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July 22, 2008

Dr. Thomas McIlwain, Chair
Gulf of Mexico Fishery Management Council
2203 N. Lois Avenue
Suite 1100
Tampa, FL 33607

Dear Dr. McIlwain:

On behalf of the Coastal Conservation Association and our more than 75,000 members in the Gulf States, I am taking this opportunity to voice our serious concerns over certain issues pertaining to the management of grouper that are currently under consideration by the Gulf Council.

Despite repeated objections from our organization and others, the Council staff and the regional office of the National Marine Fisheries Service (NMFS) have continued to support ongoing Council proposals for an "interim allocation" and recovery measures for gag and red grouper as contained in Amendment 30B to the Reef Fish Management Plan without conducting or supplying an economic impact analysis as mandated by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (P.L. 109-479) (Act). Such impact analyses have previously been used to inform both the Council members and the public of the direct consequences of any Council action since the inception of the Gulf Council.

Recent amendments to the Act specifically require the collection of economic information and descriptions of all sectors of the fishery, "including its economic impact," to allocate harvest restrictions in a fair and equitable fashion across all sectors of a fishery, taking into account economic impacts and establishing catch limits and accountability measures to ensure that overfishing does not occur. While NMFS and the Council have rightly placed great emphasis on establishing regulations to deal with overfishing, there has been little effort expended to satisfy the economic criteria which receives equal emphasis in the Act.

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The regional office and Council staff have maintained during recent meetings on this issue that a short colloquy submitted for the record between Senators Lott and Stevens before passage of the Senate bill, not upon final passage of the Act, apparently “clarified” that the language contained in Section 303 (as amended by the Act) means something entirely different than the plain reading of the statutory text.

We most strongly disagree. We believe that there is no basis, either in the science of economics or under U.S. law, to arrive at such a conclusion. The term “economic impact” is a clearly understood term of art in the field of economics. The legal standard for agency interpretation is well-established under *Chevron*, “if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹ Indeed, the starting point in discerning Congressional intent is the existing statutory text², and not by “psychoanalyzing those who enacted it”.³

A quick review of the relevant statutory language in the Act provides unambiguous intent that a complete economic impact analysis is needed for all sectors. The Act requires all fishery management plans to –

*(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, **recreational**, charter fishing, and fish processing in the fishery, including, but not limited to, . . . **economic information necessary to meet the requirements of this Act** . . .*

*(13) include a description of the commercial, **recreational**, and charter fishing sectors which participate in the fishery, **including its economic impact**, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, **recreational**, and charter fishing sectors;*

*(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, **allocate, taking into consideration the economic impact of the harvest restrictions** or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits **fairly and equitably** among the commercial, **recreational**, and charter fishing sectors in the fishery . . .*

(16 U.S.C. 1853(a)(5), (13), (14)) (emphasis added throughout)

¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

² See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 (1999).

³ *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279, 116 S. Ct. 637 (1996).

Pursuant to the plain reading of the statutory text above, the Council and NMFS are required to provide a thorough analysis of the economic impacts of any proposed harvest restrictions on each sector and ensure that allocations of the resource are made in a fair and equitable manner based on these economic considerations. There is no other way to read the above legal requirements.

Even if the Council staff and NMFS wanted to utilize the brief colloquy between the two Senators, the statute must be sufficiently ambiguous⁴ (which, as noted above, the statute is clear) and in addition, the agency's interpretation of the statute must still be based on a permissible construction of that statute.⁵

Here the Act was recently amended in numerous different places to specifically require the thorough consideration of more "economic information" to better understand the overall "economic impacts" on the various sectors in order to "fairly and equitably" allocate the fishery resource.⁶ However, the agency is now attempting to utilize a brief statement submitted for the record between two Senators to justify a more restrictive review and analysis of the economic impacts on the recreational sector. The Supreme Court has cautioned agencies numerous times on utilizing extraneous statements of legislators to interpret statutory text. Even the contemporaneous remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.⁷ The Court warns that, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."⁸

In light of the Court's caution against the use of certain legislative history and, more importantly, the clear reading of the statutory text, the Council and NMFS must provide a thorough economic analysis of the impacts on all sectors. However, if the Council and NMFS decide to depend on a brief colloquy to support an interpretation of the statute that prohibits economic review, this will be an impermissible construction of the statute and a clear violation of law.

Economic analysis should be used to assist policymakers in developing allocation policy and decisions. Such analysis focuses on the distributional impacts and efficiency of such allocations. Distributional questions are addressed by examining economic impacts. Economic impact calculations allow an allocation change to be examined in terms of who specifically in the economy will be impacted by such a change. Economic impacts can be measured in terms of jobs, value added, total output, tax revenues and personal income.

⁴ See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

⁵ See, e.g., *id.*

⁶ See generally 16 U.S.C. 1853(a)(5), (13), (14)

⁷ *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722 (1979);

⁸ *U.S. v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 1683 (1968).

Questions arising from allocation decisions dealing with the “efficiency” of the action are quite correctly addressed by measurement of societal net benefits. Measuring net benefits means subtracting the costs of a policy from the benefits society receives, hence the term cost/benefit analysis. We do not contend that the use of a cost/benefit analysis is precluded by the Act. We do not argue that such analysis is not appropriate when making allocation decisions. We simply state that the Act explicitly requires a direct consideration of economic impacts and without the results of such an analysis the Council cannot legally take action on allocations.

CCA believes that a clear understanding of both the distributional aspects and the economic efficiency of an allocation decision are necessary to provide decision-makers with the factual means of evaluating their final decision. Policies should be chosen using cost/benefit criteria while examining the distributional impacts to soften the economic blow from the policy change. For example, if two different allocations resulted in the same net benefits, policymakers should then use economic impacts to examine the distribution of those costs and benefits. If one policy results in fewer job losses, tax losses to states or less loss in revenues to fishers and fisheries associated businesses, that distributional parameter should be taken into account and the policy with better distributional outcomes selected.

The discussion of allocation changes included in Amendment 30B clearly reveals the need for a consideration of economic impacts in discussing the consequences of the allocation alternatives:

“Although the three alternatives do not change the share allocation very much, in the long term any shift in allocation could have a **negative impact** on the sector that loses shares. The **cumulative impacts**, when combined with other actions in the reef fish fishery, can lead to a **loss of income and possibly a loss of jobs** for the commercial sector. A loss of shares for the recreation sector can have a negative impact on the recreational fishery when combined with other regulations in the reef fish fishery.” (p. 46).

Unfortunately, without an impact analysis the staff is left with nothing to offer but subjective opinions on the distribution of the impacts. In this case, the subjective discussion seems to infer that there would not be lost income and jobs in the recreational sector associated with less allocation or increases in same with increased allocation. The Council needs accurate and quantified data to evaluate the very impacts discussed here for both losses and gains of shares.

The Council is at a very important junction and we all understand the implementation of catch limits and accountability measures will require addressing allocation in all fisheries. The Council has recognized the importance of this issue by beginning to develop a generic allocation amendment. We support progress on this action. However, we cannot allow the Council to begin to proceed

Dr. Thomas McIlwain, Chair

July 22, 2008

Page 5

on a course which is clearly arbitrary and contrary to the Act, and does not allow consideration of all factors and impacts of decisions on the allocation and recovery measures of our valuable marine resources.

We urge the Council to direct the staff and the regional office of NMFS to immediately proceed with an economic impact analysis of the proposed allocation decisions and harvest limitations proposed in Amendment 30B. Without such information, neither the public nor the Council can have a full and complete understanding of the implications of their actions. Without access to information on the direct and indirect economic impacts of these decisions, the Council cannot legally proceed to take final action on these measures. We ask that this letter be made available to all Council members and those attending the next Gulf Council meeting in Key Largo.

Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "David Cummins". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping underline.

David Cummins
CCA President

c: Dr. Roy Crabtree