

Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS") (Secretary Gutierrez, NOAA, and NMFS are collectively referred to as "Defendants") to comply with their statutory obligation to publish certain approved fishery management plan amendments pertaining to the management of red snapper stock in the Federal Register in accordance with the Magnuson-Stevens Act. In particular, CCA challenges the failure of Defendants to timely publish the Reef Fish Fishery Management Plan, Final Amendment 22, May 2004 ("Amendment 22") and its accompanying measures and regulations ("Reef Fish FMP") as required by 16 U.S.C. §§1854(b)(3). CCA has certain substantive objections to Amendment 22. However, in order for rules issued under a Fish Management Plan to be subject to judicial review, an action must be filed within thirty (30) days of publication of the regulations in the Federal Register. By failing to publish Amendment 22 in the Federal Register, Defendants have prevented judicial review under Section 1855(f)(1) of the Magnuson-Stevens Act.

3. Additionally, CCA challenges the substantive decisions made by Defendants pertaining to the approval of Reef Fish Fishery Management Plan ("Reef Fish FMP"), Final Amendment 22, May 2004 ("Amendment 22") and the adoption of Amendment 22 without mandating bycatch reduction standards and regulations in the Shrimp Fishery in order to prevent overfishing of red snapper within the Reef Fish Fishery.

4. It is well established that there are two principal causes of man-made mortality in the Red Snapper Fishery. The first is the Directed Red Snapper Fishery (commercial and recreational fishing activities), which presently catches an estimated 9.12 million pounds of red snapper annually. This directed fishery is controlled by quotas, size and bag limits, total allowable catch ("TAC") restrictions and time limits in an effort to rebuild stock. However, the second and primary cause of red-snapper mortality is the bycatch of the Shrimp Fishery, which depletes juvenile red snapper stock in connection with shrimp trawling activity.

5. Rather than place restrictive measures on the shrimp industry to avoid the devastating effects of bycatch, Defendants initially chose to place controls on the Directed Fishery and merely required the shrimp industry to reduce its impact on the mortality of red

snapper through the use of mechanical bycatch reduction devices ("BRDs"). Optimistically and largely without basis, NMFS projected that the use of BRDs by shrimp trawlers would result in a forty-four percent (44%) reduction in bycatch. 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"). Thus, recovery and the avoidance of continued overfishing of red snapper was made dependant upon the effective use of BRDs by the shrimp industry.

6. Current scientific evidence reveals that the use of BRDs fails and is wholly inadequate to meet the bycatch reduction goal for red snapper by a significant margin. Since the prevention of overfishing and recovery of the red snapper stock is predicated and dependent upon at least a forty-four percent (44%) bycatch reduction in the Western Gulf Exclusive Economic Zone ("EEZ"), and the most recent scientific evidence establishes that current use of BRDs yields only an approximate twelve percent (12%) reduction in bycatch, additional measures and regulations regarding bycatch are required to prevent overfishing and rebuild red snapper stocks. Defendants have concluded that the reduction will occur as a result of a predicted thirty to fifty percent (30%-50%) reduction in the shrimp fleet over the next thirty (30) years. Defendants reliance on the reduction is purely speculative. As a result, Amendment 22 wholly fails to address bycatch reduction in the shrimp industry.

7. Defendants' approval of Amendment 22 without addressing the primary basis for man-made mortality in the Red Snapper Fishery directly violates the Magnuson-Stevens Act's statutory mandates to prevent overfishing and to make fishery management decisions based on the best scientific information available. Moreover, Amendment 22 ignores the known impact of the shrimp industry on red snapper mortality. As a result, Defendants have adopted a rebuilding goal, which at the time of its adoption, cannot be achieved through any measures presently in effect.

8. Given the severity of the negative effects Defendants' action – or apparent inaction – are causing red snapper, CCA respectfully requests that the District Court assign this

matter for hearing at the earliest possible date and expedite the matter in every possible way, pursuant to 16 U.S.C. §1855(f)(4).

APPLICABLE STATUTES, JURISDICTION, AND VENUE

9. This action arises under the Magnuson-Stevens Act, NEPA, and the APA.

10. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act. That Act provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under” the Act. 16 U.S.C. §1861(d). The Magnuson-Stevens Act also 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). Defendants published the final rule implementing Amendment 22 on June 2, 2005 in the Federal Register. *See 70 Fed. Reg.* 32266 (June 2, 2005). The Magnuson-Stevens Act further provides jurisdiction in this Court over actions taken under regulations which implement an FMP. 16 U.S.C. §1855(f)(2).

11. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1331 (Federal Question); 28 U.S.C. §1361 (Mandamus); 28 U.S.C. §1346 (United States as a defendant); 28 U.S.C. §2201 (injunctive relief); 28 U.S.C. §2202 (declaratory relief); and 5 U.S.C. §§701-706 (APA).

12. An actual, justiciable controversy exists by and between CCA and Defendants. Accordingly, the relief requested herein is proper under 28 U.S.C. §2202 and 5 U.S.C. §§705 and 706.

13. Venue in this Court is proper under 28 U.S.C. §1391(e)(2) and (3).

14. In the event CCA prevails on these claims, it will be entitled to, and will seek, an award of attorneys fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412.

15. Defendants' actions are causing immediate, severe and potentially irreparable harm to red snapper stocks. Accordingly, resolution on the merits of this matter should be expedited in every way possible pursuant to 16 U.S.C. §1855(f)(4).

16. Service of process is pursuant to Fed. R. Civ. P. Rule 4(i)(1) and (2).

PARTIES

17. Plaintiff CCA is a Texas corporation with its headquarters in Houston, Texas. CCA is a marine conservation group with approximately 85,000 members throughout fifteen states. The vast majority of its members, however, live near the Gulf of Mexico and fish within its waters. Many of its members fish for red snapper, which is one of the premiere sport fish in the upper Gulf. CCA has been actively involved in the management of this fishery for twenty-five years. It has participated in the development of most of the regulations and measures governing the Gulf of Mexico now in place and has generally supported the proposed and enacted recovery plans for red snapper. CCA's members are directly affected by Amendment 22, to the extent Amendment 22 sets a recovery goal that cannot be achieved with regulations now in place, and as an interested and affected party brings this suit on behalf of itself and its adversely affected members.

18. CCA and its members are adversely affected by Defendants' failure to comply with the Magnuson-Stevens Act in the adoption of Amendment 22, because members, staff, and officers of CCA use and enjoy the Gulf of Mexico for numerous activities, including recreational fishing. As part of their use and enjoyment of these waters, members, staff and officers of CCA value the ocean's marine life in a healthy state. As a result of their activities, members of CCA receive social, aesthetic, recreational, scientific, educational and physical benefits from the existence of red snapper in the Gulf of Mexico. These benefits have been directly impaired by Defendants' ignoring the failure of the shrimp industry to achieve a fifty percent (50%) reduction in the bycatch of juvenile red snapper, thereby making it impossible to maintain a recreational red snapper fishery, prevent overfishing and rebuild the red-snapper stock. Unless this Court

grants the requested relief, CCA will continue to be impaired by Defendants' actions in failing to promulgate management measures that prevent overfishing and bycatch of red snapper pursuant to the Magnuson-Stevens Act. CCA has no other adequate remedy at law.

19. Defendant Secretary Gutierrez, in his official capacity as Secretary of Commerce of the United States, is the Federal official responsible for the operations of NOAA and NMFS. Secretary Guitierrez is also the official obligated to publish regulations under the Magnuson-Stevens Act. Secretary Guitierrez is sued in his official capacity as the chief officer of the Department charged with overseeing the proper administration and implementation of the Magnuson-Stevens Act, NEPA, and the APA.

20. Defendant NOAA is an agency of the United States Department of Commerce with supervisory responsibility for NMFS. The Secretary of Commerce has delegated responsibility to ensure compliance with the Magnuson-Stevens Act, NEPA, and the APA to NOAA, which in turn has sub-delegated the responsibility to NMFS.

21. Defendant NMFS is the Federal agency with primary responsibility for administering and enforcing the Magnuson-Stevens Act and performing NEPA compliance on its Magnuson-Stevens Act actions. NMFS has final management authority over red snapper and other reef fish in the Gulf of Mexico. NMFS is the Federal agency that approved Amendment 22 to the Reef Fish FMP and its implementing regulations, which are the subject of this Complaint.

STATUTORY AND REGULATORY BACKGROUND

22. The Magnuson-Stevens Act establishes an elaborate system for conserving and managing fish populations primarily in the United States EEZ, which extends from the seaward boundaries of state waters to 200 miles offshore, or to an international boundary with neighboring countries, whichever is less.

23. 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).

24. In enacting the Sustainable Fisheries Act of 1996 to amend the Magnuson-Stevens Act, Congress found that:

"Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) inadequacy of fishery resource conservation and management practices and controls. . . ."

16 U.S.C. §1801(a)(2).

25. In order to manage the nation's fish stocks and prevent overfishing, the Magnuson-Stevens Act created eight Fishery Management Councils, each responsible for generating Fishery Management Plans to regulate fishing within its region. 16 U.S.C. §1852. These Fishery Management Plans must balance the needs of fishery users against conservation principles by reference to ten National Standards. 16 U.S.C. §1851(a). Fishery Management Plans must, to comply with the statutory requirements, 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); 50 C.F.R. §§600-305-355 (guidelines implementing the National Standards).

26. The regional councils submit their Fishery Management Plans to the Secretary of Commerce, who acts through NMFS. NMFS solicits public comment and reviews the Fishery Management Plans 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 a Fishery Management Plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. §1854(a)(3).

27. Section 1854(b)(3) and (c)(7) of the Magnuson-Stevens Act requires that the Secretary of Commerce, acting through NMFS, publish final regulations in the Federal Register within 30 days after the end of the comment period for the proposed regulation.

28. The Magnuson-Stevens Act also 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 published in the Federal Register. 16 U.S.C. §1855(f)(1). If the challenged regulations and elements of an adopted amendment are not published in the Federal Register, they are not subject to judicial review.

29. The APA provides that “[a] person 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 a 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 action, findings, and conclusions found to be (A) arbitrary, capricious, and abusive 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).

30. In addition to the publication requirements, the Magnuson-Stevens Act establishes National Standards for creating Fishery Management Plans. National Standard 1 of the Magnuson-Stevens Act requires that conservation and management measures shall "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery. . ." 16 U.S.C. §1851(a)(1).

31. The Magnuson-Stevens Act mandates that optimum yield cannot exceed Maximum Sustainable Yield ("MSY") and must provide for rebuilding of overfished stocks to levels consistent with producing MSY. 16 U.S.C. §1802(28).

32. The Magnuson-Stevens Act defines the terms “overfishing” and “overfished” “[to] mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. §1802(29).

33. The National Standard Guidelines promulgated to assist in development of Fishery Management Plans and Amendments to Fishery Management Plans state that “[t]he

national standards are statutory principles that must be followed in any [Fishery Management Plan].” 50 C.F.R. §600.305.

34. The regulatory guidelines addressing optimum yield and the precautionary approach state that the “Secretary has an obligation to implement and enforce the [Fishery Management Plan] so that [optimum yield] is achieved. If management measures prove unenforceable . . . or are not rigorous enough to realize [optimum yield] --- they should be modified.” 50 C.F.R. §600.301(f)(5)(i).

35. The regulatory guidelines further state that “even if no overfishing resulted from exceeding [optimum yield], continual harvest at a level above [optimum yield] would violate National Standard 1, because [optimum yield] was not achieved on a continuing basis.” *Id.*

36. 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 amendment 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:

“[D]evelop 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 affected area.” 16 U.S.C. §1881(d)(f).

37. In response to this statutory mandate, and based upon results from the cooperative research program showing significant bycatch in the Shrimp 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). NMFS later adopted Amendment 10 to the Shrimp FMP, which mandated the use of BRDs in the Eastern Gulf in order to reduce shrimp trawl bycatch of finfish.

38. The Magnuson-Stevens Act also requires that any Fishery Management Plan, and any regulation promulgated to implement a Fishery Management Plan, be consistent with National Standard 2, which requires that “conservation and management measures . . . be based upon the best scientific information available.” 16 U.S.C. §1851(a)(2).

39. Before NMFS undertakes a major action significantly affecting the quality of the human environment, NEPA requires that the agency write a detailed statement evaluating “the environmental impact of the proposed action.” 42 U.S.C. §4332(2)(C)(i). The agency may prepare an Environmental Assessment (“EA”) to determine whether an action constitutes a major federal action significantly affecting the quality of the human environment and thus necessitates preparation of an Environmental Impact Statement (“EIS”), unless the agency has already decided to prepare an EIS. *See* 40 C.F.R. §1508.9.

40. Council on Environmental Quality (“CEQ”) and NOAA Guidelines in turn require that, to make the determination of whether an EIS is needed, the EA must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,” 40 C.F.R. §1508.9(a)(1), and evaluate the direct, indirect, and cumulative impacts of the proposed action. *See* 40 C.F.R. §§1508.8 and 1508.9; NOAA Administrative Order 216-6 at 5.03b (June 3, 1999).

41. As the CEQ and NEPA regulations make clear, an EA or EIS is the vehicle for analysis of federal agency actions upon the environment and the consideration of reasonable alternatives that would avoid or minimize the adverse impacts of those actions. 40 C.F.R. §1502.1. The primary purpose of an EA or EIS “is to serve as an action forcing device to ensure

that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. §1502.1. Accordingly, an EA or EIS “is more than a disclosure document” and is to be used by the Federal officials in conjunction with other relevant materials to plan actions and make decisions.” *Id.* An EA or EIS must be prepared early enough in the agencies decision making process “so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. §1502.5; *see also* 40 C.F.R. §1502.2(g) (an EIS “shall serve as the means of asserting the environmental impact of proposed agency actions, rather than justifying decisions already made.”).

42. The EA or EIS must consider reasonable alternatives to the proposed action that have the potential to mitigate the potential negative impacts of action, 42 U.S.C. §4332(2)(C)(iii), 40 C.F.R. §1500.2(e); “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” 42 U.S.C. §4332(2)(C)(iv); and “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. §4332(2)(C)(v).

43. The APA provides that “[a] person 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 a 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 action, findings, and conclusions found to be (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).

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

44. Red snapper is one of the premiere sport fish in the upper Gulf of Mexico. By 1979, the Gulf of Mexico Fisheries Management Council (“Gulf Council”) determined that red snapper stocks were overfished. The Gulf Council is one of eight regional Fisheries Management Councils created under the Magnuson-Stevens Act.

45. There are two principal sources of man-made mortality in the Red Snapper Fishery. The first is the Directed Red Snapper Fishery, which today cumulatively catches approximately 9.12 million pounds of red snapper annually. The Directed Red Snapper Fishery is strictly controlled and it is determined by quotas and, season, size and bag limits.

46. The other source of mortality is the bycatch of the shrimp industry, which catches juvenile red snapper in connection with its shrimp-trawling activity. Approximately eighty percent (80%) of every year class¹ of Gulf red snapper is caught and killed in shrimp trawls at an average size of four inches. NMFS has determined that the Red Snapper Fishery is overfished, and that overfishing continues to occur. Moreover, NMFS admits that the overfishing is a result of the “high level of bycatch mortality on juvenile red snapper by the shrimp trawl fishery.” Amendment 22, at 5.

47. The original Reef Fish FMP set forth management measures to rebuild declining fish stocks, including red snapper. Prior to the adoption and publication of Amendment 22, this stock was under a rebuilding plan to restore it to a twenty percent (20%) spawning potential ratio (“SPR”) by 2019. NMFS has since determined that the twenty percent (20%) SPR goal is inconsistent with National Standard Guidelines:

“Definitions of stock size, the over-fish 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.”

Amendment 22, at 1.

¹ Year class is a term used to describe those fish that reach a certain age in a given year.

48. Amendment 22 assumes rebuilding of the red-snapper stock can be accomplished by continuing the directed red snapper harvest at 9.12 million pounds per year and reducing the shrimp bycatch by fifty percent (50%). Defendants base this conclusion on a possible reduction of thirty to fifty percent (30%-50%) in the size of the shrimp fleet over the next thirty (30) years. The revised management measures and regulations specified in Amendment 22 are even more restrictive on the directed red snapper fishery, yet there is no attempt in Amendment 22 to improve the existing regulations for shrimp bycatch or offer any new ones.

49. Despite the new regulations set forth in Amendment 22, the red snapper stock cannot be rebuilt without addressing the red snapper depredation caused by the shrimp trawler bycatch. Without additional regulations on the shrimp industry, NMFS cannot meet the requirements of the Magnuson-Stevens Act to prevent overfishing of red snapper in the Gulf of Mexico and to rebuild the red snapper stock in the Gulf of Mexico.

50. Amendment 22, with its proposed red snapper stock rebuilding schedule, was first published, with a Request for Comment, on November 23, 2004. 69 Fed. Reg. 68199. The comment period was closed on January 7, 2005. Pursuant to 16 U.S.C. §§1854(b)(3), Amendment 22 was to be rejected or adopted, and published, in final form, by February 7, 2005.

51. The Secretary of Commerce failed to publish Amendment 22 in the Federal Register. Nevertheless, the NMFS has indicated that Amendment 22 has been approved as of March 9, 2005. By failing to publish Amendment 22 in the Federal Register within thirty (30) days of approval, the Secretary attempted to prevent judicial review of the new measures and regulations set forth in Amendment 22.

52. The failure to timely publish Amendment 22 was arbitrary, capricious and an abuse of discretion. Such failure violates the due process rights of CCA and its members and violates the Magnuson-Stevens Act. Though the regulations in Amendment 22 do not adequately protect the rights of CCA and its members in regard to red snapper, the CCA and its members have been denied a forum to challenge the substance of Amendment 22 due to the failure of the Secretary to publish Amendment 22 in the Federal Register.

53. In addition, despite the new regulations set forth in Amendment 22, the red snapper stock cannot be rebuilt without, at least, the established level of bycatch reduction required in the Shrimp FMP. Amendment 9 to the Shrimp FMP requires the use of NMFS certified BRDs in shrimp trawl nets to reduce the bycatch of red snapper by forty-four percent (44%) from the average mortality from the years 1984 through 1989. This restriction applies to the EEZ from Cape San Blas, Florida to the Texas-Mexico border, where the majority of red snapper bycatch occurs.

54. Although red snapper recovery efforts to date have been premised on a forty-four percent (44%) reduction in bycatch, closed seasons, commercial quotas and recreational bag limits, NMFS studies have revealed that BRDs have achieved reduction in red snapper bycatch in the shrimp-trawl fishery of only approximately twelve percent (12%). Although non-compliance by shrimpers was cited as the primary reason for this failure, other factors impact the effectiveness of the BRDs. Amendment 22's establishment of a rebuilding target of 2032 is based on a fifty percent (50%) reduction in bycatch that was adopted without any reference to the present actual level of bycatch reduction, despite such information being well known to Defendants. Defendants reliance on a reduction in the size of the fleet is totally outside of its control and was not included in its analysis of the potential for a fifty percent (50%) reduction in bycatch.

55. According to the best available science, 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. NMFS has admitted, in connection with Amendment 9 to the Shrimp FMP, that “[e]ven 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 adult spawning stock to recover.” 62 Fed. Reg. 35774 (July 2, 1997).

56. As recently as May 2004, NMFS concluded that:

“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 directed 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.”

Amendment 22, at 46.

57. NMFS further found that:

“The effects [of this bycatch] are also apparent in comparisons of the time it would take to rebuild red snapper [sic]. Whereas a 10 percent reduction in shrimp effort (and, presumably bycatch) typically speeds up the rebuilding time by 10 years or more, a reduction in the directed catch of over 30 percent (from 9.12 to 6 mp wwt) only speeds up rebuilding by a few years . . . As a result, ending overfishing and allowing the red snapper stock to rebuild cannot occur through regulations on the directed fishery alone.”

Amendment 22, at 46.

58. Moreover, NMFS has recognized that “fishing mortality rates associated with the directed and the shrimp trawl bycatch component of the red snapper fishery” are linked, which “requires that both rates be reduced proportionally to achieve [maximum sustainable yield].”

Amendment 22, at 30.

59. Therefore, management measures in the Directed Red Snapper Fishery alone will never rebuild the stock without addressing the bycatch issue.

60. Because approximately ninety-nine percent (99%) of all red snapper bycatch is taken by the Gulf Shrimp Fishery, dramatic reduction of shrimp-trawl bycatch should receive the highest priority from NMFS. However, while Amendment 22 notes problems associated with shrimp-trawl bycatch, Amendment 22 adopts a rebuilding standard without proposing or even assuming any new regulations to further reduce shrimp trawl bycatch.

61. Moreover, although Amendment 22 states that it is inappropriate for NMFS to regulate bycatch through the Reef Fish Fishery Management Plan, NMFS has made no proposal

to regulate shrimp trawl activity or reduce bycatch in the Shrimp Fishery by amendment to the Shrimp FMP.

62. Without additional regulations on the Shrimp Fishery, NMFS cannot meet its obligations under the Magnuson-Stevens Act to prevent overfishing of red snapper in the Gulf of Mexico.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **(Declaratory Judgment)**

63. Plaintiff CCA incorporates the allegations set forth in paragraphs 1 through 62 above, as though fully set forth herein.

64. Sections 1854(b)(3) and (c)(7) of the Magnuson-Stevens Act require that regulations to a Fishery Management Plan be published in the Federal Register within thirty (30) days after the end of the comment period.

65. The Secretary of Commerce has failed to timely publish Amendment 22 in the Federal Register. Plaintiff asks that the Court declare such failure to be a violation of the Magnuson-Stevens Act.

SECOND CLAIM FOR RELIEF **(Order Compelling Performance of Duty)**

66. CCA incorporates the allegations set forth in paragraphs 1 through 62 and 64 through 65 above, as though fully set forth herein.

67. CCA asks that the Court issue an order in the nature of mandamus, injunction or otherwise, directing the Secretary of Commerce to fulfill his statutory obligations and timely publish Amendment 22 in the Federal Register.

THIRD CLAIM FOR RELIEF
First Alternative Claim for Declaratory Judgment

(Amendment 22 violates the Magnuson-Stevens Act's Requirements to Prevent Overfishing and Achieve Optimum Yield on a Continuing Basis)

68. Plaintiff CCA incorporates by reference the allegations set forth in paragraphs 1 through 62 above as if fully set forth herein.

69. National Standard 1 of the Magnuson-Stevens Act requires that Conservation and Management Measures “prevent overfishing while achieving, on a continuing basis, the optimum yield from *each* fishery . . .” 16 U.S.C. §1851(a)(1) (emphasis added).

70. The regulatory guidelines for National Standard 1 of the Magnuson-Stevens Act explain that “even if no overfishing resulted from exceeding [optimum yield], continual harvest at a level above [optimum yield] would violate National Standard 1, because [optimum yield] was not achieved on a continuing basis.” 50 C.F.R. §600.310(f)(5)(i).

71. Section 303(a)(1) of the Magnuson-Stevens Act, 16 U.S.C. §1853(a)(1), further requires that the Fishery Management Plans contain conservation and management measures that are adequate to prevent overfishing.

72. Amendment 22 fails to comply with the mandates of National Standard 1 and the Magnuson-Stevens Act requirements by failing to address shrimp trawl bycatch, or otherwise propose any new regulations to further reduce shrimp trawl bycatch, and thus reduce overfishing and rebuild red snapper stocks. By failing to address overfishing via a reduction of shrimp trawl bycatch, Amendment 22 unnecessarily and improvidently places too great a burden on the Directed Red Snapper Fishery and fails to address the primary cause of red snapper overfishing in the Gulf.

73. Amendment 22 violates National Standard 1 and Section 303(a)(1) of the Magnuson-Stevens Act by failing to prevent overfishing of red snapper and failing to achieve optimum yield on a continuing basis.

74. NMFS decision to adopt Amendment 22 without addressing shrimp industry bycatch is arbitrary, capricious, contrary to law and is an abuse of agency discretion in violation of the APA, 5 U.S.C. §706(2).

75. NMFS violations of the Magnuson-Stevens Act and the APA have caused CCA irreparable injury for which it has no other adequate remedy at law.

FOURTH CLAIM FOR RELIEF
Second Alternative Claim for Declaratory Judgment

(Amendment 22 violates the Magnuson-Stevens Act's Requirement
that Regulations be Based on the Best Available Science)

76. CCA incorporates by reference the allegations set forth in paragraphs 1 through 62, as though fully set forth herein.

77. National Standard 2 requires that conservation and management measures “be based upon the best scientific evidence available.” 16 U.S.C. §1851(a)(2). Amendment 22 violates National Standard 2 by failing to address the cause of overfishing in the Gulf of Mexico attributable to the high level of bycatch mortality on juvenile red snapper in the Shrimp Fishery due to trawling (Reef Fish FMP, Amendment IX, 62 Fed. Reg. 35774 (July 2, 1997)); by relying on an economic study to bolster its conclusion that thirty to fifty percent (30%-50%) of the fleet would stop fishing and that result would be a fifty percent (50%) reduction in bycatch; by ignoring scientific data finding that BRDs are producing an average reduction of juvenile red snapper bycatch mortality of only approximately twelve percent (12 %), by failing to take into account the failure of the BRD’s to reduce bycatch from 1997 to 2005 in the establishment of the recovery timetable, when NMFS mandated a reduction in bycatch mortality pursuant to the use of BRDs in excess of forty percent (40%) and adapted the recovery goal based on that percentage reduction; and that even if the required forty-four percent (44%) reduction is met by the use of BRDs, such reduction is presently insufficient in the rebuilding period to offset the historical damage done to the red snapper stock by shrimp trawls.

78. NMFS' decision in adopting Amendment 22, without addressing the best available scientific data indicating that overfishing is derived almost exclusively from shrimp trawl bycatch, is arbitrary, capricious, contrary to law and is an abuse of agency discretion in violation of the APA, 5 U.S.C. §706(2).

79. NMFS' violation of the Magnuson-Stevens Act and the APA has caused CCA irreparable injury for which it has no other adequate remedy at law.

FIFTH CLAIM FOR RELIEF
Third Alternative Claim for Declaratory Judgment

(Amendment 22 violates the Magnuson-Stevens Act's Requirement That Conservation and Management Measures Shall Minimize Bycatch, to the Extent Practicable)

80. CCA incorporates by reference the allegations set forth in paragraphs 1 through 62 above, as though fully set forth herein.

81. National Standard 9 of the Magnuson-Stevens Act requires that 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." 16 U.S.C. §1851(a)(9).

82. The regulatory guidelines for National Standard 9 of the Magnuson-Stevens Act set as the first priority "to avoid catching bycatch species where practicable... Any proposed conservation and management measure that does not give priority to avoiding the capture of bycatch species must be supported by appropriate analyses." 50 C.F.R. §600.350(d).

83. Amendment 22 fails to comply with the mandates of National Standard 9 and the Magnuson-Stevens Act requirements regarding minimization of bycatch by failing to address shrimp trawl bycatch or otherwise propose any new regulations to further reduce shrimp trawl bycatch, and thus reduce overfishing and rebuild red snapper stocks. By failing to address overfishing via a reduction of shrimp trawl bycatch, Amendment 22 neither minimizes bycatch

nor minimizes the mortality of such bycatch, as mandated by National Standard 9, and fails to address the primary cause of red snapper overfishing in the Gulf.

84. NMFS decision to adopt Amendment 22 without addressing shrimp industry bycatch in violation of National Standard 9 is arbitrary, capricious, contrary to law and is an abuse of agency discretion in violation of the APA, 5 U.S.C. §706(2).

85. NMFS violations of the Magnuson-Stevens Act and the APA have caused CCA irreparable injury for which it has no other adequate remedy at law.

SIXTH CLAIM FOR RELIEF
Fourth Alternative Claim for Declaratory Judgment

(Amendment 22 Violates NEPA by Not Adequately Addressing the Environmental Consequences by Failing to Increase Regulations on the Shrimp Industry)

86. CCA incorporates by reference the allegations set forth in paragraphs 1 through 62 above, as though fully set forth herein.

87. NEPA requires NMFS, in the context of developing Fishery Management Plans and amendments thereto, to prepare a detailed statement which addresses “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. §4332(2)(c).

88. NMFS failed to fully address well documented scientific concerns about the environmental impact on the red snapper stock and on efforts to prevent overfishing and rebuild the stock if no action is taken to reduce bycatch in the Shrimp Fishery. NMFS further failed to fully disclose the unavoidable adverse effects of failing to take any action involving shrimp

industry bycatch. Finally, Amendment 22 fails to establish, assess or fully analyze environmental affects of taking no action with regard to the shrimp industry.

89. NMFS violated NEPA by proceeding with Amendment 22 on the basis of an inadequate EA.

90. By acting on the basis of an inadequate and unlawful EA, NMFS acted arbitrarily, capriciously, contrary to law and is an abuse of agency discretion in violation of the APA, 5 U.S.C. §706(2).

91. NMFS violations of NEPA and the APA have caused CCA irreparable injury for which it has no other adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Coastal Conservation Association respectfully requests this Court to enter the following relief:

1. A declaratory judgment that Defendants have violated the Magnuson-Stevens Act by failing to cause Amendment 22 to be timely published in the Federal Register.

2. An Order directing Defendants to timely publish Amendment 22 in the Federal Register.

3. A declaratory judgment that Amendment 22 violates National Standard 1 and Section 303(a)(1) of the Magnuson-Stevens Act and the APA by failing to prevent overfishing of red snapper and achieve the optimum yield for red snapper.

4. A declaratory judgment that Amendment 22 violates National Standard 2 and the APA by failing to address bycatch in the Shrimp Fishery despite the best available science that overfishing of red snapper is derived almost exclusively from shrimp trawl bycatch.

5. A declaratory judgment that Amendment 22 violates National Standard 9 and the APA by failing, to the extent practicable, to minimize bycatch in the Shrimp Fishery despite evidence from fishery monitoring that red snapper trawl escapement is far below the standard upon which stock rebuilding is premised.

-- and --

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CERTIFICATE OF SERVICE

I hereby certify that on June 3rd, 2005, a copy of the foregoing document was served upon all known counsel of record by mailing via United States First Class Mail, Postage Prepaid, in accordance with the Federal Rules of Civil Procedure, properly addressed as follows:

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