

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

RECREATIONAL FISHING ALLIANCE,
INC.,

Plaintiff,

v.

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

THE NATIONAL MARINE FISHERIES
SERVICE,

Defendant.

DEFENDANT’S ANSWER TO AMENDED COMPLAINT

Defendant National Marine Fisheries Service (“NMFS”), by and through counsel, in response to the like-numbered paragraphs of Plaintiff’s Amended Complaint, hereby responds as follows:

INTRODUCTION AND JURISDICTION

The first unnumbered introductory paragraph contains Plaintiff’s characterization of its case, to which no answer is necessary.

1. The allegations contained in Paragraph 1 constitute Plaintiff’s characterization of its case and legal conclusions, to which no answer is necessary. The cited statutes speak for themselves and are the best evidence of their content. NMFS denies any allegation inconsistent with the cited statutes’ plain language, meaning and context.

2. With regard to the allegations contained in Paragraph 2, NMFS lacks sufficient knowledge to admit or deny the allegations contained in the first, second, and third sentences, and the first half of the fourth sentence, and on that basis the allegations are denied. With regard to the allegations contained in the second half of the fourth sentence and in the fifth sentence,

NMFS avers that Plaintiff has participated in the South Atlantic Fishery Management Council (“South Atlantic Council”) and related fishery management processes for approximately the past two years and denies the remaining allegations. NMFS denies the allegations contained in the sixth sentence.

3. With regard to the allegations contained in Paragraph 3, NMFS admits that NMFS is a sub-agency of the National Oceanic and Atmospheric Administration (“NOAA”) within the United States Department of Commerce. NMFS admits that red snapper is one of the species of fish managed in the Fishery Management Plan (“FMP”) for the Snapper Grouper Fishery of the South Atlantic Region (“Snapper Grouper FMP”). The remaining allegations contained in Paragraph 3 constitute legal conclusions, to which no answer is necessary.

4. With regard to the allegations contained in Paragraph 4, NMFS admits there is a fishery for red snapper in the Atlantic Ocean off the coasts of North Carolina, South Carolina, Georgia and Florida, and that there are recreational and commercial components to the red snapper fishery.

5. The allegations contained in Paragraph 5 purport to characterize Snapper Grouper FMP Amendment 4, see Final Rule, 56 Federal Register 56016 (October 31, 1991), which speaks for itself and provides the best evidence of its contents. NMFS denies any allegation inconsistent with the amendment’s plain language, meaning, or context.

FACTUAL BACKGROUND

6. NMFS admits the allegations contained in the first sentence of Paragraph 6, however, to the extent Plaintiff alleges that FMP amendments may be promulgated only in response to stock assessments, NMFS denies such allegation. The remaining allegations contained in Paragraph 6 constitute Plaintiff’s characterization of provisions of the Magnuson-Stevens

Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (“Magnuson-Stevens Act”) and NMFS’s interpretive rules (the National Standard Guidelines found at 50 C.F.R. §§ 600.305 - 600.355), which speak for themselves and are the best evidence of their content. NMFS denies any allegation inconsistent with the aforementioned authorities’ plain language, meaning and context.

7. The allegations contained in Paragraph 7 constitute Plaintiff’s characterization of the final temporary rule implementing interim measures for red snapper (“Red Snapper Interim Rule”), which speaks for itself and is the best evidence of its content. NMFS denies any allegation that is inconsistent with the plain language, meaning and context of the Red Snapper Interim Rule.

8. NMFS denies the first sentence of Paragraph 8. The allegations contained in the second sentence constitute Plaintiff’s characterization of the Reauthorized Magnuson-Stevens Act, which speaks for itself and is the best evidence of its content. NMFS denies any allegation inconsistent with the plain language, meaning and context of the Magnuson-Stevens Act. NMFS denies the allegations in the third and fourth sentences.

9. With respect to the first sentence of Paragraph 9, NMFS admits that the Reauthorized Magnuson-Stevens Act was signed into law and that certain, but not all, provisions went into effect on January 12, 2007. The allegations in the second sentence constitute Plaintiff’s characterization of provisions of the Magnuson-Stevens Act as originally enacted in 1976, which speak for themselves and are the best evidence of its content. NMFS denies any allegation inconsistent with the statute’s plain language, meaning and context. As to the allegations contained in the third sentence, NMFS admits that NMFS commenced the Marine Recreational Fishing Statistical Survey (“MRFSS”) program in 1979, and that the program relies in part on

dock intercepts and random telephone surveys, and denies the remaining allegations.

10. NMFS admits the allegations contained in the first sentence of Paragraph 10, however, to the extent Plaintiff alleges NMFS used the MRFSS on a “real-time” basis, as opposed to subsequently evaluating landings, such allegations are denied. NMFS denies the allegations contained in the second sentence of Paragraph 10.

11. With respect to the first sentence of Paragraph 11, NMFS denies that in 2006 Congress found that the MRFSS was flawed. The remaining allegations contained in Paragraph 11 constitute Plaintiff’s characterization of the Magnuson-Stevens Act, which speaks for itself and is the best evidence of its content. NMFS denies any allegation inconsistent with the plain language, meaning and context of the Magnuson-Stevens Act.

12. The allegations of Paragraph 12 are directed at a party other than NMFS and therefore no response is required. To the extent that a response may be deemed required, NMFS lacks information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

13. NMFS denies the allegations contained in the first sentence of Paragraph 13. NMFS admits the allegations in the second sentence that a proposed system called the Marine Recreational Information Program (“MRIP”) was released by NMFS in December 2008. NMFS denies the remaining allegations in Paragraph 13.

14. NMFS denies the allegations contained in Paragraph 14.

15. NMFS denies the allegations contained in Paragraph 15.

16. The allegations contained in Paragraph 16 purport to characterize, and quote from, the Magnuson-Stevens Act, 16 U.S.C. § 1881, which speaks for itself and provides the best evidence of its contents. NMFS denies any allegation inconsistent with the statute’s plain

language, meaning, or context.

17. NMFS denies the allegations in Paragraph 17.

18. The allegations contained in Paragraph 18 purport to characterize, and quote from, the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(2), which speaks for itself and provides the best evidence of its contents. NMFS denies any allegation inconsistent with the statute's plain language, meaning, or context.

19. Regarding the allegations contained in Paragraph 19, NMFS admits that Dr. Frank Hester provided testimony to the South Atlantic Fisheries Management Council regarding the red snapper stock assessment, and denies the remaining allegations.

20. NMFS denies the allegations in Paragraph 20. The allegations in Paragraph 20(a) purport to characterize, and quote from, the Red Snapper Interim Rule and the Magnuson-Stevens Act, both of which speak for themselves and provide the best evidence of their contents. NMFS denies any allegation inconsistent with their plain language, meaning, or context. The allegations in Paragraph 20(b)-(h) purport to characterize the Southeast Data Assessment and Review (SEDAR) process that determined red snapper are overfished and undergoing overfishing (SEDAR 15), and the reports that were developed during that process. Those SEDAR 15 reports speak for themselves and provide the best evidence of their contents. NMFS denies any allegation inconsistent with their plain language, meaning, or context. NMFS denies all remaining allegations in these subparagraphs.

21. NMFS denies the allegations contained in Paragraph 21 and subparagraphs 21(a)-(d).

22. NMFS denies the allegations in Paragraph 22.

23. NMFS denies the allegations in Paragraph 23.

24. NMFS denies the allegations contained in Paragraph 24.

25. Regarding the allegations contained in Paragraph 25, NMFS admits that SEDAR 15 included data from MRFSS, and denies the remaining allegations.

26. NMFS denies the allegations contained in Paragraph 26.

27. NMFS admits that testimony was given during the public hearings for red snapper regarding a reduction in the recreational effort due to high fuel prices and the downturn in the economy. NMFS denies the remaining allegations in Paragraph 27.

28. NMFS denies the allegations in Paragraph 28.

29. NMFS denies the allegations in Paragraph 29. NMFS avers that red snapper in the south Atlantic is currently scheduled for a SEDAR assessment update in 2010.

30. NMFS denies the allegations contained in the first sentence of Paragraph 30. The allegations contained in the indented portions of Paragraph 30 constitute Plaintiff's characterization of the Magnuson-Stevens Act, which speaks for itself and is the best evidence of its content. Defendant denies any allegation inconsistent with the plain language, meaning and context of the Magnuson-Stevens Act.

31. NMFS denies the allegations contained in the first sentence of Paragraph 31. As to the second sentence of Paragraph 31, the allegations are directed at a party other than NMFS and therefore no response is required. To the extent that a response may be deemed required, NMFS lacks information sufficient to form a belief as to the truth of the allegations and on that basis denies them. NMFS avers that a quantitative analysis of the expected economic effects of the Red Snapper Interim Rule was conducted for regions within the south Atlantic area.

32. NMFS denies the allegations contained in the first sentence of Paragraph 32. The allegations contained in the indented purported quotation constitute Plaintiff's characterization of National Standard 8, 16 U.S.C. § 1851 (a)(8), which speaks for itself and is the best evidence

of its content. NMFS denies any allegations inconsistent with the plain language, meaning and context of National Standard 8.

33. NMFS denies the allegations contained in the first sentence of Paragraph 33. The allegations contained in the indented purported quotation constitute Plaintiff's characterization of National Standard 9, 16 U.S.C. § 1851 (a)(9), which speaks for itself and is the best evidence of its content. NMFS denies any allegations inconsistent with the plain language, meaning and context of National Standard 9.

CLAIMS FOR RELIEF

34. NMFS incorporates by reference each and every response to the allegations contained in Paragraphs numbered 1 through 33 above. NMFS denies that Plaintiff is entitled to any of the relief requested in its Claims for Relief, including each and every subpart, or to any relief whatsoever. NMFS denies the allegations contained in Paragraph 34.

35. NMFS denies the allegations contained in Paragraph 35.

36. NMFS denies the allegations contained in Paragraph 36.

37. NMFS denies the allegations contained in Paragraph 37.

38. NMFS denies the allegations contained in Paragraph 38.

39. NMFS denies the allegations contained in Paragraph 39.

40. NMFS denies the allegations contained in Paragraph 40.

GENERAL DENIAL

NMFS denies any allegations contained in Plaintiff's Complaint, whether express or implied, that are not specifically admitted, denied or qualified. To the extent any allegation contained in Plaintiff's Complaint remains unanswered, NMFS denies such allegations.

AFFIRMATIVE DEFENSES

1. The United States has not waived sovereign immunity for claims purportedly arising under 16 U.S.C. § 1881.
2. Plaintiff fails to state a claim on which relief may be granted as to some or all claims.
3. This Court lacks subject matter jurisdiction over some or all of Plaintiff's claims.
4. Plaintiff's Complaint is time-barred in whole or in part.

DEFENDANT'S PRAYER

WHEREFORE, NMFS prays that the action be dismissed, that judgment be given for NMFS, and that Plaintiff takes nothing by their complaint.

Respectfully submitted this 18th day of February, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2010, I electronically filed the foregoing with the Clerk of

the Court via the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Bradley H. Oliphant
BRADLEY H. OLIPHANT

