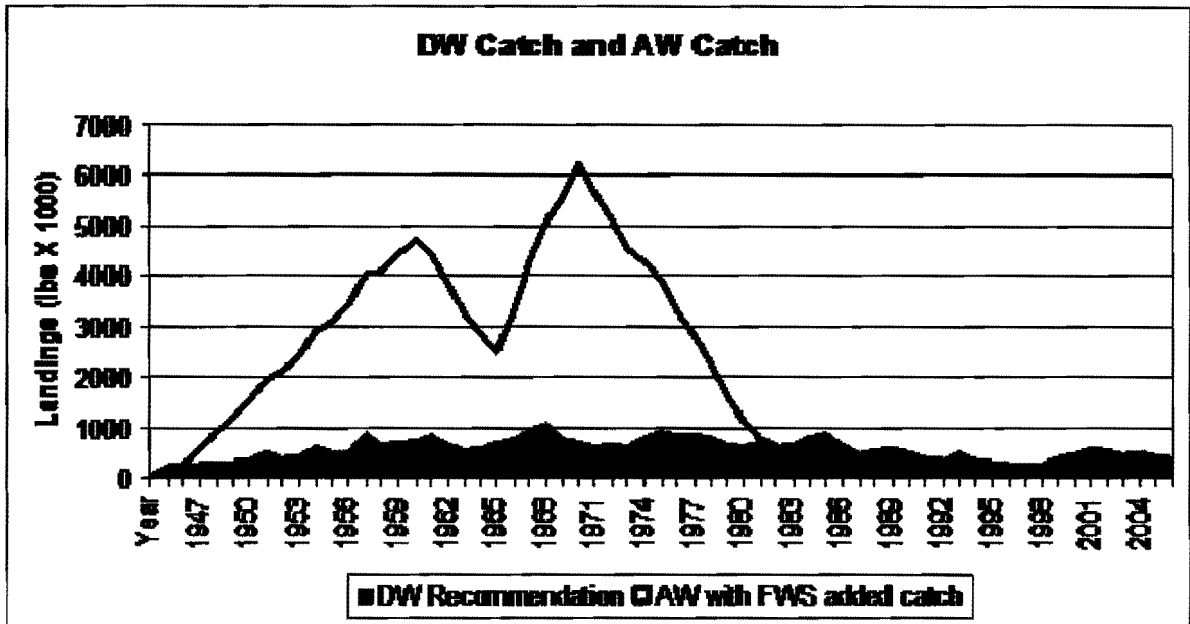
The flaws in the data and science can be best illustrated by the following charts.

The first is the NOAA chart that was originally used by NOAA to illustrate the necessity of Amendment 17A.



(source: NOAA Fishwatch January 2010)

This chart shows the glaring errors made by NOAA in assessing the historical Red Snapper population. This chart is clear evidence that NOAA when faced with no data prior to 1980, made a wide guess of the population that is ridiculous at best. When confronted with the errors NOAA chose only to dig in its bureaucratic heels and deny the glaring error.



(R 07388)

This chart and the black shaded area more accurately reflect the historical levels of the Red Snapper population have been. The unshaded peaks show the erroneous projections done by NOAA as a contrast. Dr. Hester's report was rejected basically offhand by NOAA, despite the clear showing of the errors by NOAA.

*Until the early catch problem and selectivity for the recreational fishery is resolved, the assessment is incomplete and it is impossible to evaluate stock status or provide management benchmarks. A concerted effort has to be made to establish the historical catch including any by foreign fleets if the assessment is to attempt to reconstruct the biomass 70 years in the past. Even when some agreement is reached on how to handle this particular problem, the assessment will suffer from a lack of data. At this time, I see little point in addressing projections, as these will necessarily change and the recruitment problem they are having with steepness may go away.*

*I am disappointed in the fact that once again the reviewers did not take it upon themselves to send what was an obviously flawed assessment back. (R 07392)*

**THE NATIONAL MARINE FISHERIES SERVICE VIOLATED OF NATIONAL  
STANDARD 8 BY FAILING TO CONDUCT AN ECONOMIC IMPACT STUDY OF THE  
AREA IMPACTED BY AMENDMENT 17A**

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 attempted to extrapolate a study from the Gulf of Mexico in regard to the economic impact.

*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.*

Amendment 17A has adversely affect coastal communities within the closure areas, NMFS failed to do the required economic impact study of the South Atlantic in violation of the MSRA.

Respectfully submitted 6th day of March 2012.

/s/ David R. Heil

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