

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THE FISHING RIGHTS ALLIANCE, INC.,
Plaintiff,

v.
THE NATIONAL MARINE FISHERIES SERVICE,
Defendant.
/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, The Fishing Rights Alliance, Inc. (Plaintiff or “FRA”), by and through its undersigned counsel, brings this action against Defendant, National Marine Fisheries Service (“NMFS” or Defendant), 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. FRA is a Florida corporation with its headquarters in St. Petersburg, Florida. FRA is a marine conservation group with members throughout Florida, Georgia, Louisiana, Alabama and Mississippi, Georgia, South Carolina and North Carolina. The FRA’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. Many of FRA's members live along the South Atlantic Ocean and fish its waters. Many of its members seek to catch fish within the grouper complex, and FRA has been actively involved in the management of various South Atlantic fisheries 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. FRA'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 Reef Fish Fishery Management Plan which governs the grouper complex, NMFS has final management authority over Snapper and Grouper fish in the Atlantic Ocean. NMFS is the federal agency that approved the Amendment 16, which is the subject of this Complaint. NMFS is a sub-agency of NOAA within the United States Department of Commerce.

4. The grouper fishery is conducted off the South Eastern coast of the United States. The grouper complex of fishes are fished for extensively in the EEC. The grouper fishery is both a commercial and recreational fishery. The grouper complex includes 17 species of groupers, including, among others, Goliath, dwarf sand perch, sand perch, misty, snowy, yellow edge, Nassau, Warsaw, speckled hind, black, gag, red, yellow fin, scamp, yellow mouth, rock hind, speckled hind, and red hind groupers. See 50 C.F.R. Part 622, Table 3, Annex A.

FACTUAL BACKGROUND

5. The recreational take of Grouper and Vermillion Snapper in the Atlantic Ocean in federal waters (beyond 3 nautical miles) is governed by a Fishery Management Plan (“FMP”), which is 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).

6. The present controversy arises in connection with Amendment 16 to the Snapper/Grouper FMP (Amendment 16) for the South Atlantic, a document which spans 608 pages. See

<http://safmc.net/Portals/6/Library/FMP/SnapGroup/SnapGroupAmend16FINAL.pdf>

S/G 16 purports to implement some of the 2006 amendments to the MSA which were enacted January 12, 2007. Some of the MSA requirements at issue in this action are Annual Catch Limits (“ACLs”) and Accountability Measures (“AMs”).

7. Amendment 16 has attempted to prematurely institute ACLs and AMs before 2010 when they are mandatory, stating:

The Magnuson-Stevens Reauthorization Act of 2006 requires that Councils develop Annual Catch Limits (ACLs) and Accountability Measures (AMs) for all stocks, with stocks that are overfished or undergoing overfishing requiring such measures by 2010. While the final NMFS guidelines for ACLs and AMs have not yet been published, implementing interim ACLs and AMs allows the Council to have greater flexibility in proposing short term management measures by providing a means to assure that overfishing will not occur, and that corrective action will be taken if it does occur.

8. Amendment 16 will reduce the recreational bag limit from 5 to 3 grouper aggregate (Misty grouper, red grouper, scamp, tiger grouper, yellowedge grouper, yellowfin grouper, blueline tilefish, sand tilefish, coney, graysby, red hind and rock hind) it

would reduce the bag limit from 2 to 1 Gag or Black grouper within the aggregate. It would also establish a closed season from January 1 through April 30 of each year for what is defined as shallow water grouper including Gag, Black and Red Groupers, scamp, red hind, Rock hind, coney graysby, yellowfin grouper, yellowmouth grouper and tiger grouper.

9. ACLs and AMs are required by the MSA for any species undergoing overfishing as of 2010. ACLs are catch levels intended to reduce the likelihood of overfishing. If ACLs are met or exceeded, AMs are triggered. AMs are intended to prevent ACLs from being exceeded, and correct or mitigate overages in landings if they occur.

10. The fundamental flaw in 16 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 MSA, 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 it likes while ignoring the burdens it has failed to implement. This a la carte usage of the MSA is another clear example of the arbitrary and capricious methods used by NMFS in the management of the fisheries.

11. The MSA 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.

12. The MRFSS was not designed to provide real-time data to determine whether a quota is exceeded or an ACL is reached. NMFS acknowledges that the MRFSS system is fatally flawed.

13. 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") (bolding added). 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)

14. This requirement to fix the broken problem 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, 2009. The

implementation will not be effective until at least January 1, 2010 and data from the system will not be available for a considerable time after that date.

15. 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 it has acted arbitrarily and capriciously in continuing to implement regulations based upon what has been proven to be incomplete and incorrect data. These regulations will force businesses to close and cost thousands of Americans who rely on those businesses for their livelihood their jobs and cripple communities.

16. NMFS is not in compliance with section 1881(g) and should be foreclosed from implementing an accountability measure devised in Amendment 16 unless the data on which it is based meets the standards set forth under the MSA.

17. 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.

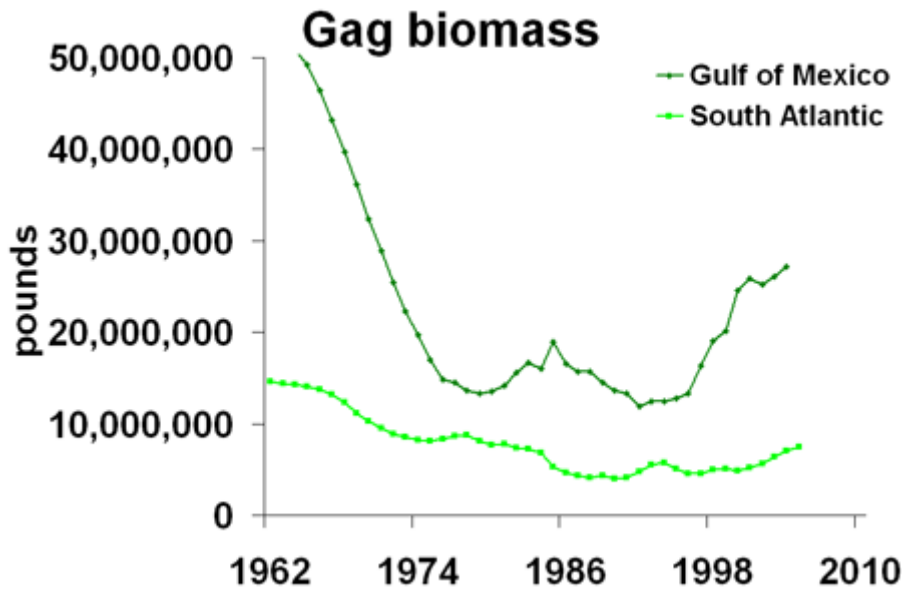
18. Even without the mandate of the MSA to improve the quality of the data on which FMPs are based, Amendment 16 and the underlying Gag Grouper and Vermillion Snapper stock assessment are not based on the best available science.

19. The existing 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).

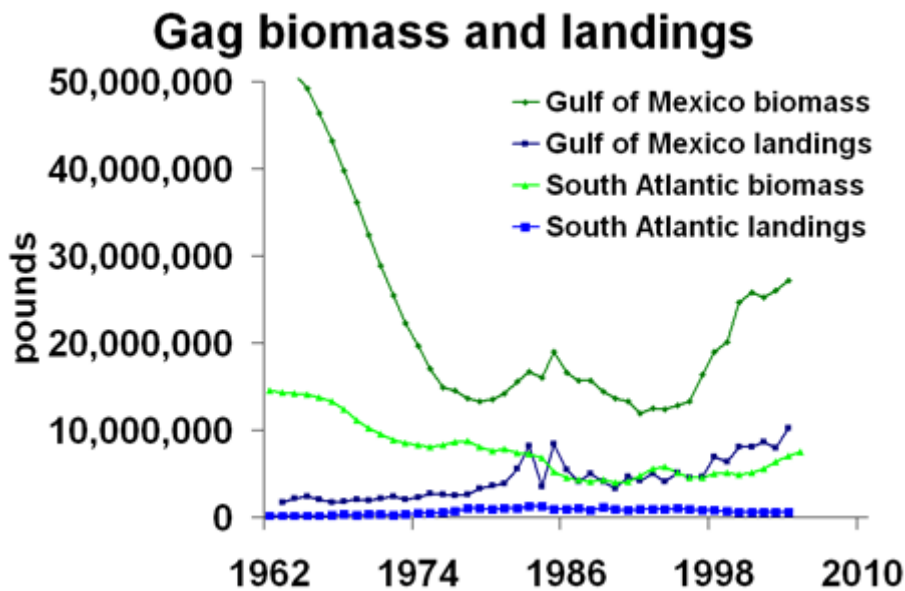
20. On January 1, 1992 NMFS issued regulations set forth in Amendment 4 setting a 20” minimum size limit and included Gag Grouper in the 5 grouper aggregate bag limit.

21. On February 24, 1999 NMFS issued regulations set forth in Amendment 9 increasing the minimum size from 20” to 24”. The regulation also set a bag limit of 2 Gag Grouper to be included within the 5 grouper aggregate limit.

22. These prior regulatory measures have provided the desired results and the graphs below show that the biomass of Gag Grouper has had a sharp rebound as a result of the current regulations. These charts conclusively prove that the Grouper complex is no undergoing overfishing as per the definition of



Source: NMFS Fishwatch



Source: NMFS Fishwatch

These NMFS charts conclusively prove that the Grouper complex is no undergoing overfishing as per the definition of over fishing contained in 50 C.F.R.

600.310(d)

(d)Overfishing – (1) Definitions. (i) “To overfish” means to fish at a rate or level that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.

23. Amendment 16 also prohibits landings of black grouper, red grouper, scamp, rock hind, red hind, coney, graysby, yellowfin grouper, yellowmouth grouper, and tiger grouper in addition to Gag Grouper. Of this group, only Red Grouper is listed as experiencing overfishing but is not included as a targeted species for regulation, but is only an incidental addition.

24. In 2005 in another action against the NMFS for acting once again exceeding its powers, Judge Steele ruled that NMFS could not close the entire grouper fishery to protect one species. Although this ruling is not directly applicable to the instant matter as it construed the limited power of NMFS relative to regulations, it recognized that the entire grouper complex should not be closed just because one or more species are undergoing overfishing. Judge Steele recognized that avoiding by-catch is not sufficient to close the entire fishery.

25. Recreational fishing effort has declined since 2004. The gag stock assessment completed in 2006 was based on MRFSS' estimate of fishing effort from 2004.

26. NMFS ignored evidence that the reduction in take for gag grouper had already been achieved before Amendment 16 was finalized in October 2008:

27. During public hearings, the Council received testimony that a portion of the large percent of reduction has already been achieved through reductions in recreational effort due to high fuel prices or other factors, but a reliable value to assign to this reduction could not be determined.

28. The gag grouper stock assessment is erroneous in part because 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. There is not a scheduled stock reassessment for gag grouper. Yet, 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 Golden Tilefish bag limits are set using an allocation that has been set using a 95% commercial 5% recreational allocation. This is in direct violation of National Standard 4:

(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.

31. The 95% commercial/5% recreational allocation of Golden Tilefish violates 4(a) in that it is not either “fair or equitable” and 4(c) allows the commercial fishermen to acquire an excessive share of the fishery.

32. The Snowy Grouper bag limits are set using an allocation that has been set using a 95% commercial 5% recreational allocation. This is in direct violation of National Standard 4:

(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.

33. The 95%commercial /5% recreational allocation of Snowy Grouper violates 4(a) in that it is not either “fair or equitable” and 4(c) allows the commercial fishermen to acquire an excessive share of the fishery.

34. The methodology of the NMFS is inherently flawed in that it is a designed closed 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 helps draft proposed regulations
6. NMFS interprets the regulations

7. NMFS recommends regulations through the council process
8. NMFS approves or rejects council proposed regulations
9. NMFS enforces the regulations
10. NMFS Administrative Judges sentence violators of NMFS regulation.

35. The NMFS and the SAFMC failed to conduct any economic studies or assessment to determine the economic impact in the South Atlantic area on communities from the possible alternatives to the enacted regulations as required by the Magnusson Stevens Act.

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.

36. In a study done by the Gentner Consulting Group, Gag Grouper in the Gulf of Mexico generated \$107 million in added value, \$60.8 million in income and supported 1,523 jobs. The closure of the fishery when combined with the upcoming Red Snapper closure will close the for hire sector for 4 months of the year which will cause the closure of businesses such as charter boats, bait and tackle stores, marinas permanently.

37. 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.

38. The NMFS has failed to consider the “Mixed-Stock Exception” as required by 50 C.F.R. 600.310(d)(6)(i-iii). The stocks of the other fish within the grouper complex included in Amendment 16 are healthy stocks and not declared to be undergoing overfishing, The angler’s ability to fish for these fish would be limited and/or prevented by this amendment.

39. The NMFS has failed to implement two alternatives that would produce a substantial reduction in mortality by declining to require the use of venting tools and circle hooks. This is in violation of National Standard (9)

(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.

CLAIMS FOR RELIEF

40. Plaintiff realleges paragraphs 1 through 39.

41. The accountability measures permitted in Amendment 16 should be enjoined from implementation until and unless The National Marine Fisheries Service complies with its duties under the MSA to collect relevant data to manage the grouper fishery as required by Congress. Legal error is an abuse of discretion under the MSA.

42. The implementation of Amendment 16 should be enjoined until such time as the NMFS has complied with the consideration and application of the “Mixed-Stock Exception” to Amendment 16.

43. The gag grouper stock assessment completed in 2006 and amended through 2008 should be rejected as the product of the fatally flawed MRFSS program and agency predisposition and bias. The 2006 assessment did not employ BAS and improperly rejected better and available information that the desired reduction in gag take was achieved without any action by the NMFS.

44. The individual one-fish per person bag limits for black grouper and gag grouper should be rejected as conducive to excessive by-catch and replaced with a single five grouper aggregate limit because specie-specific limits create bycatch which is contrary to the National Standards mandating elimination of by-catch.

45. The one -fish bag limit on Golden Tilefish and Snowy Grouper is arbitrary and capricious because recreational fishermen are allotted a small percentage (5%) of the catch, the bag limit should be rejected unless the allocation is set at 50% recreational as required by National Standard 4 of the MSA.

46. The seasonal closures for red and gag grouper are an abuse of discretion. 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 16.

47. Black grouper, red grouper, scamp, rock hind, red hind, coney, graysby, yellowfin grouper, yellowmouth grouper, and tiger grouper cannot be closed simply to avoid by-catch of gag grouper during the closure. One species cannot be used as a hostage to stop fishing for stocks which are healthy. Any closure should be narrowly-tailored to achieve its underlying purpose.

48. The 2011 assessment should not be conducted using the discredited MRFSS system; rather, any assessment after January 1, 2009 must be conducted under the provisions of the MSA, utilizing data generated in compliance with the MSA.

49. Plaintiff should be permitted to engage in discovery regarding the claim that NMFS was predisposed to reduce the recreational take of gag grouper regardless of the state of the fishery in 2005 and permitted this bias to infect the 2006 stock assessment and the content of 30B.

PRAYER FOR RELIEF

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

Respectfully submitted,

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