
**Petition for
Action to Stop Overfishing of Red Snapper by
The Gulf of Mexico Shrimp Fleet**

Pursuant to the Magnuson-Stevens and Administrative Procedure Acts

Submitted to:
The Honorable Carlos Gutierrez
Secretary, U.S. Department of Commerce
14th Street & Constitution Avenue, NW
Washington, DC 20230

Submitted by:
The Coastal Conservation Association
Houston, Texas

March 29, 2005

Communications may be addressed to:

Robert G. Hayes
Ball Janik LLP
1455 F Street, NW, Suite 225
Washington, D.C. 20005
202-638-3307
202-783-6947 (fax)
rhayes@dc.bjllp.com

I. INTRODUCTION

The Coastal Conservation Association (“CCA”) hereby petitions the Secretary of Commerce to exercise his authority under 16 U.S.C. § 1855(c) to stop the overfishing of red snapper by the Gulf of Mexico shrimp fleet. The Secretary is required under the Magnuson-Stevens Fishery Conservation and Management Act¹ (the “Magnuson-Stevens Act”) to prevent overfishing, recover overfished stocks, and address all sources of fishing mortality. The Secretary, upon finding that overfishing exists in a fishery or that interim measures are needed to reduce overfishing, may promulgate emergency or interim measures to address the problem. Such a situation exists today in the Gulf of Mexico where the failure of bycatch reduction devices (“BRDs”) to meet regulatory bycatch reduction standards in the Gulf of Mexico shrimp trawl fishery makes recovery of the red snapper fishery unlikely and ensures years of continued overfishing in the fishery.

The Coastal Conservation Association is a marine conservation group composed of some 90,000 members in 15 states. The vast majority of its members live near and fish in the Gulf of Mexico. Many of its members fish for red snapper, which in the upper Gulf is one of the premier sport fish. CCA has been actively involved in the management of this fishery for 25 years. It has participated in most of the litigation challenging the measures now in place and has generally stood by the recovery plan. CCA’s request is generated from a firm view that the present plan has failed and only immediate action will prevent the complete closure of the fishery to all parties. CCA has made these views known to the Gulf Council, which has chosen to ignore them, leaving us no choice but to petition the Secretary for redress.

¹ 16 U.S.C. § 1801 et. seq.

II. BACKGROUND

It is well established that there are two principal sources of manmade mortality in the red snapper fishery. The first is the directed red snapper fishery, which today cumulatively catches 9.12 million pounds of red snapper annually. The directed fishery is controlled by quotas, seasons, size, and bag limits. The other source of mortality is the bycatch of the shrimp trawl fishery, which catches juvenile snapper in connection with its lawful trawling activity. Rather than put measures into place that required the shrimp fishery to avoid the bycatch, the Secretary chose to require the industry to reduce the mortality of red snapper through the use of a bycatch reduction device. In order to prevent overfishing and achieve some level of rebuilding in the red snapper fishery, a forty-four percent (44%) bycatch reduction goal was established in May of 1998 in the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico ("Shrimp FMP"). Hence, recovery and the avoidance of continued overfishing was dependant upon the effective use of the BRD by the industry.

The latest research shows that the use of BRDs fails to meet the bycatch reduction goal. Since the prevention of overfishing and recovery of the red snapper stock is predicated on at least a forty-four percent (44%) bycatch reduction in the western Gulf Exclusive Economic Zone ("EEZ"),² and recent research shows that current BRD use, in practice, yields only a twelve percent (12%) bycatch reduction, the plan as implemented must be declared a failure.

² That is a forty-four percent (44%) reduction in the Gulf EEZ west of 85°30' W. long. (the "western Gulf") from the average level of bycatch mortality (F=2.06) on juvenile red snapper, age 0 and age 1, during the years 1984-1989. Amendment 9 to the Shrimp FMP. 63 Fed. Reg. 18139 (April 14, 1998).

III. STATUTORY AUTHORITY FOR PETITION

This petition is filed under the authority of the Administrative Procedure Act (“APA”)³ and the Magnuson-Stevens Act. Section 553(e) of the APA provides that “each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). The Secretary of Commerce must carefully consider the petition, and may approve or deny it. Specifically, the APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). The APA requires an agency to take one of three actions in response to a petition for rulemaking: (1) grant the petition; (2) undertake public rulemaking proceedings; or (3) deny the petition. *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981). An agency must “fully and promptly consider” petitions for rulemaking. *Id.* “Agencies denying rulemaking petitions must explain their actions.” *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 (D.D.C. 1995). Accordingly, “the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition.” *Id.* at 115-16. Moreover, “[i]t is an abuse of discretion for an agency to grant judgment without espousing a rational basis for its decision.” *Natchez Coca-Cola Bottling Co., Inc. v. N.L.R.B.*, 750 F.2d 1350 (5th Cir. 1985).

If the Secretary of Commerce chooses to deny this petition, he must do so promptly and provide a “statement of the grounds for denial.” *WHHT v. FCC*, 656 F.2d 807, 813 n. 10 (D.C. Cir. 1981). Denials of petitions for rulemaking are subject to judicial review. *Id.* at 818. The courts review the denial of a petition to see if the action was arbitrary and capricious. *American Horse Protection Association v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). The Secretary must present a “reasonable explanation” for his denial of a petition in order for the denial to be in accordance with law. *Id.* at 7.

³ See 5 U.S.C. § 533(e).

A denial of this petition would be arbitrary and capricious. The Magnuson-Stevens Act authorizes the Secretary of Commerce to promulgate emergency regulations or interim measures if he finds that overfishing exists. 16 U.S.C. § 1855(c)(1). The most recent scientific evidence shows that the BRDs are not meeting the bycatch reduction standards set forth in the Shrimp FMP, thus overfishing is occurring in the Gulf of Mexico red snapper fishery. It would be arbitrary and capricious to deny this evidence and make a decision for which no “reasonable explanation” could be offered.

IV. FISHERIES PROTECTION: STATUTORY OBLIGATION

A. The Magnuson-Stevens Act Purpose: Protect and Restore Fish Stocks

The Magnuson-Stevens Act is intended to protect and restore the nation’s fish stocks, which have been depleted due to overfishing and habitat loss. 16 U.S.C. § 1801(a)-(b). The Magnuson-Stevens Act creates eight fishery management councils, each responsible for generating fishery management plans (“FMPs”) to regulate fishing within its region. 16 U.S.C. § 1852. These FMPs must balance the needs of fishery users against conservation principles by reference to ten National Standards. 16 U.S.C. § 1851(a). For example, FMPs must: prevent overfishing while obtaining the optimum fishing yield (National Standard 1); be based upon the best scientific information available (National Standard 2); and, minimize bycatch to the extent practicable (National Standard 9). 16 U.S.C. § 1851(a); *see also* 50 C.F.R. Parts 600.305-.355 (guidelines implementing the National Standards).

The regional councils submit their FMPs to the Secretary of Commerce, who acts through NMFS. NMFS solicits public comment and reviews the FMPs to ensure that they are consistent with the National Standards and other applicable laws. 16 U.S.C.

§§ 1852(h)(1), 1854(a)(1)-(2). If an FMP is consistent with the applicable law, NMFS must approve it. 16 U.S.C. § 1854(a)(3).

Amendments to the Magnuson-Stevens Act in 1996 addressed the particular problem of bycatch :

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.

Pub. L. No. 104-297, Title I, § 106, 110 Stat. 3570 (1996) (codified at 16 U.S.C. § 1851(a)(9) (National Standard 9)). The amendments also ended a four-year moratorium Congress had placed upon regulations affecting shrimp trawls and instructed NMFS to identify fish stocks subject to significant incidental harvest by shrimpers. 16 U.S.C. §1881(b)-(c). Congress further instructed the Secretary of Commerce to implement a bycatch reduction program to:

develop technological devices and other changes in fishing operations necessary and appropriate to minimize the incidental mortality of bycatch in the course of shrimp trawl activity to the extent practicable

16 U.S.C. § 1881(d)(1). Such measures must be consistent with “the need to avoid any serious adverse environmental impacts on such bycatch species or the ecology of the effected area.” 16 U.S.C. § 1881d(f).

In response to this statutory mandate, and based on results from a cooperative research program showing significant bycatch in the Gulf of Mexico shrimp trawl fishery, NMFS adopted Amendment 9 to the Shrimp FMP. 63 Fed. Reg. 18139 (April 14, 1998). Amendment 9 required the installation of certified BRDs in shrimp trawls towed in the western Gulf. To be certified, the BRDs were required to reduce the bycatch mortality

of juvenile red snapper by a minimum of forty-four percent (44%). 62 Fed. Reg. 35774 (July 2, 1997).

By NMFS own admission, the red snapper stock is presently in an overfished condition and currently undergoing overfishing. Reef Fish Fishery Management Plan ("Reef Fish FMP"), Final Amendment 22, May 2004. The Reef Fish FMP⁴ and the interrelated Shrimp FMP work together to manage the rebuilding of the red snapper stock and address overfishing. The original Reef Fish FMP set forth management measures to rebuild declining reef fish stocks, including red snapper. Currently, this stock is under a rebuilding plan to restore it to a twenty percent (20%) spawning potential ratio ("SPR") by 2019. Reef Fish FMP, Amendment 3, July 29, 1991.

NMFS has since determined that the twenty percent (20%) SPR goal is inconsistent with National Standard guidelines:

Definitions of stock size, the overfished threshold, and yield must be biomass based, but overfishing definitions can be based on SPR proxies. Therefore, before a rebuilding plan can be initiated to halt overfishing and rebuild a stock, targets and thresholds must be specific so that rebuilding goals are known.

Reef Fish FMP, Final Amendment 22, at 1, May 2004. The agency has adopted Amendment 22, which provides for a new rebuilding goal based on a 50% reduction in bycatch.

Recovery of the red snapper stock is not based upon bycatch reduction alone. The commercial and recreational directed fisheries have size limits, bag limits, total allowable catch ("TAC") restrictions, and time limits in an effort to rebuild the stock.

⁴ The first Reef Fish FMP was implemented in 1984.

However, the red snapper stock cannot be rebuilt without, at least, the established level of bycatch reduction required in the Shrimp FMP of forty-four percent (44%) or the level required by Amendment 22 of fifty percent (50%). Amendment 9 to the Shrimp FMP requires the use of NMFS-certified BRDs in shrimp trawl net to reduce the bycatch of red snapper by forty-four percent (44%) from the average mortality for the years 1984-1989. This restriction applies to the EEZ from Cape San Blas, Florida, to the Texas/Mexico border, where most red snapper bycatch occurs.⁵

The cause of overfishing in the Gulf is largely attributable to the high level of bycatch mortality on juvenile red snapper in the shrimp trawl fishery.⁶ According to one study,⁷ prior to requiring BRDs in 1998, the amount of red snapper taken by shrimpers accounted for about ninety percent (90%) of the total red snapper harvest. Therefore, management measures in the directed commercial or recreational fishery alone will never rebuild the stock without addressing the bycatch issue.

As recently as May 2004, NMFS observed the following:

Efforts to rebuild the Gulf red snapper are complicated by the significant amounts of bycatch that occur in the shrimp fishery. The effects of this bycatch on the red snapper population are substantially greater than the effect of the direct fishery. This is illustrated in the fact that ending overfishing and stock rebuilding within the next 100 years cannot be achieved at the current bycatch mortality rates (40 percent bycatch reduction) according to the red snapper stock assessment model, even if the red snapper fishery were eliminated.

⁵ In 2003, NMFS adopted Amendment 10 to the Shrimp FMP requiring the use of BRDs in the *eastern* Gulf to reduce shrimp trawl bycatch of finfish.

⁶ In the discussion of the proposed rule on Amendment 9, NMFS states, "Even if the directed fisheries for adult red snapper were eliminated, the bycatch of juvenile red snapper in shrimp trawls would still need to be reduced significantly for the adult spawning stock to recover." 62 Fed. Reg. 35774 (July 2, 1997).

⁷ Schirripa, M.J. and C.M. Legault, 1999, Status of the Red Snapper Fishery in the Gulf of Mexico: Updated through 1998. NMFS, SEFSC, SFD-99/00-75. 86pp +app.

Reef Fish FMP Amendment 22 at 46. Despite acknowledging that bycatch reduction is the key to rebuilding this stock, NMFS goes on to comment that the Reef Fish FMP is not the place to address shrimp regulations. Unfortunately, expected discussions regarding new shrimp trawl management measures (Shrimp FMP Amendment 13) were canceled a number of times in 2004 at the Gulf Fishery Management Council.

The fisheries regulatory establishment is plainly aware of the problem regarding overfishing of red snapper within the shrimp trawl fishery, but has failed to take corrective action.

B. New Research Shows BRDs Are Not Increasing Red Snapper Stocks

The recovery plan for red snapper was predicated on at least a forty-four percent (44%) reduction in juvenile red snapper bycatch by the shrimp trawl industry over the last five years. While the recreational and commercial sectors of the directed fishery adhered to their restrictions – with positive results – recent studies indicate that the BRDs being pulled by the shrimpers are getting no where near the established reduction goal.

NMFS has been monitoring the efficacy of BRD use through an observer program to ascertain whether the devices are meeting their assumed survival goals for juvenile red snapper. Since first required, the presumption was that the BRDs were meeting the forty-four percent (44%) mortality reduction goal. However, recent research out of the Southeast Fisheries Science Center (“SEFC”) indicates otherwise.

The most recent assessment of BRD performance in the Gulf of Mexico shrimp fishery indicates that the devices are producing only an average eleven and seven-tenths percent (11.7%) reduction in juvenile red snapper bycatch mortality.⁸ Non-

⁸ Status of Bycatch Reduction Device (BRD) Performance and Research in North-Central and Western Gulf of Mexico, April 2004, United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Science Center. SEDAR7-DW-38.

compliance with the regulations governing BRD installation and use, along with altered fishing behaviors, are cited as the main cause of low level of mortality reduction.⁹

Advice given to the Gulf Council by SEFC scientists in 2000 indicated that even if the use of BRDs achieved a reduction in bycatch mortality of forty percent (40%), it might be necessary to pursue other alternatives for reducing bycatch to achieve reductions in the sixty percent (60%) to eighty percent (80%) range by 2005.¹⁰ In reference to future increases in bycatch mortality reductions the report anticipated “the mechanisms to do this will have to be developed and debated over the next five years....”¹¹

Even in the face of these new studies, and despite the repeated requests of Petitioner,¹² the Council has failed to act. The Council does not even have a bycatch reduction provision under consideration. The undeniable fact is that the BRDs are not reducing the amount of bycatch they are required to reduce. Moreover, even if the required forty-four percent (44%) reduction is met by use of BRDs, such reduction is presently insufficient to offset the historical damage done to the stock by the shrimp trawls. The Gulf Council is fully informed of the situation and has chosen to simply postpone its consideration at their level. Therefore, emergency or interim action is required by the Secretary of Commerce to fulfill the statutory mandate on the regulations and the fishery management plans.

⁹ Daniel G. Foster, 1999–2003 North-Central and Western Gulf of Mexico BRD Performance Report to SEDAR, NOAA Fisheries, Southeast Fisheries Science Center.

¹⁰ J. E. Powers, C.M. Legaulty & R. Crabtree, Updated Projections for Gulf of Mexico Red Snapper, National Marine Fisheries Service, Southeast Fisheries Science Center, July 2000.

¹¹ Ibid. p.10

¹² Petitioner has requested a response to red snapper stock reduction on numerous occasions but NMFS has failed to act. See January 7, 2005, and February 25, 2005, correspondence from David Cummins to Ms. Julie Morris, Chair of the Gulf of Mexico Fishery Management Council.

C. Emergency Regulations or Interim Measures are Necessary to Avoid Further Overfishing

16 U.S.C. § 1855 (c)(1) provides:

If the Secretary finds that an emergency exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing, without regard to whether a fishery management plan exists for such fishery.

Here, by NMFS' own studies and reports, an emergency exists regarding overfishing of red snapper within the shrimp trawl fishery. Accordingly, the Secretary of Commerce must immediately promulgate and enforce emergency or interim regulations to prevent such overfishing. Specifically, the emergency regulations or interim measures must result in bycatch reduction acceptable to repair any damage done by the previous measures and allow for the rebuilding of the red snapper within the time frame of the reef fish FMP. Such measures should include strict bycatch quotas tracked by observer data, bag limits, TAC restrictions, time and area closures or restrictions, improved BRDs, season limitations, seasonal closures, and other reduction measures. A firm target for bycatch reduction of between sixty percent (60%) and eighty percent (80%) of historic levels should be set, with a time line established that achieves that target within the shortest time possible.

The directed recreational and commercial red snapper fishery has already adopted many of these measures in an effort to rebuild red snapper stock. A mandated effort reduction program must be applied to the Gulf Shrimp Fleet.

V. CONCLUSION

Compelling new studies show that the BRDs used in the shrimp trawl fishery are not meeting the level of reduced mortality on which the recovery of red snapper is

premised. While the members of the directed fishery (commercial and recreational) share the responsibility of rebuilding the red snapper stock with the shrimp trawl industry, recovery cannot happen without shrimp trawl bycatch reduction at a level higher than a forty-four percent (44%) bycatch reduction. Emergency and interim action is specifically anticipated in the Magnuson-Stevens Act for situations just like this, where the loss to the fishery is high and immediate action can reverse decreases in the fishery. Therefore, the Secretary of Commerce must adopt this petition and establish the requested emergency regulations or interim measures. CCA views a reasonable time to consider this petition should not exceed June 1, 2005.

Respectfully Submitted,

Robert G. Hayes
Counsel to the Coastal Conservation Association