

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

THE FISHING RIGHTS ALLIANCE,  
INC.,

Plaintiff,

v.

Case No. 8:09-cv-00916-T-30TGW

THE NATIONAL MARINE FISHERIES  
SERVICE,

Defendant.

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**AMENDED 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. 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 fish within the grouper complex, 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.

3. 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 FMP amendments. Since NMFS is responsibility for the Reef Fish Fishery Management Plan which governs the grouper complex, NMFS has final management authority over reef fish in the Gulf of Mexico. NMFS is the federal agency that approved the Amendment 30B, 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 primarily off the west coast of Florida. Groupers are fished for extensively in state waters. 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 reef 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). 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).

6. The present controversy arises in connection with Amendment 30B to the Reef Fish FMP (“RFA 30B” or “30B”) for the Gulf of Mexico, a document which spans 462 pages. See <http://sero.nmfs.noaa.gov/sf/pdfs/Final%20Amendment%2030B.pdf>. RFA 30B 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. RFA 30B 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.

RFA 30B, p. 16).

8. 30B, if effective, will replace an interim rule which went into effect January 1, 2009, which implemented limited portions of 30B that pertain to gag grouper. Under the interim rule, the recreational gag grouper bag and possession limit is 2 per person, per day. The interim rule extended the recreational closed season for gag grouper from February 1 through March 31. 30B establishes a recreational grouper aggregate bag limit of four (4) fish per day. Within the aggregate bag limit, no more than two (2) gag grouper may be caught. Similarly, no more than two (2) red grouper may be caught. 30B also includes a recreational closed season for all shallow-water grouper from February 1, through March 31 of each year.

9. ACLs and AMs are required by the MSA for any specie 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. For example, in the recreational fishery, AMs are potentially catastrophic:

- If either gag or red grouper recreational landings exceed the ACL, then the target catch level in the following year will be maintained at the prior year's target catch level.
- The length of the Shallow Water Grouper fishing season will be reduced in the following year by the amount necessary to ensure the gag or red grouper target catch level are not exceeded.

11. The fundamental flaw in 30B is that Defendant 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.

12. 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 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.

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

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

15. Defendant is not in compliance with section 1881(D) and should be foreclosed from implementing an accountability measure devised in Amendment 30B 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, 30B and the underlying gag grouper stock assessment are not based on the best available science (“BAS”).

18. 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).

19. In 2003, NMFS determined that one species in the grouper fishery, red grouper, was overfished and decided to implement a secretarial plan amendment (Secretarial Plan Amendment 1 to the Reef Fish FMP adopted by the Secretary in May 2004 (“Amendment 1”). Amendment 1 included bag limits for recreational fishermen (2 per day for red grouper and 5 total grouper per day total per angler), a specific quota for the commercial sector, and a 10-year rebuilding plan for red grouper. Amendment 1 identified a target catch of 1.25 million pounds of red grouper for the recreational sector and a quota for the commercial sector of 5.31 million pounds.<sup>1</sup> Amendment 1 and

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<sup>1</sup> The plan specifically allocated 81% of a total allowable catch (“TAC”) of 6.5 million pounds to the commercial sector of the fishery. The remaining 19% of the total TAC is left for the recreational sector. Of note, the study recognized that the historic division between the commercial and recreational sector was 75% commercial and 25% recreational (1986-1989) and 76% commercial and 24% recreational for years 1990 through 2000. The study noted a spike in the data for the data for 1999-2001

implementing regulations included provisions to close the commercial sector as it approaches its annual quota but had no such provisions for the recreational sector. In addition, there was no provision in the plan or regulations for actions in the event the recreational target catch is exceeded.

20. In July 2004, NMFS issued regulations establishing the bag limit for red grouper of two fish per person per day. All of Amendment 1, and its implementing regulation, were done through a normal MSA notice, comment and hearings process. FRA members participated in that public process at both the Gulf Council level and NMFS. In January 2005, the State of Florida established the same restrictions for State waters.

21. From 2004 on, the Gulf Council, the State of Florida and NMFS worked to establish limits for the recreational red grouper catches in line with the target catch through the use of traditional methods of size and bag limits. In 2003, the recreational catch of red grouper was approximately 1.35 million pounds. In 2004, government asserted that the recreational fishery landed 3.1 million pounds.

22. This government estimate of 2004 red grouper landings was erroneous and based on flawed data acquired through the MRFSS. The Gulf Council's own study group had concluded that the MRFSS routinely overestimate recreational red snapper catches. The same study group found that the standard of error for the MRFSS system in 2004 may have exceeded the entire estimated recreational landings in the Gulf of Mexico.

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in which the commercial percentage of take rose to 81% and the recreational take dropped to 19%. While the study anticipated that there was a temporary aberration and that a return to the historic percentages was anticipated, the Gulf Council nonetheless adopted the 81%/ 19% allocation between the commercial and recreational sector to minimize the impact of the reductions on the commercial sector.

23. In March 2005, at the specific request of NMFS, the Gulf Council reviewed the MRFSS catch information and gave NMFS authority by emergency or interim rule to bring recreational red grouper within the target catches previously determined for red grouper. The MRFSS data did not adequately take into account differences in fishing habits and effort shifting due to Florida's unprecedented 2004 hurricane season. Nonetheless, NMFS still promulgated the Interim Rule, which further reduced the red grouper bag limit to 1 fish per day and, most importantly, shut down the recreational grouper fishery from November through December 2005.

24. After NMFS prevailed on the red grouper dispute in 2005 before Judge Steele in which it imposed a closure and further reduction in the bag limits, nearly a year later NMFS conceded that red grouper were healthy and did not undergo any overfishing as NMFS had steadfastly claimed the prior year. In fact, NMFS admits that its 2004-05 management measures played no part in the 2007 red grouper assessment, stating:

In 2007, a new stock assessment utilizing data through 2004 (SEDAR 12 2007) found that the stock had recovered, in large part due to strong recruitment year classes in the late 1990s and 2000.

(RFA 30B, p. 16). A subsequent table in 30B misleadingly claims that overfishing for red grouper ended in 2005 when the bag-limit was reduced to 1 fish per day (RFA 30B, pp. 331-32). It is interesting that with respect to red grouper, reductions in catch were perceived by Defendant as the end of overfishing (RFA 30B, pp. 331-32). However, with regard to gag grouper, significant declines in "recreational landings" in 2005 were perceived as proof that "overfishing [was] occurring" (RFA 30B, p. 331). On page 325 of 30B, NMFS states: "Declines in effort may be a signal of stress within the fishery." NMFS cannot have

it both ways to suit its agenda.

25. 30B describes the red grouper fiasco NMFS engineered as follows, conceding that the management measures instituted by NMFS were improper and unnecessary:

Red grouper were placed under a rebuilding plan in 2004. The stock had been found to be overfished and undergoing overfishing in both a 1999 stock assessment and a subsequent 2002 assessment. However, the 2002 assessment indicated that the stock was recovering faster than previously estimated, most likely due to a strong recruitment year class in 1997. Management measures implemented in 2004 as part of the rebuilding plan included a reduced aggregate commercial shallow-water grouper quota, a red grouper quota within the aggregate quota, and a recreational bag limit of two red grouper within the five fish aggregate grouper bag limit. The red grouper quota was reached, and the commercial shallow-water grouper fishery closed, on November 15, 2004. In order to extend the 2005 season, stepped commercial grouper trip limits (10,000, 7,500, and 5,500 pounds) were adopted. For 2006 and later, a fixed 6,000 pound grouper trip limit was adopted.

For the recreational sector, landings data indicated that the recreational red grouper allocation was being exceeded despite the red grouper bag limit. **Consequently, in 2005 an interim rule intended to reduce the red grouper bag limit from two to one fish per person per day, reduce the aggregate grouper bag limit from five to three grouper per day,** and implement a one-time closure of the recreational fishery, from November - December 2005, for all grouper species.

The rule was challenged by organizations representing recreational fishing interests, and on October 31, 2005, a U.S. District Court judge ruled that an interim rule to end overfishing can only be applied to the species that is undergoing overfishing. Consequently, the reduction in the aggregate grouper bag limit and the application of the closed season to grouper other than red grouper were overturned. **The reduction in the red grouper bag limit to one per person and the November-December 2005 recreational closed season on red grouper were allowed to proceed.**

The one red grouper bag limit was made permanent in a 2006

regulatory amendment, which also prohibited for-hire vessel captains and crews from retaining bag limits of any grouper while under charter, and established a recreational closed season for red grouper, gag and black grouper from February 15 to March 15 each year (matching a previously established commercial closed season) beginning with the 2007 season.

The most recent SEDAR 12 stock assessment for red grouper was completed in early February 2007. Although this assessment confirmed the findings of the previous two assessments that the red grouper stock was overfished in the 1990s, **it estimated that the red grouper estimated spawning stock exceeded SSMSY starting in 1999**, and that the current (2005) stock status was close to its OY biomass level. Consequently, the red grouper rebuilding plan could be replaced with a management policy to maintain the stock at its OY level.

This is merely one example of how flawed MRFSS data was misused by NMFS as a real-time quota monitoring device to achieve a desired outcome. The consequences were drastic yet completely avoidable.

26. Judge Steele found that NMFS clearly exceeded its authority in 2005 when it proposed “an interim rule intended to reduce the red grouper bag limit from two to one fish per person per day, reduce the aggregate grouper bag limit from five to three grouper per day.” The attempt to reduce the aggregate bag limit was completely improper because gag grouper were not undergoing overfishing in 2005.

27. That NMFS proposed lower bag limits for gag grouper in 2005 without a finding of overfishing for this grouper specie indicates that it follows a philosophy that the ends justify the means. NMFS routinely engages in sophistry to restrict recreational fishing.

28. In 30B, NMFS imposes a two-fish bag limit on red grouper and a two-month annual closure even though red grouper fishing have not been overfished since 1999 and

the red grouper stock is healthy and producing optimum yield according to the red grouper stock assessment completed in 2007. Even after the stock assessment was completed in 2007, NMFS waited another 2 years to give back one red grouper to recreational anglers whom were adversely affected by using MRFSS data as a real-time quota monitoring device. The two month closure for red grouper is bogus and serves as a prophylactic measure so that recreational anglers will not fish for grouper at all in February and March of each year.

29. In 2005, Judge Steele ruled that NMFS could not close the entire grouper fishery to protect one specie. Although this ruling is not directly applicable to the instant matter as it construed the limited power of NMFS relative to interim rules, 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.

30. RFA 30B is based on a flawed gag grouper stock assessment according to Dr. Trevor Kenchington's opinions and testimony. There is a significant probability that the ultimate conclusions contained within 30B were foreordained years in advance to achieve what NMFS sought to do without any evidence of overfishing of gag grouper by interim rule in 2005 which Judge Steele prevented. Initially, the gag assessment employed shifting rationales which evolved over time as NMFS had to acknowledge serious flaws in its methods, e.g., dead discard mortality. Each flaw was patched by a new concept so that NMFS could attempt to claim neither flaw alone altered the overall results of the assessment. This was exemplified where a renowned outside fishing expert proved that NMFS' own numbers showed that the reduction in effort since 2004 made further

reductions in take unnecessary. NMFS discounted this science as inconclusive. NMFS also used incorrect assumptions regarding natural mortality of gag grouper based on the opinion of Dr. Kenchington.

31. This is how NMFS described the gag grouper stock assessment:

Gag were declared to be undergoing overfishing in October 2006 based on the results of a stock assessment prepared under the Southeast Data, Assessment and Review (SEDAR) process. Following a re-analysis in 2007 **using corrected data inputs**, overfishing was still found to be occurring **in 2004** under the maximum fishing mortality threshold of F30% SPR as well as under any likely redefinition of MFMT

See RFA 30B, p. 15. Gag grouper biomass increased from the mid-1990s through 2004 due to high reproduction rates over a 15 year period. Biomass is still near record highs.

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

33. Defendant ignored evidence that the reduction in take for gag grouper had already been achieved before 30B was finalized in October 2008:

During public hearings, the Council received testimony that a portion of the 41 percent 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**. Preferred Alternative 7 is intended to achieve an estimated 26 percent reduction in recreational gag harvest, which is greater than the minimum reduction needed to end overfishing. Additional reductions from reduced effort will further reduce fishing mortality and will help to achieve the ultimate target of FOY. Preferred Alternative 7 proposes a gag bag limit of 2 fish per person per day within the aggregate bag limit, a red grouper bag limit of 2 fish per person per day within the aggregate bag limit, an aggregate bag limit of 4 grouper total per person per day, and a recreational shallow-water grouper closed season of February 1-March 31 (306 day season, reduces gag 26 percent, increases red grouper 17 percent).

34. The gag grouper stock assessment is erroneous in part because it overestimates dead discards and release mortality by the recreational sector. Release mortality for red grouper is 10% but for gag grouper it is deemed much higher, on average 20% and ranging as high as 42%.

35. The next scheduled stock assessment for gag grouper is 2011. 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 allowed to bootstrap past errors into a flawed gag assessment in 2011.

### **CLAIMS FOR RELIEF**

36. Plaintiff realleges paragraphs 1 through 35.

37. The accountability measures permitted in Amendment 30B should be enjoined from implementation until and unless Defendant 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.

38. 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 Defendant. Moreover, NMFS disregarded expert testimony and evidence from Dr. Trevor Kenchington regarding the gag assessment and whether further reductions in take were needed under 30B.

39. The individual two-fish per person bag limits for red grouper and gag grouper should be rejected as conducive to excessive by-catch and and replaced with a single four-

grouper aggregate limit because specie-specific limits create bycatch which is contrary to the National Standards mandating elimination of by-catch.

40. The two-fish bag limit on red grouper is arbitrary and capricious because recreational fishermen account for a small percentage of the red grouper catch; alternatively, the allocation of red grouper to recreational fishermen is an abuse of discretion since NMFS has proposed an emergency rule which will greatly reduce the long-line fishery for red grouper based on turtle interactions and the death of sea turtles. Relief on this claim should be ordered only after a final rule is put into place governing long-line fishing for red grouper.

41. 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.

42. Red grouper cannot be closed simply to avoid by-catch of gag grouper during the closure. One specie 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. If the purpose is to protect the breeding stock, then it is sufficient to close fishing in depths over 180 feet during the spawn. Such a narrowly tailored spawning-motivated closure should extend to all classes, including the commercial sector.

43. 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.

44. Plaintiff should be permitted to engage in discovery regarding the claim that

Defendant 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,

/s/ Craig L. Berman

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