

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

THE FISHING RIGHTS ALLIANCE,
INC.,

Plaintiff,

v.

Case No.

THE NATIONAL MARINE FISHERIES
SERVICE,

Defendant.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND REQUEST FOR EXPEDITED CONSIDERATION**

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. By this action, the FRA seeks to prevent Defendant from using the “fatally flawed” MRFSS as a real-time quota-monitoring device or as a triggering mechanism for accountability measures in the Gulf of Mexico and elsewhere both for Greater Amberjack and several other species.

2. 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”). Plaintiff seeks expedited consideration of this action.

3. 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).

4. A closure of the 2009 recreational Greater Amberjack season was published October 22, 2009 and made effective October 24, 2009 under which recreational fishermen are prohibited from keeping amberjack in federal waters for the remainder of 2009. See 74 FR 54489 (October 22, 2009). The 2009 recreational quota of 1.368 million pounds was established in 2008. The closure took effect at 12:01 a.m. local time on Saturday, October 24, 2009 and runs through December 31, 2009. According to the applicable Fishing Bulletin, “[i]f despite the closure, recreational landings continue and exceed the quota for 2009, that excess will be recovered by shortening the 2010 recreational amberjack season.” In pertinent part, the stated basis for the Amberjack closure contained in the Federal Register states “[t]his action responds to the best available information recently obtained from the fishery.” 74 FR 54489.

5. 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.

6. 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) (bolding added).

7. 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. 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. The vast majority of FRA's members live near the Gulf of Mexico and fish within its waters. Many of its members seek to catch Greater Amberjack, and FRA has been actively involved in the management of various Gulf of Mexico fisheries since its inception. It has participated in the development of many of the regulations and measures governing the Gulf of Mexico now in place and has generally supported efforts to enact recovery plans for at-risk fish in the Gulf of Mexico. FRA's members are directly and adversely affected by the actions of which it complains.

8. Defendant NMFS is an agency of the United States government with primary responsibility 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 amendments. Since NMFS has responsibility for the Reef Fish Fishery Management Plan which governs the Greater Amberjack, NMFS has final management authority over reef fish in the Gulf of Mexico. NMFS is the federal agency that approved the Amendment 30A, which is the subject of this Complaint. NMFS is a sub-agency of NOAA within the United States Department of Commerce.

9. The Amberjack fishery is conducted off the west coast of Florida.

FACTUAL BACKGROUND

10. The recreational take of fish in the Gulf of Mexico (“GOM”) in federal waters (beyond 9 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).

11. Regional councils submit FMPs to the Secretary of Commerce, who acts through NMFS. Defendant 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).

12. The present controversy arises in connection with Amendment 30A to the Reef Fish FMP for the Gulf of Mexico and the closure instituted October 24, 2009. In this

case, the October 24 closure was based on MRFSS data gathered in 2009 which failed to conform to the requirements of the MSA contained in 16 U.S.C. § 1881 (section 1881) with which NMFS failed to comply after two years of foot-dragging.

13. The MSA was signed into law and went into effect on January 12, 2007. See Public Law 100–479, 120 Stat. 3575. The MSA added section 1881.

14. The MSA, in the form as originally enacted in 1976, required that Defendant collect statistics for measuring effort and total catch. Defendant commenced the Marine Recreational Fishing Statistical Survey (“MRFSS”) program in 1979, which relies on dock intercepts and random telephone surveys. The MRFSS program contains several elements:

- MRFSS data, which includes the For-Hire Telephone Survey taken from for-hire vessels, is produced in 2 month waves (January-February, March-April, May-June, etc.). There are two components to MRFSS: telephone effort surveys and dockside intercept surveys.
- Data from the for-hire sector (“FHS”) is collected differently from that used to assess private/recreational effort. Dockside intercepts are conducted the same for both surveys at the same time. FHS effort is collected weekly. Surveys are taken the week following the week of the actual trips. This survey is performed by a state employee who calls for-hire vessel owners or captains to obtain the trip effort data, number of trips, hours fishing, number of anglers, area fished, etc. Only ten percent (10%) of for-hire vessels are interviewed each week. The federally permitted vessels are required to participate, although they are not required to answer their phone. State

licensed for-hire vessels must volunteer to participate.

- Effort numbers for the private/recreational sector is collected beginning the week after the previous wave. The effort data is collected for wave 1 starting the 1st week of March. Data collection for wave 2 begins the 1st week of May and so on. The effort calls go on for 2 weeks. A very small percentage of coastal county households are called based on census data. The dockside intercepts are done all year and various sites are preselected based on historical activity.
- Dockside intercepts provide the harvest data, the composition of catch, length and weight of species, helps to verify the effort by asking the number of anglers, what they caught and kept, caught and threw back, ate, used for bait, etc. Dockside intercepts also discover potential anglers and/or for-hire vessels that were not identified in the effort calling part.
- Known for-hire vessels are part of the vessel frame (list). When a for-hire vessel is intercepted at the dock, but is not in the frame, then NMFS assume there may be other for-hire vessels not in the frame and a statistical formula called a correction factor is then used to adjust the number of vessels and the effort collected. The correction factor starts at 1. As vessels are sampled at a dock which are not on the list, the correction factor increases for all effort and catch data as 1 is modified to 1.1, 1.2, and has been higher than 2. The correction factor is used to multiply the effort data which is assumed to be complete when other vessels are found which then multiplies the effort and thus multiplies the harvest, as effort and harvest are directly connected.

- A similar correction factor is used in the private/recreational effort data. If an angler is interviewed and that person does not have a land phone line, then an assumption is made that there are more anglers like that and a correction factor is used to adjust that number.
- Once the wave period ends and after the 2 weeks of collecting effort numbers all that data is then put together in the MRFSS system. In the period after the 1st 2 weeks of the month following the wave, the data is reviewed for errors and any possible errors or strange numbers are questioned, explained and then all is put together and placed on the MRFSS web site. Typically the data for each wave is available by the 6th or 7 week following the end of the wave. For example, wave 1 ends 2-28 and data for wave 1 is generally available by 4-15 to 21. Wave 2 data is available by 6-15 to 21, etc.

15. The MRFSS was never designed to provide real-time data to determine whether a quota is met. The MRFSS system is recognized to be “fatally flawed.”

16. “Since its inception, the accuracy of the MRFSS data and the manner of its application have been criticized and questioned by the fishing community, fishery scientists, and fishery managers.”¹ In 2005, responding to continuing public criticism of the MRFSS system of survey data, the NMFS commissioned the National Academy of Sciences/National Research Council (“NAS/NRC”) to perform an independent, peer-reviewed evaluation of the MRFSS, and to make recommendations for its application

¹ New York v. Gutierrez, 2008 U.S. Dist. LEXIS 94779 (E.D.N.Y. Nov. 19, 2008).

and improvement. See *Review of Recreational Fisheries Survey Methods*, National Academies Press (2006) (hereafter “NRC Report”).

17. In 2006, Congress found that MRFSS was flawed and required Defendant to take specific actions to correct it by January 1, 2009. See 16 U.S.C. § 1881(g)(3)(D) (“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).

18. 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, 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) 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) (emphasis added). The NRC report recommended:

“The MRFSS Should Be Completely Redesigned to Improve its Effectiveness and Appropriateness of Sampling and Estimation Procedures, its Estimation Procedures, its Applicability to Various Kinds of Management Decisions, and its Usefulness

for Social and Economic Analyses.”

“A Comprehensive, Universal Sampling Frame with National Coverage Should Be Established. The Most Effective Way to Achieve this Is Through a National Registration of All Saltwater Anglers or Through New or Existing State Saltwater License Programs.”

“Future Telephone Surveys Should Be Based on the above Universal Sampling Frame.”

19. MRFSS is inappropriate for real time monitoring or in-season adjustments. NMFS is taking the current action against the NRC recommendations with which it agreed. Furthermore, the landing data for Amberjack is still preliminary and that data has not been finalized.

20. Defendant is not in compliance with section 1881(g)(3) and should be foreclosed from implementing an accountability measure devised in Amendment 30A unless the data on which it is based meets the standards set forth under the MSA.

21. Defendant has failed to comply with the Congressional mandate to establish a national registry of recreational anglers and does not foresee compliance until 2010. See http://www.countmyfish.noaa.gov/mrip/newsroom/downloads/saltwater_angler_registry_FINAL_press_release.pdf.

22. 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(g). These required elements of data did not inform the closure of the Amberjack fishery.

23. The number of intercepts is inadequate, the surveys did not target registered anglers, and NMFS failed to develop a “weather corrective factor” as Congress required. Moreover, NMFS has “failed to assemble 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.”

24. While the NRC has previously stated that industry data like fuel sales, tax records, marine receipts or even NOAA’s own weather data should be used at least to help validate the MRFSS data, the National Marine Fisheries Service (NMFS) through NOAA is still incapable or unwilling to recognize this information.

25. NMFS closed commercial fishing for amberjack on November 7, 2009 based on an actual real-time data system.

CLAIMS FOR RELIEF

26. Plaintiff realleges paragraphs 1 through 25.

27. NMFS has violated several National Standards and the MSA itself. MRFSS is not best available science since Congress found in section 1881 that better science was available and was ordered to be utilized.

28. The accountability measures permitted in Amendment 30A and the closure effective October 24, 2009 should be enjoined until and unless Defendant complies with its duties under the MSA to collect relevant data to manage the Amberjack fishery as required by Congress.

29. The closure perpetrated in October 2009 is capable of repetition and must be addressed even if the Court renders its decision after January 1, 2010 when amberjack re-opens.

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. Amberjack should be re-opened because NMFS has ignored Congress' directive and failed to meet a known deadline.

Respectfully submitted,

/s/ Craig L. Berman

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