

Coastal Conservation Association  
comments on

## Amendment 29 to the Gulf of Mexico Reef Fish Plan

*These comments were submitted electronically on June 8, 2009,  
in response to the publication of the proposed rule and  
final fishery management plan Amendment 29  
to the Gulf of Mexico Reef Fish Plan published April 8, 2009.*

This amendment should be rejected by the Secretary and returned to the Gulf of Mexico Fishery Management Council for further consideration. As developed to date, it does not comply with the requirements of the Magnuson Stevens Act and the Administrative Procedure Act.

This amendment is the first Individual Transferable Quota (ITQ) system developed under the Magnuson Stevens Act (MSA) as amended in 2007. As such, it ought to receive extraordinary consideration prior to adoption. Its adoption and implementation will establish precedential guidelines for all such systems in the future and therefore should strictly adhere to a sound decision process and comply with all of the regulatory requirements of the MSA and related statutes and adhere to commonly accepted practices of good policy formation. As developed to date, this amendment fails on all of these counts.

### **The amendment fails to comply with the ITQ requirements in section 303 A of the MSA.**

The development of this amendment either assumes no impact on any other part of the fishery or simply ignores it in a linearly myopic attempt to address the principle objective of the amendment. A review of all of the supporting documents and the plan itself makes no reference to any decision process or analysis of the impacts of an ITQ system on anything other than the directed commercial fishery. There is no discussion of the impact on the recreational fishery or any other commercial fishery which might catch grouper incidentally.

Section 303A (C) requires an extensive analysis of the impacts of the components of the entire fishery before there is a determination of who the participants are in the ITQ system. This action fails as there is no consideration of any component of the fishery other than the directed commercial fishermen and their related infrastructure. The plan framework, the environmental impact statement (EIS) and all of the related documents reflect no consideration of including charter or private boat recreational fishermen as a participant in the ITQ system. The entire process assumes participation only by the commercial industry without any basis for the determination.

Even a cursory reading of the authorizing bill leads one to conclude that Congress put in section 303A to ensure that the public at large could participate in the decision process and the impact on all elements of the fishery would be considered prior to a determination that a public resource would be privatized. The decision to make this a directed commercial ITQ violates the MSA and is arbitrary on its face.

**The decision to exclude the public from purchasing ITQs for 5 five years is arbitrary on its face and violates the MSA fundamental principles of fairness.**

The MSA and The National Environmental Policy Act (NEPA) both require extensive analysis so that the public can make a sound decision about the various options being proposed. There is no analysis of the effect of this effort on charterboats and private recreational vessels. A simple analysis pointing out that the charter industry is overcapitalized and could benefit from the same system could have enlarged the decision process, while achieving the fundamental goal of rightsizing the commercial fleet. By allowing all private recreational fishermen the right to purchase ITQs, the goal of the amendment would have been greatly enhanced as increased competition for access would have increased the value of individual ITQs and provided a greater incentive to the holders to sell rather than fish. Council votes based on nothing other than member's own views are arbitrary in and of themselves. Decisions without supporting analysis deprive the public of its right to an informed basis for participation in a public process. There is no analysis in the record of this amendment that supports excluding recreational fishermen and the public at large from purchasing access from a commercial ITQ holder.

Fairness under the MSA is harder to judge. In the absence of any other standard, the National Marine Fisheries Service (NMFS) has usually relied on the "what's good for the goose is good for the gander" standard or "you get one and I get one." That standard, of course, is based either on a lack of information or on an analysis that supports the decision. In the instant case, there is a clear pattern that exists which has been ignored in the development of this amendment. If approved, this amendment will provide the agency with the ability to manage the commercial fishery within its quota and reduce the number of boats in the commercial fishery. At the same time, it will restrict charter and private recreational boats from any access to the commercial quota for five years, when it will be further considered. It will leave the management of the recreational quota to the present failed system:

- A data system which the National Research Council concluded was incapable of being used for any management purpose;
- State and federal management rules, which are inconsistent and now treat citizens of different states very differently;
- The high potential that the exclusive economic zone (EEZ) recreational fishery will be conducted in a very short period of weeks, virtually eliminating the charterboat industry.

What is good for the commercial sector is a new form of effective management. What's good for the recreational sector is no change—in fact, there isn't even an effort to address these problems. The new data system, the Marine Recreational Information Program (MRIP), has been put on hold despite the fact that every state on the Gulf of Mexico requires a saltwater fishing license to fish in a boat. The agency answer to recreational management includes shorter seasons and smaller bag limits. It is ignoring its own economic analysis on the impact of these actions on private recreational boats and the industry behind it, which isn't even reflected in the record on the Council's web site. The commercial fishermen can fish anytime within their quota and if they wish can participate in the recreational sector, which many of them do, as charter boat fishermen, guides and private citizens, they can. The recreational fisherman is excluded from any participation in the commercial fishery and, because of annual catch limits (ACLs) and poor data collection, is doomed to shorter and shorter seasons.

This action fails to make any attempt at fairness. It fails the test of fairness and equity for the same reason that "separate but equal" failed—as implemented it simply isn't fair—it provides one sector of the fishery with a subsidy to rightsize itself, while it dooms the other to poor management and ultimately to economic failure.

## **The record presupposes the outcome and as such is arbitrary.**

Adoption of any amendment must be supported by the record. Even initial decisions, like who can participate in the plan, have to be supported by an analysis of the existing data and the impacts of the decision. It is simply not adequate to conclude at the outset that only the commercial sector can have an ITQ. The agency's total focus on the commercial sector of this fishery dooms this amendment from being legally sufficient.

## **New data requires disapproval.**

The only decision that is reviewable by the Courts, is the decision of the Secretary in adopting the amendment and implementing regulations. The Secretary must rely on the record before him in his determination of its legal sufficiency. The record includes not only that information and analysis developed to date by the region and Council in support of the decision, but any other actions or information related to this fishery at the time of approval. Three recent developments cast considerable doubt on the breadth of the decision process for this amendment and its viability for acceptance.

The first is the discovery of a high bycatch of listed sea turtles by bottom longliners in the grouper fishery. Regulations amending the plan have already been adopted to move this portion of the fishery out beyond 50 fathoms to reduce the bycatch. The bottom longline fleet represents 57 percent of the potential ITQ holders. Recent testimony from the holders of these permits claims that they cannot operate beyond 50 fathoms and many vessels are now converting to hook and line fishing. Assuming this to be true, the vast majority of this fishery will rationalize itself without any subsidy.

The second event is the new grouper assessment, which will greatly reduce the available take in the fishery. This will also accelerate the rightsizing of the fleet without any subsidy. It, combined with the poor data collection practices of the agency in the red snapper recreational fishery, will cause a disproportionate impact on the recreational sector. None of these outcomes have been analyzed by the region or the Council.

The third is the emerging economic analysis of the contribution of the recreational sector to the economies of the Gulf States. The recreational sector needs access to the fishery to generate economic value. Measures like shorter seasons and closed areas impact the number of trips recreational fishermen take. A moratorium in a fishery often is acceptable so long as there are viable alternatives. Here there are none. Virtually the entire reef fish fishery will be closed for a vast portion of the year if the assessment is correct and there is no improvement in the recreational management system. The economic impact on boat builders, marina operators and tourism industries will be significant and irreversible for at least 5 years.

For all of these reasons, Coastal Conservation Association requests that the entire plan be disapproved and returned to the council for further deliberation.

The plan violates national standards 1,3, 4, 5, 6.

It is inconsistent with sections 303 a 9, 303 b 6, 303 a 4 c, and 304 e.