

[ORAL ARGUMENT NOT YET SCHEDULED]
No. 23-5026

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

A.P. BELL FISH COMPANY, INC., SOUTHERN OFFSHORE FISHING
ASSOCIATION, INC., and GULF OF MEXICO REEF FISH
SHAREHOLDERS' ALLIANCE,

Appellants

v.

GINA RAIMONDO, in her official capacity as Secretary of the United States
Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE,

Appellees

and

COASTAL CONSERVATION ASSOCIATION and STATE OF LOUISIANA,

Intervenor-Appellees

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Plaintiffs-Appellants A.P. Bell Fish Company, Inc., Southern Offshore Fishing Association, Inc., and Gulf of Mexico Reef Fish Shareholders Alliance (“Appellants”) certify the following information:

A. Parties and Amici

The parties in the district court and this Court are as follows:

Plaintiffs-Appellants:	A.P. Bell Fish Company, Inc. Southern Offshore Fishing Association, Inc. Gulf of Mexico Reef Fish Shareholders’ Alliance
Defendants-Appellees:	Gina M. Raimondo, in her official capacity as Secretary of the United States Department of Commerce; National Oceanic and Atmospheric Administration; National Marine Fisheries Service
Intervenor-Appellees:	Coastal Conservation Association; State of Louisiana

B. Ruling Under Review

The ruling at issue in this Court is District Court Judge Timothy J. Kelly’s Memorandum Opinion and Order denying Plaintiff’s Motion for Summary Judgment and granting Defendants’ Cross-Motion for Summary Judgment and

Intervenor-Defendants' Cross-Motions for Summary Judgment, *A.P. Bell Fish Co., Inc. v. Raimondo*, No. 22-cv-1260 (TJK), 2023 WL 122270 (D.D.C. Jan. 6, 2023).

See JA ____.

C. Statement of Related Cases

Pursuant to Circuit Rule 28(a)(1)(C), the undersigned counsel is not aware of any cases pending before this court that are related within the meaning of this rule.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a), Appellants respectfully submit the following corporate disclosure statement:

A.P. Bell Fish Company, Inc. (“A.P. Bell”) is a corporation organized under the laws of Florida and located in Cortez, Florida. A.P. Bell does not have a parent company, does not issue securities to the public, and no publicly-held company has a 10 percent or greater ownership interest in A.P. Bell.

Southern Offshore Fishing Association, Inc. (“SOFA”) is a non-profit corporation organized under the laws of Florida and located in Madeira Beach, Florida. SOFA does not issue securities to the public and no publicly-held company has a 10 percent or greater ownership interest in SOFA.

Gulf of Mexico Reef Fish Shareholders’ Alliance (“Shareholders’ Alliance”) is a non-profit corporation organized under the laws of the State of Texas and located in Galveston, Texas. The Shareholders’ Alliance does not issue securities to the public and no publicly-held company has a 10 percent or greater ownership interest in the Shareholders’ Alliance.

Pursuant to the requirement of Circuit Rule 26.1(b) that movants provide a statement of general nature and purpose relevant to the litigation, Appellants state as follows:

A.P. Bell is a commercial fishing, fish processing, and wholesale and retail fish distribution business.

SOFA is a trade association formed over 30 years ago to promote fresh, high quality, domestic seafood, and works to keep the Gulf of Mexico clean and environmentally secure.

The Shareholders' Alliance is a trade organization representing commercial fish harvesters in the Gulf of Mexico, including those who fish commercially for and sell red grouper from the Gulf of Mexico.

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JURISDICTIONAL STATEMENT

This is an appeal from the final order of the district court in *A.P. Bell Fish Company, Inc. et al. v. Gina Raimondo, et al.*, No. 22-cv-1260 (TJK), 2023 WL 122270 (D.D.C. Jan. 6, 2023). The district court had jurisdiction of the case pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1855(f), 1861(d), and pursuant to 28 U.S.C. §§ 1331, 1361. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered a final order disposing of all claims on January 6, 2023. Appellants filed a timely notice of appeal from the district court's final order on February 3, 2023, as required by Rules 3 and 4(a) of the Federal Rules of Appellate Procedure.

ISSUES FOR REVIEW

Appellants challenge a Final Rule issued by Respondents the National Marine Fisheries Service, et al. (“Service”) at 87 Fed. Reg. 25573 (May 2, 2022), JA ____, AR 17419-17436, implementing Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, JA ____, AR 7946-8268 (“Amendment 53”). The issues for review are:

1. Whether Amendment 53 violates 16 U.S.C. § 1851(a)(4)(B), which requires allocations of fishing privileges to be “reasonably calculated to promote conservation,” because the allocation under Amendment 53 will significantly increase bycatch and waste of red grouper, reduce the size of

- the red grouper stock and make it less productive, and increase management uncertainty and risk of overfishing.
2. Whether Amendment 53 violates 16 U.S.C. § 1851(a)(9), which requires conservation and management measures to “minimize bycatch” and the “mortality of such bycatch” to the extent practicable, because it will perpetuate high levels of bycatch and did not consider available measures to minimize bycatch and bycatch mortality.
 3. Whether Amendment 53 violates 16 U.S.C. § 1853(a)(15), which requires fishery management plans to have “annual catch limits...at a level such that overfishing does not occur in the fishery, including measures to ensure accountability,” because a significant portion of overall fishing mortality resulting from bycatch is not subject to annual limits or accountability measures.
 4. Whether Amendment 53 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because it relies on an economic analysis the Service previously rejected as “erroneous.”

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in an addendum.

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns efforts to conserve and utilize one species of fish in the Gulf of Mexico: the red grouper. Appellants represent commercial fishermen and women who catch and sell red grouper to consumers across the country. Appellants challenge an action taken by the Service that reduces the amount of fish for the commercial fishing sector and increases the amount for the recreational fishing sector. Allocating more fish to the recreational sector will harm the red grouper stock because the recreational sector has much higher levels of bycatch—fish that are harvested but not sold or kept for personal use, and so are discarded at sea. By the Service’s own estimation, allocating more fish to the recreational sector will reduce the size and productivity of the red grouper stock, increase uncertainty in managing the stock, and increase risk of overfishing. These outcomes are contrary to the conservation goals set by Congress for managing the nation’s fisheries under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (“Fishery Act”).

II. LEGAL FRAMEWORK

Congress enacted the Fishery Act in 1976 “to take immediate action to conserve and manage the fishery resources found off the coasts of the United States” and “to promote domestic commercial and recreational fishing under sound

conservation and management principles.” 16 U.S.C. §§ 1801(b)(1), 1801(b)(3). Under the Fishery Act, the country is divided into eight regions, and each region has a regional fishery management council (“Regional Council”) charged with managing the marine fisheries in its respective jurisdiction. *See id.* § 1852. Each Regional Council develops fishery management plans to manage stocks of fish under its jurisdiction, and proposes management measures to the Service. *Id.* § 1852(h). The Service must approve the proposed measures if consistent with the Fishery Act and other laws and, where appropriate, promulgate the necessary federal regulations. *Id.* § 1854.

The management plans developed by the Regional Councils and approved by the Service must include measures that are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” *Id.* § 1853(a)(1)(A). Plans must also be consistent with all of the Fishery Act’s provisions, including ten National Standards. *Id.* §§ 1853(a)(1)(C), 1851(a).

As relevant here, National Standard 1 states that management measures “shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” *Id.* § 1851(a)(1). National Standard 4 requires that, if “fishing privileges” are allocated “among various United

States fishermen,” the allocation must be “fair and equitable” and “reasonably calculated to promote conservation.” *Id.* § 1851(a)(4). National Standard 9 states that 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.” *Id.* § 1851(a)(9).

Bycatch is unwanted catch—“fish which are harvested in a fishery, but which are not sold or kept for personal use.” *Id.* § 1802(2). Congress amended the Fishery Act in 1996 partly because bycatch is “one of the most pressing problems facing the continuation of sustainable fisheries, and one of the most crucial challenges facing fisheries managers today,” 142 Cong. Rec. 25511 (1996) (statement of Rep. Young), and to “bring a stop to this inexcusable amount of waste.” 142 Cong. Rec. 23697 (1996) (statement of Sen. Stevens). *See* Pub. L. 104-297 (Oct. 11, 1996), §§ 106 (adding National Standard 9 to the Fishery Act to expressly address bycatch) and 108 (adding other requirements for management plans to establish a standardized bycatch reporting methodology and to include measures that comport with National Standard 9).

Congress again amended the Fishery Act in 2007 to further strengthen the Act’s conservation mandates. *See* Pub. L. 109-479 (Jan. 12, 2007); S. Rep. 109-229 (Apr. 4, 2006) at 6 (finding that “overfishing is still occurring in a number of fisheries, even those fisheries under a rebuilding plan” and that failure to require

“routine adherence” to catch limits “has contributed to continued overfishing.”).

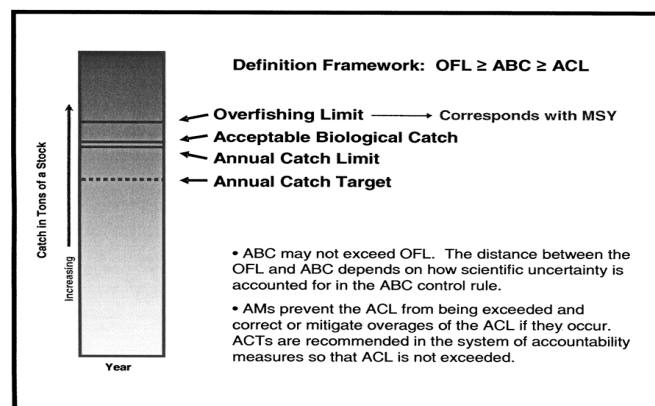
In particular, Congress added new requirements that management plans include science-based “annual catch limits...at a level such that overfishing does not occur in the fishery” and “accountability measures” to ensure compliance with those catch limits. 16 U.S.C. § 1853(a)(15); *see Conservation L. Found. v. Pritzker*, 37 F. Supp. 3d 254, 266 (D.D.C. 2014) (These statutory amendments “fundamentally altered American fishing regulation by requiring [managers] to set hard, science-based caps on how many fish could be caught each year and by demanding that accountability measures be triggered when fishermen exceeded those caps.”) (citations omitted).

To implement these new statutory mandates, the Service issued guidelines for the establishment of annual catch limits (“Annual Catch Limits”) and accountability measures. *See* 50 C.F.R. § 600.310. The guidelines specify certain biological reference points to ensure that catch limits are set at appropriate levels and enforced to prevent overfishing and rebuild overfished stocks as required by the Fishery Act. *Id.*

First, a scientific committee of each Regional Council establishes the Overfishing Limit for each stock of fish. The Overfishing Limit is a scientific estimate of the catch above which overfishing is occurring. *See* § 600.310(e)(2)(i)(D). The scientific committee then recommends where the Regional

Council should set the Acceptable Biological Catch, which is the level of annual catch that accounts for scientific uncertainty in the estimate of the Overfishing Limit. *See* § 600.310(f)(2)(ii). The Acceptable Biological Catch must not exceed the Overfishing Limit, but can be reduced to create a buffer to account for scientific uncertainty. § 600.310(f)(3). The Regional Councils then set the Annual Catch Limit, which “cannot exceed the [Acceptable Biological Catch],” but which may be reduced to account for management uncertainty. § 600.310(f)(4)(i). Management uncertainty “refers to uncertainty in the ability of managers to constrain catch so that the [Annual Catch Limit] is not exceeded, and the uncertainty in quantifying the true catch amounts (i.e., estimation errors).” § 600.310(f)(1)(v). The term “catch” includes both fish that are landed (brought to shore) and discarded dead. § 600.310(f)(1)(i).

The Service has published a chart to demonstrate the relationship between the reference points described in its regulations. *See* 74 Fed. Reg. 3178, 3180 (Jan. 16, 2009):



The Regional Councils must also establish accountability measures to ensure adherence to the Annual Catch Limit. §§ 600.310(f)(2)(iv), 600.310(g).

III. FACTUAL BACKGROUND

A. Management of Red Grouper in the Gulf of Mexico

Red grouper are bottom dwelling fish found in the Gulf of Mexico. JA ____, AR 8047, 8049, 8059. The Gulf of Mexico Fishery Management Council (“Gulf Council”) manages red grouper along with other reef fish species under its Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (“Reef Fish Plan”). See JA ____, AR 7946-8268. Despite being under a rebuilding program for nearly twenty years, see 69 Fed. Reg. 1278 (Jan. 8, 2004), the red grouper stock remains near historically low levels and below its target size. See JA ____, AR 4469-4470, 4479, 6480-6481, 7965.

B. The Commercial and Recreational Fishing Sectors

The stock of red grouper supports both commercial and recreational fishing. These two sectors of the fishery—the commercial and recreational sectors—share the same resource but have distinct differences.

1. The Commercial Sector

The commercial sector is limited access, meaning that only a fixed number of commercial fishing permits are available. JA ____, AR 8004, 8037. Fewer than 400 vessels commercially harvest red grouper each year, *id.*, selling fish to

consumers through restaurants, grocery stores and fish markets, *see, e.g.*, JA ____, AR 14085, 14106, 14108, 14111, 14115.

The commercial sector operates under an individual fishing quota program, where participants hold long-term and transferable harvesting privileges that authorize them to catch fixed percentages of the commercial sector's catch limits for red grouper and other reef fish species. *See* 50 C.F.R. § 622.22; JA ____, AR 7975-7976. Strict monitoring ensures that each pound of fish landed is tracked in real time to ensure the commercial sector catch limit is not exceeded. *See* 50 C.F.R. §§ 622.22(b), 622.28; *see also* *Guindon v. Pritzker*, 240 F. Supp. 3d 181, 195 (D.D.C. 2017) (“*Guindon II*”) (“[T]he [Individual Fishing Quota] program has ended quota overruns.”) (internal quotation and citation omitted). Commercial vessels must maintain records of their fishing activities and landings. *See* JA ____, AR 8170. In addition, to manage bycatch, each year 20 percent of vessels must submit discard logs to report the number and species of any fish discarded at sea. *Id.*; JA ____, AR 18637.

2. The Recreational Sector

The recreational sector is split into two components. One is the charter/for-hire component, which consists of federally-permitted vessels that take anglers fishing for a fee. JA ____, AR 8047. The charter/for-hire component is limited access, with 1,312 permits in total, and vessels are required to report fish landed and

discarded. JA ___, AR 18597, 8008.

Anglers fishing on privately owned vessels make up the other component of the recreational sector. This component is sometimes referred to as “private anglers.” The Service estimates that private anglers account for approximately 80 percent of recreational sector red grouper landings. JA ___, AR 4405. The private angler component is open access, meaning that any person can participate. *See* JA ___, AR 8053. No federal permit is required to fish for red grouper as a private angler, *id.*, and private anglers are not required to report what they land or discard to the Service. As a result, the Service must estimate landings and discards by private anglers by making extrapolations from voluntary, random surveys. JA ___, AR 12490. The lack of mandatory reporting causes uncertainty and imprecision in determining recreational sector landings and bycatch. *See* JA ___, AR 9692 (“recreational data sources have a high level of uncertainty because self-reported data are not considered overly reliable and not all recreational fishermen are surveyed”).

C. The 2009 Red Grouper Allocation Between the Sectors

The Service apportioned the Annual Catch Limit between the commercial and recreational sectors, setting “sector Annual Catch Limits” for each according to an allocation formula. *See* 50 C.F.R. §§ 622.41(e)(1), (e)(2)(iv). The sum of the sector Annual Catch Limits equals the total Annual Catch Limit. The allocation formula, Annual Catch Limit and sector Annual Catch Limits cover only red grouper

landings, not red grouper dead discards. *See* JA ____, AR 17422. Thus, although the Service's regulations contemplate that the term "catch" includes both landings and dead discards, the Annual Catch Limits for red grouper are actually annual landings limits.

The allocation formula was first established in 2009 by Amendment 30B to the Reef Fish Plan. *See* 74 Fed. Reg. 17604 (Apr. 16, 2009); JA ____, AR 10410-10871, 10482. Based on the commercial sector's reported landings and the recreational sector's estimated landings from 1986-2005, Amendment 30B allocated 76 percent of the Annual Catch Limit to the commercial sector and 24 percent of the Annual Catch Limit to the recreational sector. *Id.*; *see also* JA ____, AR 10568, 7221, 11955, 10475, 18893, 18923 (explaining inputs to the formula).

D. The Service Updates its Catch Estimation Methodology to Address Undercounting of Recreational Landings and Bycatch

After Amendment 30B, the Service modified its methodology to estimate landings and discards by the recreational sector. The Service developed a new angler survey intended to correct deficiencies in the old survey. *See* JA ____, AR 12286, 12303-12305 (discussing flaws in old survey, known as the Coastal Household Telephone Survey); JA ____, AR 18914 (discussing the new survey, known as the Fishing Effort Survey).

The new survey indicated that recreational anglers catch significantly more fish than previously estimated. JA ____, AR 4406. The Service conducted both

surveys side-by-side for three years, 2015 through 2017. JA ____, AR 18971-18972. The Service developed a calibration model to convert recreational landings estimated by the old survey into units comparable to the new survey. *Id.*; JA ____, AR 12499. The Service then retrospectively “recalibrated” the entire time series of recreational landings estimates for multiple fish species going back to the early 1980s. *See* JA ____, AR 12491. In general, the Service’s recalibration exercise indicated that the recreational sector had significantly higher landings each year, including landings of red grouper during the years of 1986-2005 that Amendment 30B used to allocate the red grouper Annual Catch Limit between the recreational and commercial sectors. *See* JA ____, AR 7992-7993.

E. The Recreational Sector Has High Levels of Bycatch

The Service’s recalibration exercise also demonstrated that bycatch of red grouper in the recreational sector is significantly higher than previously estimated. JA ____, AR 4410. Because the recreational sector is open access with thousands of participants, fishing by the recreational sector as a whole has major impacts to the stock. The recreational sector catches and discards millions of red grouper each year, JA ____, AR 8172, typically because the fish are too small to retain, JA ____, AR 8179.

The Service has determined that 11.6 percent of the number of red grouper caught and discarded by recreational anglers do not survive. JA ____, AR 18294. The

recreational sector therefore discards as dead and wastes hundreds of thousands of red grouper each year. The Service's new information indicated that the recreational sector wastes nearly one fish for each fish retained. *See* JA ____, AR 18592-18593 (showing that on average between 2015-2019, the recreational sector retained approximately 370,000 red grouper each year, and wasted another approximately 320,000 red grouper that were killed as bycatch, assuming a discard mortality rate of 11.6 percent).

The Service determined that commercial sector discards are "less than a tenth of recreational discards." JA ____, AR 8070 (recreational anglers discard "an order of magnitude more fish (in number of fish) than the commercial sector").

F. Development of Amendment 53

The Service commissioned a new stock assessment for red grouper in 2019. JA ____, AR 5344-5628. The Service's higher, recalibrated landings estimates for the recreational sector were used in the stock assessment model. The Service presented the results of the stock assessment to the Gulf Council in October 2019, and recommended certain management changes. JA ____, AR 443, 699.

The Service urged the Gulf Council to amend the Reef Fish Plan to change the existing 76/24 percent allocation between the sectors based on the revised historical recreational landings estimates. *Id.* The Service specifically recommended that the Gulf Council increase the recreational sector's allocation from 24 percent to

40 percent, and to correspondingly decrease the commercial sector's allocation from 76 percent to 60 percent. *Id.* The Service did not recommend measures to minimize the higher levels of recreational bycatch and bycatch mortality demonstrated by its new survey and recalibration exercise.

The Gulf Council adopted Amendment 53 in June, 2021, following the Service's recommendation. JA ____, AR 4039-4046. The Gulf Council adopted the same allocation formula from Amendment 30B—dividing future allowable landings based on the sector's respective average landings from 1986-2005—but this time using the Service's higher, recalibrated landings estimates for the recreational sector. As a result, Amendment 53 increased the recreational sector's allocation from 24 to 40.7 percent and decreased the commercial sector's allocation from 76 to 59.3 percent. JA ____, AR 17420.

Apart from changing the allocation between the sectors, Amendment 53 implemented additional management changes. It formally adopted the Service's new angler survey to estimate recreational sector landings and track that sector's usage of its Annual Catch Limit to be consistent with the data used in the stock assessment. JA ____, AR 7981, 17419-17420. Amendment 53 also reduced the Overfishing Limit, Acceptable Biological Catch, Annual Catch Limit and sector Annual Catch Limits for 2022 and beyond to comport with the new stock assessment guidance and to reflect the change in allocation between the sectors. *Id.*; JA ____, AR 7967. The

sector Annual Catch Limits resulting from Amendment 53 therefore reflect two different management actions, neither of which accounts for the fact that recreational sector bycatch and waste is ten times that of the commercial sector.

Although the codified Annual Catch Limit increased under Amendment 53 from 4.16 million pounds to 4.26 million pounds, the change reflected use of the higher, recalibrated recreational sector landings estimates in the stock assessment model. *See* JA ____, AR 17420. In effect, the new Annual Catch Limit is expressed in different units than the prior Annual Catch Limit, and so the two are not directly comparable. *Id.* The Service estimates that the prior Annual Catch Limit would have been 5.26 million pounds if expressed in units consistent with the new stock assessment. *Id.* Thus, in reality, the new Annual Catch Limit represents a 19 percent decrease from the prior Annual Catch Limit. Some of that decrease is attributable to guidance from the stock assessment, which indicated a reduction in fishing mortality was necessary. JA ____, AR 7979. Most of the decrease is attributable to the need to account for increased bycatch mortality associated with shifting more of the allocation to the recreational sector. *See* JA ____, AR 7967-7969. Despite new information confirming much higher levels of bycatch in the recreational sector, the Service did not consider or include any measures in Amendment 53 to minimize recreational sector bycatch or bycatch mortality.

G. Ecological and Management Effects of Amendment 53

Because the recreational sector has high levels of bycatch, reallocating more fish to that sector will result in negative consequences for the red grouper fishery.

1. Reallocation to the recreational sector increases bycatch.

Reallocating a larger portion of the total catch limit to the recreational sector increases bycatch and discards of red grouper. The Service acknowledged that, “[b]ecause the recreational sector selects for smaller and younger fish compared to the commercial sector..., an increase of allocation to the recreational fleet results in more encounters and higher overall discards (of which 11.6% will die).” JA ___, AR 9692; *see also* JA ___, AR 9686, 8187.

Before the district court, the Service took the position that Amendment 53 did not increase bycatch relative to the status quo, because the recreational sector had been catching and discarding more fish than estimated all along. *See* JA ___, ECF 36 at 36 (the new survey changed the Service’s “*understanding* of recreational landings and bycatch”). But by deciding to change the recreational sector’s allocation from 24 to 40.7 percent going forward, the Service understood that bycatch would be far higher than it would be without the allocation change. *See* JA ___, AR 8187, 9692. Instead of minimizing bycatch, the Service codified higher levels of it and knowingly failed to adopt measures to address a previously unknown issue that its allocation action had made much worse.

2. The Service reduced landings for both sectors to account for increased recreational sector by catch.

To deal with the higher bycatch and dead discards that result from shifting more allocation to the recreational sector, the Service’s solution was to reduce the total Annual Catch Limit that governs both the commercial and recreational sectors. The Service acknowledged that “when more fish are allocated to the recreational sector, total landings have to be constrained more to account for the greater dead discards from recreational red grouper fishing.” JA ____, AR 8070. Accordingly, “increases in recreational allocation are accompanied by a decrease in overall [Annual Catch Limit] to mitigate the effects of the increased bycatch.” JA ____, AR 8187; *see also* JA ____, AR 8188 (“Bycatch is considered wasteful because it reduces overall yield obtained from the fishery.”).

The effects are shown in Table 1 of Amendment 53. JA ____, AR 7967. The relevant portion of Table 1 is reproduced below:

	OFL	ABC	Total ACL	Comm ACL	Rec ACL
Alternative 2 Retain current percentages (76% commercial:24% recreational)	5.35	4.90	4.90	3.72	1.18
Preferred Alternative 3 MRIP-FES data 1986-2005 (59.3% commercial:40.7% recreational)	4.66	4.26	4.26	2.53	1.73

The total Annual Catch Limit would be 4.90 million pounds under the prior 76/24 percent allocation. But the total Annual Catch Limit drops to 4.26 million pounds—a 640,000 pound decrease—when the allocation is changed to 59.3/40.7

percent under the selected alternative. Because the total Annual Catch Limit governs both sectors, the commercial sector was forced to give up a significant portion of its allocation to cover higher levels of bycatch in the recreational sector.

3. Reallocation results in a smaller, less productive stock.

The Service also determined that shifting more of the allocation to the recreational sector will change the long-term composition of the red grouper stock. “Shifts in allocations ultimately change the age specific population structure of the stock.” JA ___, AR 9692. Because the recreational sector catches “smaller and younger fish compared to the commercial sector,” the Service found that harvesting “larger numbers of smaller, younger fish result[s] in a smaller overall population at equilibrium (100 years into the future).” *Id.* This, in turn, reduces the productivity of the stock and reduces the annual yields that the stock can sustainably provide. The Service acknowledged that “changing the age-specific population structure of the stock...leads to a lower maximum sustainable yield and annual [Overfishing Limits].” JA ___, AR 9686.

4. Reallocation increases management uncertainty and overfishing risk.

Because private anglers are not required to report what they catch to the Service, estimates of recreational sector landings and discards are imprecise and have a high degree of uncertainty. JA ___, AR 18639. The Service acknowledged that allocating a larger portion of landings to the recreational sector increases

uncertainty as to the total catch, which in turn increases the risk of overfishing the stock. “Allocating a greater percentage of the [Annual Catch Limit] to a sector that has more uncertainty in landings...is more likely to result in an overfishing or eventual overfished status for Gulf red grouper.” JA ____, AR 7970; *see also* JA ____, AR 8082 (“Alternatives that result in larger allocations to the recreational sector could increase the likelihood of overfishing because of the uncertainty in determining recreational landings.”); JA ____, AR 8110 (there is “an increased potential for overfishing of red grouper if there is an increase in allocation the recreational sector, which is associated with more uncertainty in constraining harvest”).

In response to comments on Amendment 53, the Service qualified its findings by asserting that Amendment 53 “does not *substantially* increase the risk of overfishing.” JA ____, AR 8260, 17422 (emphasis added). The Service contended that the “risk of overfishing is the same under all of the allocation alternatives considered by the Council.” JA ____, AR 17422. That conclusion is based on an analysis that assumed the catch limits would not be exceeded. *Id.* Thus, the conclusion does not take into account the increased risk of overfishing from increased management uncertainty associated with allocating more fish to the recreational sector that the Service acknowledged, and instead merely assumes away the problem it had previously identified. JA ____, AR 7970.

In addition, the Service's regulations acknowledge that higher levels of bycatch, such as in the recreational sector, also increase management uncertainty and overfishing risk: "bycatch can increase substantially the uncertainty concerning total fishing-related mortality, which makes it more difficult to assess the status of stocks, to set the appropriate [optimum yield] and define overfishing levels, and to ensure that [optimum yields] are attained and overfishing levels are not exceeded." 50 C.F.R. § 600.350(b).

SUMMARY OF ARGUMENT

The Fishery Act establishes separate and independent requirements the Service must meet for managing marine fisheries. The Fishery Act requires the Service to set catch limits to prevent overfishing. 16 U.S.C. §§ 1851(a)(1), 1853(a)(15). But that is not the only statutory requirement. The Service must also ensure that any allocation of fishing privileges is "reasonably calculated to promote conservation." § 1851(a)(4). The Service violated that requirement here because the allocation of fishing privileges established by Amendment 53 will have negative consequences for conservation of the red grouper stock. In particular, the allocation will increase bycatch and waste of red grouper, reduce the size and productivity of the red grouper stock, increase management uncertainty, and increase risk of overfishing. Rather than address this problem as required by National Standard 4, the Service simply relied on the reduced catch limit set under National Standard 1

and § 1853(a)(15), and reduced the commercial allocation that was not causing the problem rather than the recreational allocation that was. Based on these outcomes, the Service cannot reasonably conclude that the allocation promotes conservation.

The Fishery Act also requires the Service to minimize bycatch and bycatch mortality to the extent practicable. § 1851(a)(9). In this case, the Service shifted more of the allocation to the recreational sector knowing that the shift would increase bycatch relative to maintaining the prior allocation. The Service justified this action by asserting it would prolong the recreational fishing season and increase net economic benefits. But the Service considered no measures to offset the increased levels of bycatch its allocation would cause. The Service instead reduced the overall catch limit governing both the commercial and recreational sectors to account for the additional bycatch mortality from the recreational sector. That decision thus also arbitrarily penalized the commercial sector for a problem in the recreational sector, and did nothing to “minimize” bycatch or bycatch mortality as required.

The catch limits set by the Service through Amendment 53 also exclude a significant source of fishing mortality from bycatch. The catch limits govern only landings, not bycatch mortality, in conflict with the Service’s own regulations. The Service set overall limits on landings to account for bycatch mortality, but there are no catch limits or accountability measures that apply to the bycatch itself. It thus did not directly address the problem it had identified in the red grouper fishery,

specifically, that the level of bycatch in the recreational sector is up to ten times the level in the commercial sector. The Service's decision does not comport with the requirement in § 1853(a)(15) that the Service establish Annual Catch Limits with accountability measures to ensure catch limits are achieved.

The Service also erred by relying on an economic analysis for Amendment 53 that the Service previously rejected as "erroneous." The Service justified the admittedly negative consequences for conservation flowing from its decision to increase the recreational sector allocation by asserting that Amendment 53 "is expected to result in the greatest net economic benefits to the Nation." *See, e.g.*, JA ___, AR 17424. But that finding is based on the economic analysis the Service previously rejected as erroneous. JA ___, AR 11991. The Service's decision is therefore arbitrary and capricious and an abuse of discretion.

The Court should reverse the judgment of the district court, vacate Amendment 53, and remand it to the Service.

STANDING

As a participant in the commercial sector, Appellant A.P. Bell Fish Company, Inc.'s Article III standing to challenge a reduction in the commercial sector's red grouper allocation with attendant environmental harms is self-evident as it has reduced access to the fishery due to the reduced commercial allocation. *See Guindon v. Pritzker*, 31 F. Supp. 3d 169, 187 (D.D.C. 2014) ("*Guindon I*") (plaintiffs in the

commercial sector had standing to challenge regulation of the recreational sector under the Reef Fish Plan); *Guindon II*, 240 F. Supp. 3d at 193 (finding “no reason to deny standing here” in commercial sector’s challenge to reallocation of a different species managed by the Reef Fish Plan) (citing *Guindon I* and *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002)). Similarly, Appellants Southern Offshore Fishing Association, Inc. and Gulf of Mexico Reef Fish Shareholders’ Alliance have associational standing to bring this suit on behalf of their members, including A.P. Bell, who participate in the commercial red grouper fishery and are harmed by the Service’s reallocation to the recreational sector and the negative environmental impacts that will result. *See Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015). All Appellants have prudential standing because they are in the zone of interests protected by the Fishery Act, the statute in question. *See Nat’l Petrochemical & Refiners Ass’n v. E.P.A.*, 287 F.3d 1130, 1147 (D.C. Cir. 2002). *See also* JA ___, ECF 20-1 at 1-4; ECF 20-2 at 1-4 (standing declarations).

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews a grant of summary judgment de novo. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 54 (D.C. Cir. 2015). Where the dispute involves review of an agency action, the Court reviews the administrative record directly, with “no particular deference to the judgment of the District Court.” *Id.*

(citation omitted). *See also Oceana, Inc. v. Ross*, 920 F.3d 855, 860 (D.C. Cir. 2019). Agency actions under the Fishery Act are reviewed pursuant to Section 706(D) of the Administrative Procedure Act. 16 U.S.C. § 1855(f)(1)(B); *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011). Under this standard, the agency's action must be upheld unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise.” *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). The agency must have a “reasoned basis” for its regulatory actions, and must “cogently explain” why it has exercised its discretion in a given manner. *State Farm*, 463 U.S. at 43, 48.

In reviewing an agency's interpretation of a statute it administers, the Court first looks to whether the intent of Congress is clear; if it is, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously express intent of Congress.” *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S.

837, 842-43 (1984). If the intent of Congress is not clear, the agency’s interpretation is entitled to deference if it is “reasonable” and not otherwise “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44.

II. AMENDMENT 53 VIOLATES SEVERAL PROVISIONS OF THE FISHERY ACT

A. Amendment 53 Does Not Promote Conservation As Required by National Standard 4

National Standard 4 of the Fishery Act, 16 U.S.C. § 1851(a)(4), provides specific requirements that an allocation of fishing privileges must meet:

Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The allocation between the commercial and recreational sectors established by Amendment 53 is not “reasonably calculated to promote conservation” and thus violates the standard.

1. The allocative aspect of Amendment 53 must promote conservation.

The Fishery Act does not define what it means to “promote conservation.” The district court looked to the statutory definition of “conservation and management” in 16 U.S.C. § 1802(5) and to the ordinary definition of “conservation,” and concluded that under either definition “the promote-

conservation requirement of national standard 4 contemplates protecting fisheries from damage to their long-term vitality, such as from ‘overharvesting.’” JA ____, ECF No. 46 at 21. The district court further noted that “to ‘promote’ means ‘advance or further’ conservation.” JA ____, ECF 46 at 22 (quoting *Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 89 (D.D.C. 2019)). In *Groundfish Forum*, the court held that an allocation of fishing privileges “must actually ‘promote’ a conservation purpose—that is, advance or further it—rather than just avoid jeopardizing one.” *Groundfish Forum*, 375 F. Supp. 3d at 89 (quoting the definition of “promote” from Webster’s Third New International Dictionary (1961) as “to contribute to the growth, enlargement, or prosperity of: further, encourage”). Putting these concepts together, the district court concluded that to “promote conservation” as required by National Standard 4, an allocation must “advance the vitality” of the stock. JA ____, ECF 46 at 22.

Appellants do not take issue with the district court’s definition that an allocation must advance the vitality of red grouper stock, but the district court erred in agreeing with the Service that Amendment 53 does so because it “reduces the total number of grouper that may be caught.” JA ____, ECF 46 at 22. The district court rejected Appellants’ contention that the “allocative *aspect* of [Amendment 53] must independently promote conservation,” JA ____, ECF 46 at 22 (emphasis in original), and held that “[w]hat matters is the total catch limit—so long as that limit accounts

for factors like bycatch, effects on the average age of the stock, and management uncertainty, as this one does,” *id.* at 24.

The district court’s holding conflicts with the plain language of the statute. The relevant portion of National Standard 4 applies specifically to allocations of “fishing privileges among various United States fishermen,” which “shall be ...reasonably calculated to promote conservation.” § 1851(a)(4)(B). Thus, contrary to the district court’s holding, the “allocative aspect” of Amendment 53 must indeed under the statute’s plain language “independently promote conservation.” JA ___, ECF 46 at 22.

The fact that the Service elected to combine different management actions together in Amendment 53—changing the allocation along with incorporating catch limit guidance from the latest stock assessment and setting catch limits for 2022 and beyond—does not excuse the Service from ensuring that each action met the statutory requirements, including that the allocative aspect of the amendment promote conservation. The Service is also expressly required by another provision of the Fishery Act to set “catch limits...at a level such that overfishing does not occur.” § 1853(a)(15). Under the district court’s interpretation, the Service would always be in compliance with the requirement to “promote conservation” under National Standard 4 provided that the Service sets catch limits in compliance with § 1853(a)(15). That interpretation renders the “promote conservation” requirement of

National Standard 4 superfluous. *See Delaware Dep't of Nat. Res. & Env'tl. Control v. Env'tl. Prot. Agency*, 895 F.3d 90, 99 (D.C. Cir. 2018) (“[W]e strive to construe statutes so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (internal quotations and citations omitted).

The district court’s interpretation of National Standard 4 is also in tension with the Fishery Act as a whole. *See Wisconsin v. Env'tl. Prot. Agency*, 938 F.3d 303, 316 (D.C. Cir. 2019) (“A ‘reasonable statutory interpretation’ of the Provision ‘must account for ... the broader context of the statute as a whole.’”) (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014)). Under the district court’s interpretation, it does not matter that the allocation established by the Service “increased bycatch, reduced the fecundity of the stock, and ‘increased management uncertainty’ relative to other possible allocations.” JA ____, ECF 46 at 22. The district court’s reading would allow the Service to disregard those negative outcomes simply by setting a total catch limit that prevents overfishing. But the Fishery Act requires the Service to do more than merely prevent overfishing. *See, e.g.*, §§ 1851(a)(1) (requiring that measures both prevent overfishing and achieve optimum yield over the long term); 1851(a)(9) (requiring that measures minimize bycatch and bycatch mortality to the extent practicable); 1853(a)(1)(A) (requiring management plans to “protect, restore, and promote the long-term health and stability of the fishery”). If Congress intended that an allocation of fishing privileges shall merely prevent

overfishing, it would have stated so. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”) (internal quotations and citations omitted).

The district court relied upon *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, No. 3:21-cv-247 (JMK), 2022 WL 2222879 (D. Alaska June 21, 2022) to support its conclusion that “second-order effects of an action can render it an allocation,” and therefore the relevant allocation here is the total Annual Catch Limit set by Amendment 53 and not the change to the allocation percentages between the sectors. *See* JA ____, ECF 46 at 23. *United Cook Inlet* is inapposite. The question before that court was whether a closure to commercial fishing but not recreational fishing constituted an allocation that must comply with National Standard 4, or merely had “incidental allocative effects” exempt from the standard. 2022 WL 2222879, at *14. Here there is no such question. *See* JA ____, ECF 46 at 20 (finding that an allocation decision was before the Court and reviewable). The statutory language makes clear that it is the distribution of fishing privileges “among various United States fishermen” that is subject to the standard. § 1851(a)(4)(B). In this case, it is the distribution of available landings among the commercial and recreational sectors that is subject to the standard, not the total catch limit that applies to both sectors.

The Fishery Act does not require the Service to establish or change an allocation of fishing privileges; rather, the Fishery Act establishes certain requirements that apply “[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen.” § 1851(a)(4). Where the Service elects to make such an allocation, as the district court agreed it did here, JA ___, ECF No. 46 at 20, it must ensure that the allocation itself is “reasonably calculated to promote conservation.” *Id.*

2. The allocation under Amendment 53 does not promote conservation.

The record is clear that the allocation established by Amendment 53 does not promote conservation under a reasonable interpretation of what that term requires. *See City of Cleveland v. U.S. Nuclear Regulatory Comm’n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995) (providing that an agency’s interpretation must be “reasonable and consistent with the statutory scheme and legislative history”). The Service acknowledged that the allocation change under Amendment 53 will increase bycatch and dead discards relative to retaining the prior allocation, JA ___, AR 9692, 9686, 8187; remove more younger fish from the stock and reduce the stock size, JA ___, AR 9692; reduce stock productivity and generate smaller yields over the long term, JA ___, AR 9686; and increase management uncertainty and risk of overfishing the stock, JA ___, AR 7970, 8082, 8110. These outcomes do not “advance the vitality” of the red grouper stock or comport with the Fishery Act’s objectives.

Rather, the Service concluded that the supposed economic and social benefits of more recreational fishing outweighed the negative conservation consequences of the allocation change. Citing to the concept of “wise use” found in its advisory guidelines at 50 C.F.R. § 600.325(c)(3)(ii), the Service determined that the “revised allocation promotes wise use by considering both the biological impacts to the red grouper stock, including preventing overfishing, and the economic and social impacts to fishery participants.” JA ____, AR 17424. In particular, the Service concluded that the revised allocation was “expected to result in the greatest net economic benefits to the Nation.” *Id.*¹ Before the district court, the Service explained that the allocation change would provide “more opportunities for recreational fishermen to participate in the red grouper fishery.” JA ____, ECF 36 at 29.

The Service’s justification conflicts with the Fishery Act because it elevates economic and social benefits over the fundamental statutory goal of conservation of the resource. “[U]nder the Fishery Act, the Service must give priority to conservation measures.” *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). “It is only when two different plans achieve similar conservation measures that the Service takes into consideration adverse economic consequences.” *Id.* Stated otherwise, the consideration of economic and social benefits must be subordinate to the statutory conservation goals. Amendment 53 inverts this statutory hierarchy by

¹ This finding was also erroneous, as explained below in section III.

sacrificing conservation to increase economic benefits. *See id.*; *see also Groundfish Forum*, 375 F. Supp. 3d at 92 (observing that socio-economic benefits for communities “are *distinct* from the ‘conservation’ objectives contemplated in National Standard 4”).

In *Daley* the Court held that a catch limit set by the Service with an 18 percent probability of achieving the target level of fishing mortality did not reflect a reasonable and permissible construction of the Fishery Act’s requirement to “prevent overfishing,” and indeed was “largely incomprehensible when one considers the principal purposes of the Fishery Act.” 209 F.3d at 754. The Service’s decision in this case is similarly flawed. Whatever “wise use” may mean under the Service’s guidelines, an allocation that increases bycatch, increases management uncertainty and risk of overfishing, and alters the stock structure to make it less productive with smaller yields, all in service of supposedly promoting economic benefits for one of two sectors that both depend on the stock (based on an economic analysis the Service found erroneous), is neither “wise” nor comports with the requirement to “promote conservation.” “[T]he self-proclaimed wisdom of the approach cannot save it because the Congress, in its more commanding wisdom, has not authorized it.” *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011).

B. Amendment 53 violates National Standard 9 of the Fishery Act

National Standard 9 provides 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); *see also* § 1853(a)(11). National Standard 9 is qualified; “by using the term ‘practicable’ Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.” *Conservation L. Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004); *see Nat’l Coalition for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 137 (D.D.C. 2002) (the Service must find the combination of regulations that would best meet the statute’s various objectives). Accordingly, courts have recognized that the Service need not “adopt every measure that could conceivably reduce bycatch.” *Nat. Res. Def. Council v. National Marine Fisheries Serv.*, 71 F. Supp. 3d 35, 66 (D.D.C. 2014). The Service must, however, “demonstrate [a] reasoned analysis of the bycatch issue” and explain how the management plan “as amended, actually minimizes bycatch to the extent practicable.” *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 59 (D.D.C. 2012).

Two cases are instructive. In *National Coalition*, to reduce bycatch of longline fishing gear, the Service had implemented an area closure and a restriction on using live bait. 231 F. Supp. 2d at 136. The Service projected that these measures would reduce bycatch of two species by nine and 15 percent. *Id.* The plaintiffs alleged that the Service did not go far enough in adopting other measures. *Id.* But the Service had evaluated other areas for potential closure, and concluded they were not

practicable because the two species in question were widely distributed without specific concentrations where closures would be effective. *Id.* at 136-37. The Service also concluded that additional measures to reduce bycatch were not practicable because the Service had already prohibited retention of the two species in question, and found that they constituted only 1.25 percent of catch by longline gear and were usually released alive. *Id.* at 137. The court concluded that the Service appropriately “analyzed the record evidence and conservation alternatives,” and reasonably determined that the challenged actions “were the best means of attaining the agency’s conservation objectives.” *Id.* at 138.

In *Flaherty*, by contrast, the court found the Service’s analysis deficient under National Standard 9. 850 F. Supp. 2d at 58-59. In defending the management plan at issue, the Service pointed to prior actions it claimed would minimize bycatch, and to brief discussions of bycatch in the amendment. *Id.* The court concluded that none of these things demonstrated that the Service undertook “any examination or consideration of whether the FMP, as amended, actually minimizes bycatch to the extent practicable.” *Id.* at 59. The court in *Flaherty* further emphasized that ancillary benefits of reduced bycatch from lower limits on overall fishing did not meet the requirements of National Standard 9. *Id.* at 58.

National Coalition and *Flaherty* demonstrate that compliance with National Standard 9 requires more than a cursory, box-checking exercise. The Service must

rigorously examine the “bycatch issue,” *id.*, consider “conservation alternatives,” *National Coalition*, 231 F. Supp. 2d at 138, and reasonably explain why the selected measures constitute the practicable extent of what can be done to minimize bycatch and bycatch mortality, *see id.* at 138; *Flaherty*, 850 F. Supp. 2d at 59. Moreover, the Service must consider these measures “to the extent practicable.” It cannot refuse to consider other available measures simply because it has taken some, if they are in fact practicable.

The Service’s analysis of Amendment 53 falls well short of these requirements. Faced with new information that bycatch in the recreational sector is significantly higher than previously estimated, JA ____, AR 4410, and would have adverse consequences for the red grouper stock going forward, *see* section II(A), *supra*, the Service did not consider measures to mitigate bycatch or bycatch mortality and did not reasonably explain why additional measures were not practicable. *See* JA ____, AR 17424-17425, 8180 (“No measures are proposed in this amendment to directly reduce the bycatch of red grouper and other species.”).

Instead, the Service increased the allocation for the recreational sector—guaranteeing higher levels of bycatch—and reduced the total Annual Catch Limit in a blunderbuss effort to account for the mortality of that bycatch. The district court observed that “the effective quota [Annual Catch Limit] was adjusted to account for the allocation to the recreational sector.” JA ____, ECF 46 at 29. But reducing the

Annual Catch Limit to *account* for bycatch does not *minimize* bycatch; to the contrary, that solution allows bycatch to continue unabated, without making any effort to address the *cause* of that increased bycatch.

Moreover, the total Annual Catch Limit governs the landings of both the commercial and recreational sectors. By reducing the total Annual Catch Limit to account for higher levels of bycatch in the recreational sector, the Service irrationally penalized the commercial sector and consumers. In effect, the Service took fish from the commercial sector that would otherwise be utilized—sold to consumers in restaurants, grocery stores and fish markets throughout the nation—and gave those fish to the recreational sector where approximately half will be wasted, discarded dead into the Gulf of Mexico.

This is not rational decision-making in compliance with the objectives of the Fishery Act. Accounting for the mortality of bycatch in the Annual Catch Limit is required by other provisions of the Fishery Act, including the requirement in § 1853(a)(15) to set catch limits to prevent overfishing. *See* 50 C.F.R. § 600.310(f)(1)(i) (“catch” includes landings and dead discards). Congress’s primary concern in enacting National Standard 9, however, was with ending *waste* of natural resources. *See* 142 Cong. Rec. 23697 (1996).

Nor can the further reduction of the Annual Catch Limit to reflect the latest stock assessment guidance serve as compliance with National Standard 9. *See* JA

___, ECF 46 at 29 (“anyway, A53 reduced the total catch limit by 19 percent”). *Flaherty* is instructive on this point. 850 F. Supp. 2d at 58. In that case, the Service pointed to catch limits in the Atlantic herring fishery to show that bycatch of other herring species would be minimized. *Id.* The court rejected that argument, finding that “generally limiting the amount of fishing in the Atlantic herring fishery” merely produced an “ancillary benefit of reducing bycatch and bycatch mortality” of herring generally, and did not show that the Service considered the “significant issue” of whether the management plan minimized bycatch to the extent practicable. *Id.* Similarly here, the Service was already required by § 1853(a)(15) to reduce the total Annual Catch Limit; merely taking that mandatory action does not demonstrate a rigorous analysis of the bycatch issue.

The Service’s other justifications fare no better. *See* JA ___, AR 17424-17425. The Service explained that socio-economic considerations justified its allocation decision, even though bycatch might be lower under a different allocation. *See* JA ___, AR 17425 (the “commercial and recreational sectors have different economic, social, and cultural goals and objectives,” and the Service “must consider and account for these differences” when determining compliance with National Standard 9). But that explanation treats high levels of bycatch in the recreational sector as given, with nothing to be done about them. *See* JA ___, AR 17423 (“These different goals and objectives impact fishing behavior, which generally results in

more discards by the recreational sector.”).

National Standard 9 required the Service to do more than simply acknowledge this bycatch. The Service did not consider whether other measures were practicable to minimize bycatch or bycatch mortality to offset its decision to increase the allocation to the recreational sector which has higher levels of bycatch.

The Service’s evaluation of its compliance with National Standard 9 is arbitrary because it entirely fails to consider an important aspect of the problem that National Standard 9 was intended to address, and improperly conflates its statutory duties under National Standard 9 with its separate duties under National Standard 1 and §1853(a)(15). *See State Farm*, 463 U.S. at 43.

C. Amendment 53 lacks catch limits and accountability measures required by the Fishery Act

Under Section 303(a)(15) of the Fishery Act, management plans must “establish a mechanism for specifying annual catch limits...at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.” 16 U.S.C. § 1853(a)(15). Amendment 53 does not comply with this requirement because it fails to set catch limits or accountability measures for dead discards.

As discussed above, the Service’s guidelines set forth the agency’s process to comply with § 1853(a)(15). The first step under the guidelines is to establish the Overfishing Limit, which is defined as “the annual amount of *catch* that corresponds

to the estimate of [the maximum fishing mortality threshold] applied to a stock...and is expressed in terms of numbers or weight of fish.” 50 C.F.R. § 600.310(e)(2)(i)(D) (emphasis added). The term “catch” is defined as the “total quantity of fish taken” in all fisheries and “includes fish that are retained for any purpose, as well as mortality of fish that are discarded.” § 600.310(f)(1)(i). “Catch” includes dead discards; therefore, the specification of the Overfishing Limit must include dead discards. This is logical because dead discards are caused by fishing, and the overfishing limit is intended to represent the level of removals from fishing beyond which overfishing is occurring. § 600.310(e)(2)(i)(C) (the “maximum fishing mortality threshold” is “the level of fishing mortality...above which overfishing is occurring”). The setting of Acceptable Biological Catch, Annual Catch Limits and sector Annual Catch Limits all follow the setting of the Overfishing Limit.

The Service’s guidelines provide that the Acceptable Biological Catch “may be expressed in terms of landings as long as estimates of bycatch and any other fishing mortality not accounted for in the landings are incorporated into the determination of [Acceptable Biological Catch].” § 600.310(f)(3)(i). However, the Service’s guidelines do not provide a similar exception for the Overfishing Limit; that limit must include both landings and dead discards. This allows the Service to track whether overfishing is occurring against a quantified limit that represents the maximum level of fishing mortality before overfishing occurs.

The Service's guidelines provide that Regional Councils "must determine as soon as possible after the fishing year if an [Annual Catch Limit] was exceeded" and, if so, "[accountability measures] must be implemented as soon as possible to correct the operational issue that caused the [Annual Catch Limit] overage, as well as any biological consequences to the stock..." § 600.310(g)(3). Accountability measures include an "overage adjustment" where the following year's Annual Catch Limit is reduced to account for the prior year's overage, or imposition of a protective buffer (or reduction) on future Annual Catch Limits to help absorb a future overage. *See id.* (the guidelines refer to such a buffer as an Annual Catch Target; *see* § 600.310(g)(4)).

Amendment 53 directly contravenes the approach set forth in the Service's guidelines. The Overfishing Limit established by Amendment 53 (4.66 million pounds; JA ___, AR 7967) applies to landings only. It does not include dead discards. Instead, mortality from dead discards and other removals (e.g., mortality from periodic red tide events that kill large numbers of grouper) is estimated separately, and factored in by the stock assessment model that projects "yield streams" (i.e., landings) the stock can produce into the future. *See* JA ___, AR 17422. Thus, for red grouper the Service does not set an annual limit on dead discards, does not track dead discards against a limit, and has not established accountability measures to ensure any limit is achieved.

The Service's approach is a particular problem in the red grouper fishery because of high levels of recreational sector bycatch and dead discards that the Service itself acknowledges. The Service's data show that nearly half of all fishing mortality from the recreational sector is attributable to dead discards, equating to hundreds of thousands of individual red grouper killed and wasted each year. *See* JA ____, AR 18592-18593, 18294, 8171-8172. By excluding dead discards from the Overfishing Limit, the Service undermines a key purpose of § 1853(a)(15). When Congress amended the Fishery Act to require Annual Catch Limits and accountability measures, it did not intend for the Regional Councils to simply exclude a significant source of fishing mortality from these limits. In a prior case, the Service agreed: “[B]ecause the [Fishery] Act now requires the Council and NMFS to set annual catch limits for these stocks, and because bycatch counts against those catch limits, the total amount of bycatch must be accurately assessed to ensure that catch limits are not exceeded.” *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 110 (D.D.C. 2011) (quoting the Service's brief). The Service provides no explanation as to why it backtracked on this obligation here, and there is none.

The district court concluded that the Service's approach complied with § 1853(a)(15) because “the quota [Annual Catch Limit] here is expressed in landings, and that number accounts for other sources of fishing mortality via estimations that originate with the latest stock assessment.” JA ____, ECF 46 at 32. “So long as

estimates of total fishing mortality are consistent, that procedure will ensure the recreational sector stays beneath the total fishing mortality...” *Id.*

The district court’s explanation assumes away the problem that Congress enacted § 1853(a)(15) to address; namely that soft catch targets had proven ineffective, and so “hard, science-based caps on how many fish could be caught each year” were needed to resolve lingering problems with overfishing. *Conservation L. Foundation*, 37 F. Supp. 3d at 266 (“[A]nnual catch limits were clearly important to Congress in 2006 when it drafted this bill, and, as a result, the legislature placed strict limits on the Service and the Council’s method for setting them and on fishers’ ability to exceed them.”). Merely making a projection about what the level of dead discards might be in the future does not qualify as a “catch limit” with “accountability measures.” The Service does not assess annually whether the recreational sector discarded more or fewer red grouper than it projected when setting limits on landings. The recreational sector could discard any number of red grouper without affecting its fishing seasons or catch limits because, with no limit on dead discards, no accountability measures kick in.

By failing to set a catch limit for bycatch, the Service also increased the risk of overfishing. The Service’s guidelines acknowledge that “bycatch can increase substantially the uncertainty concerning total fishing-related mortality,” which “makes it more difficult” to ensure that “overfishing levels are not exceeded.” 50

C.F.R. § 600.350(b). The problem with the Service’s approach is compounded by the lack of mandatory reporting by private anglers, which account for an estimated 77 percent of red grouper discards. JA ____, AR 8171-8172. The Service’s voluntary surveys “have a high level of uncertainty because self-reported data are not considered as reliable and not all recreational fishermen are surveyed.” JA ____, AR 18639. This uncertainty belies the district court’s reliance on “estimates of total fishing mortality” being “consistent” to ensure that the recreational sector “stays beneath the total fishing mortality.” JA ____, ECF 46 at 32. The district court found no “reason to believe those estimates produce inconsistent results,” *id.*, but that observation underscores the problem: the Service does not track dead discards from the reporting that does occur each year against its projections to know if inconsistency exists.

In *Oceana*, the court held that to comply with § 1853(a)(15), bycatch must “be accurately reported throughout the fishing season at levels such that [Annual Catch Limits] can be monitored and enforced.” 831 F. Supp. 2d at 111. The court further observed that bycatch monitoring provisions must be “mandatory and sufficiently specific.” *Id.* at 112. The court found that the Service met those requirements in that case because the management plan at issue required vessels to carry observers to monitor bycatch, and that the specified level of observer coverage was sufficient to quantify bycatch as “implicitly needed to support the system of

[Annual Catch Limits] and [accountability measures] that § (a)(15) requires.” *Id.* at 113.

The district court distinguished *Oceana* because the management plan at issue there was “very different” from Amendment 53. JA ___, ECF 46 at 31-32. If anything, *Oceana* underscores the deficiencies in catch monitoring at issue here. In *Oceana*, fishing vessels were already subject to rigorous bycatch reporting requirements. 831 F. Supp. 2d at 111-12. The question was whether the mandated level of observer coverage was sufficient to confirm the reporting, and the court found it was. *Id.* at 112-113. Here, by contrast, there is no mandatory reporting for private anglers and bycatch is not tracked against a predetermined limit during the fishing season. *Oceana* concerned measures to verify reported bycatch; here there is no mandatory reporting, much less any verification system.

Moreover, the quota systems in *Oceana* and here are fundamentally the same—both are “output-based” systems premised on measuring fishing results. *See Oceana*, at 831 F. Supp. 2d at 102-103 (noting that the management strategy shifted from an “input-based” system to an “out-put based” system that required changes in the way overfishing is monitored); 50 C.F.R. § 622.41(e)(2)(i) (red grouper recreational sector catch limits enforced through monitoring of landings, i.e., fishing results). The key difference between *Oceana* and this case is that here the Service has implemented no measures to quantify recreational sector out-puts in terms of

fish actually caught during the fishing season so that a catch limit that includes dead discards can be enforced.

The Service's decision to exempt bycatch from an annual limit with accountability measures does not comport with § 1853(a)(15).

III. AMENDMENT 53 ARBITRARILY RELIED ON AN ECONOMIC ANALYSIS IT PREVIOUSLY REJECTED

The Service justified the negative conservation consequences stemming from Amendment 53 primarily on the basis of purported net economic benefits. *See, e.g.*, JA ___, AR 17424-17425. The Service concluded that the reallocation “is expected to result in the greatest net economic benefits to the Nation.” JA ___, AR 17424. But in a prior amendment to the Reef Fish Plan, Amendment 28, the Service determined that “changes in net benefit estimates” are “erroneous” where, as here, a “sector’s quota is not efficiently allocated within the sector.” JA ___, AR 11991; 11948. Amendment 53 arbitrarily relies upon the same economic analysis the Service rejected as being “erroneous” in Amendment 28.

Like Amendment 53, Amendment 28 also involved a reallocation in favor of the recreational sector based on the Service's efforts to recalibrate historical landings estimates for the recreational sector. *See Guindon II*, 240 F. Supp. 3d at 190. Initially, the purpose of Amendment 28 was “to ‘consider changes to the commercial and recreational red snapper allocation to increase the net benefits from red snapper fishing.’” *Id.* (quoting 78 Fed. Reg. 66900 (Nov. 7, 2013)). However, the Gulf

Council modified the purpose of Amendment 28 “[a]fter learning that it was not possible to determine changes in economic benefits...” *Id.* at 190-91.

The problem, as the Service explained in Amendment 28, is that the allocation of fishing privileges within the respective commercial and recreational sectors is not comparable. The commercial sector, “which operates under an [individual fishing quota] program, would constitute a reasonable approximation for an efficient resource allocation.” JA ____, AR 11991. “However, the open access management approach in the recreational sector cannot be conducive to an efficient allocation of red snapper within the recreational sector.” *Id.* As a result,

changes in net benefit estimates based on the generally accepted application of the equimarginal principle...and associated inferences about economic efficiency are erroneous when each sector’s quota is not efficiently allocated within the sector (i.e., quota is not assigned to those participants that have the highest willingness to pay for the resource). As a result, policy prescriptions based on such inferences would not be valid, and therefore, not useful.

JA ____, AR 11991.

The conclusion the Service drew about net economic benefits in Amendment 28 applies equally to Amendment 53. “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) (citing *State Farm*, 463 U.S. at 29). Red grouper and red snapper are both managed with similar measures under the Reef Fish Plan. The commercial sector is limited access

with an individual fishing quota program, and the recreational sector (particularly the private angler component) is open access. JA ____, AR 7975, 8003, 8007, 8053.

In response to comments, the Service acknowledged that the findings from Amendment 28 remain valid: “economic theory does suggest that it is not possible to maximize net economic benefits to the Nation because resources are not being efficiently allocated in that [recreational] sector. As a result, it is not possible to maximize net economic benefits to the Nation...regardless of which allocation is selected.” JA ____, AR 17432. Despite that finding, the Service nevertheless proclaimed *in the same rule* that the revised allocation “is expected to result in the greatest net economic benefits to the Nation.” JA ____, AR 17424. The Service’s own rule is internally inconsistent and self-contradictory. This is a straightforward violation of the Administrative Procedure Act. *See Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm’n*, 879 F.3d 1202, 1214 (D.C. Cir. 2018) (“it would be arbitrary and capricious for [an] agency’s decision making to be ‘internally inconsistent’”).

The district court found the inconsistency was “not serious enough to warrant vacatur” because the Service’s explanation did not “fall below the standards of reasoned decisionmaking” and the Service did not “rel[y] heavily” on the analysis. JA ____, ECF 46 at 35. Those conclusions are not supported by the record.

The Service’s economic analysis played a critical role in approving

Amendment 53. The analysis is contained in the amendment under a section titled, “Direct and Indirect Effects on the Economic Environment.” JA ___, AR 8077 (Table 4.1.3.7). The conclusion of that section presents the selected reallocation alternative as the best economic outcome. *Id.* In a section titled, “Council conclusions,” the amendment states that the selected alternative “is also expected to result in the greatest net economic benefits to the Nation.” JA ___, AR 7995.

Members of the public cited the economic analysis in public testimony urging the Gulf Council to proceed with reallocation. *See, e.g.*, JA ___, AR 3912, 13927-13928. Immediately prior the Gulf Council’s final vote on Amendment 53, the Service’s Regional Administrator assured Gulf Council members and the public (wrongly, it turns out) that “these are standardized fisheries economic analyses...we’re not dramatically changing methods...they are consistent methods that are being used.” JA ___, AR 4034.

The Service responded to public comments that Amendment 53 would violate the Fishery Act’s National Standards by assuring commenters that the revised allocation would “result in the greatest net economic benefits to the Nation,” JA ___, AR 17424 (response to comment on standard 4); that the “preferred sector allocation...provides the greatest net economic benefits to the nation,” *id.* (response to comment on standard 5); and that “[c]onservation and management measures must be consistent with...maximization of net benefits to the Nation,” *id.* (response

to comment on standard 9).

Indeed, both the Service and Louisiana informed the district court that Amendment 53 was justified because it would result in the “greatest net economic benefits to the Nation.” JA ____, ECF 36 at 29; JA ____, ECF 32 at 17.

On this record, there is no basis for the district court’s conclusion that the Service did not rely heavily on the flawed economic analysis in Amendment 53, and that reliance was such a trivial matter that vacatur of Amendment 53 was not required.

The district court’s determination that the Service properly used the economic analysis for purposes of comparing alternatives rather than assessing maximum economic benefit also makes little sense on its own terms. JA ____, ECF 46 at 35. It does not follow that use of a flawed economic analysis is “erroneous” when determining overall economic benefits, but legitimate when comparing relative economic benefits. If the underlying economic analysis is flawed and inapplicable, as the Service concluded, the relative comparison between two equally flawed conclusions has no use.

The Service’s unexplained and improper reliance on an economic analysis it found erroneous, whether for comparing effects of alternatives or otherwise, is arbitrary and capricious and an abuse of discretion. *See WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1237-38 (10th Cir. 2017) (“[I]t

was an abuse of discretion to rely on an economic assumption, which contradicted basic economic principles, as the basis for distinguishing between the no action alternative and the preferred alternative.”).

CONCLUSION

Amendment 53 violates the Fishery Act and the Administrative Procedure Act. The Court should reverse the judgment of the district court, vacate Amendment 53, and remand it to the Service.

Dated: April 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On behalf of Appellants, I hereby certify pursuant to D.C. Circuit Rule 32(a)(1) and Federal Rules of Appellate Procedure 32(a)(7)(B) that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 11,425 words.

Dated: April 7, 2023

/s/ J. Timothy Hobbs

J. Timothy Hobbs

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STATUTES

5 U.S.C. § 706, Administrative Procedure Act, Scope of Review

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1801(b), Magnuson-Stevens Fishery Conservation and Management Act, Findings, purposes and policy

Findings, purposes and policy

...

(b) Purposes

It is therefore declared to be the purposes of the Congress in this chapter--

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, and (B) exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and

administration of such plans, and (B) which take into account the social and economic needs of the States;

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development in a non-wasteful manner; and

(7) to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.

16 U.S.C. § 1802(2), (5), Magnuson-Stevens Fishery Conservation and Management Act, Definitions

Definitions

...

(2) The term “bycatch” means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.

...

(5) The term “conservation and management” refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that—

(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

(ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

16 U.S.C. § 1851(a), Magnuson-Stevens Fishery Conservation and Management Act, National standards for fishery conservation and management

(a) In general

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

- (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
- (2) Conservation and management measures shall be based upon the best scientific information available.
- (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
- (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
- (5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.
- (6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

(9) 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.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

16 U.S.C. § 1852(h), Magnuson-Stevens Fishery Conservation and Management Act, Regional Fishery Management Councils

Regional Fishery Management Councils

...

(h) Functions

Each Council shall, in accordance with the provisions of this chapter--

(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824(b)(4)(C) of this title or section 1824(d) of this title, and any fishery management plan or amendment transmitted to it under section 1854(c)(4) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this chapter (and for purposes of this paragraph, the term “geographical area concerned” may include an area under the authority of another Council if the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area; but not unless such other Council is first consulted regarding the conduct of such hearings within its area);

(4) submit to the Secretary such periodic reports as the Council deems appropriate, and any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from, the capacity and extent to which United States fish

processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery (except as provided in section 4 subsection (a)(3)) within its geographical area of authority;

(6) develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g);

(7) develop, in conjunction with the scientific and statistical committee, multi-year research priorities for fisheries, fisheries interactions, habitats, and other areas of research that are necessary for management purposes, that shall--

(A) establish priorities for 5-year periods;

(B) be updated as necessary; and

(C) be submitted to the Secretary and the regional science centers of the National Marine Fisheries Service for their consideration in developing research priorities and budgets for the region of the Council;

(8) in addition to complying with the standards and requirements under paragraph (6), sections 1851(a), 1853(a)(15), and 1854(e) of this title, and other applicable provisions of this chapter, have the authority to use fishery management measures in a recreational fishery (or the recreational component of a mixed-use fishery) in developing a fishery management plan, plan amendment, or proposed regulations, such as extraction rates, fishing mortality targets, harvest control rules, or traditional or cultural practices of native communities in such fishery or fishery component; and

(9) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

16 U.S.C. § 1853(a), Magnuson-Stevens Fishery Conservation and Management Act, Contents of fishery management plans

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

(A) necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify--

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,¹ charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors,²

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for--

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority--

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(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 and;3

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

REGULATIONS

50 C.F.R. § 600.310(e)(2)(i), (f), (g), National Standard 1—Optimum Yield

(e)(2) Status determination criteria—

(i) Definitions.

(A) Status determination criteria (SDC) mean the measurable and objective factors, MFMT, OFL, and MSST, or their proxies, that are used to determine if overfishing has occurred, or if the stock or stock complex is overfished. Magnuson–Stevens Act (section 3(34)) defines both “overfishing” and “overfished” to mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the MSY on a continuing basis. To avoid confusion, this section clarifies that “overfished” relates to biomass of a stock or stock complex, and “overfishing” pertains to a rate or level of removal of fish from a stock or stock complex.

(B) Overfishing occurs whenever a stock or stock complex is subjected to a level of fishing mortality or total catch that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.

(C) Maximum fishing mortality threshold (MFMT) means the level of fishing mortality (i.e. F), on an annual basis, above which overfishing is occurring. The MFMT or reasonable proxy may be expressed either as a single number (a fishing mortality rate or F value), or as a function of spawning biomass or other measure of reproductive potential.

(D) Overfishing limit (OFL) means the annual amount of catch that corresponds to the estimate of MFMT applied to a stock or stock complex's abundance and is expressed in terms of numbers or weight of fish.

(E) Overfished. A stock or stock complex is considered “overfished” when its biomass has declined below MSST.

(F) Minimum stock size threshold (MSST) means the level of biomass below which the capacity of the stock or stock complex to produce MSY on a continuing basis has been jeopardized.

(G) Approaching an overfished condition. A stock or stock complex is approaching an overfished condition when it is projected that there is more than a 50 percent chance that the biomass of the stock or stock complex will decline below the MSST within two years.

...

(f) Acceptable biological catch and annual catch limits.

(1) Definitions.—

(i) Catch is the total quantity of fish, measured in weight or numbers of fish, taken in commercial, recreational, subsistence, tribal, and other fisheries. Catch includes fish that are retained for any purpose, as well as mortality of fish that are discarded.

(ii) Acceptable biological catch (ABC) is a level of a stock or stock complex's annual catch, which is based on an ABC control rule that accounts for the scientific uncertainty in the estimate of OFL, any other scientific uncertainty, and the Council's risk policy.

(iii) Annual catch limit (ACL) is a limit on the total annual catch of a stock or stock complex, which cannot exceed the ABC, that serves as the basis for invoking AMs. An ACL may be divided into sector-ACLs (see paragraph (f)(4) of this section).

(iv) Control rule is a policy for establishing a limit or target catch level that is based on the best scientific information available and is established by the Council in consultation with its SSC.

(v) Management uncertainty refers to uncertainty in the ability of managers to constrain catch so that the ACL is not exceeded, and the uncertainty in quantifying the true catch amounts (i.e., estimation errors). The sources of management uncertainty could include: Late catch reporting; misreporting;

underreporting of catches; lack of sufficient inseason management, including inseason closure authority; or other factors.

(vi) Scientific uncertainty refers to uncertainty in the information about a stock and its reference points. Sources of scientific uncertainty could include: Uncertainty in stock assessment results; uncertainty in the estimates of MFMT, MSST, the biomass of the stock, and OFL; time lags in updating assessments; the degree of retrospective revision of assessment results; uncertainty in projections; uncertainties due to the choice of assessment model; longer-term uncertainties due to potential ecosystem and environmental effects; or other factors.

(2) ABC control rule.—

(i) For stocks and stock complexes required to have an ABC, each Council must establish an ABC control rule that accounts for scientific uncertainty in the OFL and for the Council's risk policy, and that is based on a comprehensive analysis that shows how the control rule prevents overfishing. The Council's risk policy could be based on an acceptable probability (at least 50 percent) that catch equal to the stock's ABC will not result in overfishing, but other appropriate methods can be used. When determining the risk policy, Councils could consider the economic, social, and ecological trade-offs between being more or less risk averse. The Council's choice of a risk policy cannot result in an ABC that exceeds the OFL. The process of establishing an ABC control rule may involve science advisors or the peer review process established under Magnuson–Stevens Act section 302(g)(1)(E).

(ii) The ABC control rule must articulate how ABC will be set compared to the OFL based on the scientific knowledge about the stock or stock complex and taking into account scientific uncertainty (see paragraph (f)(1)(vi) of this section). The ABC control rule should consider reducing fishing mortality as stock size declines below B_{msy} and as scientific uncertainty increases, and may establish a stock abundance level below which fishing would not be allowed. When scientific uncertainty cannot be directly calculated, such as when proxies are used, then a proxy for the uncertainty should be established

based on the best scientific information, including comparison to other stocks. The control rule may be used in a tiered approach to address different levels of scientific uncertainty. Councils can develop ABC control rules that allow for changes in catch limits to be phased-in over time or to account for the carry-over of some of the unused portion of the ACL from one year to the next. The Council must articulate within its FMP when the phase-in and/or carry-over provisions of the control rule can and cannot be used and how each provision prevents overfishing, based on a comprehensive analysis.

(A) Phase-in ABC control rules. Large changes in catch limits due to new scientific information about the status of the stock can have negative short-term effects on a fishing industry. To help stabilize catch levels as stock assessments are updated, a Council may choose to develop a control rule that phases in changes to ABC over a period of time, not to exceed 3 years, as long as overfishing is prevented each year (i.e., the phased-in catch level cannot exceed the OFL in any year). In addition, the Councils should evaluate the appropriateness of phase-in provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

(B) Carry-over ABC control rules. An ABC control rule may include provisions for the carry-over of some of the unused portion of an ACL (i.e., an ACL underage) from one year to increase the ABC for the next year, based on the increased stock abundance resulting from the fishery harvesting less than the full ACL. The resulting ABC recommended by the SSC must prevent overfishing and must consider scientific uncertainty consistent with the Council's risk policy. Carry-over provisions could also allow an ACL to be adjusted upwards as long as the revised ACL does not exceed the specified ABC. When considering whether to use a carry-over provision, Councils should consider the likely reason for the ACL underage. ACL underages that result from management uncertainty (e.g., premature fishery closure) may be appropriate circumstances for considering a carry-over

provision. ACL underages that occur as a result of poor or unknown stock status may not be appropriate to consider in a carry-over provision. In addition, the Councils should evaluate the appropriateness of carry-over provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

(3) Specification of ABC. ABC may not exceed OFL (see paragraph (e)(2)(i)(D) of this section). Councils and their SSC should develop a process by which the SSC can access the best scientific information available when implementing the ABC control rule (i.e., specifying the ABC). The SSC must recommend the ABC to the Council. An SSC may recommend an ABC that differs from the result of the ABC control rule calculation, based on factors such as data uncertainty, recruitment variability, declining trends in population variables, and other factors, but must provide an explanation for the deviation. For Secretarial FMPs or amendments, agency scientists or a peer review process would provide the scientific advice to establish ABC. For internationally-assessed stocks, an ABC as defined in these guidelines is not required if stocks fall under the international exception (see paragraph (h)(1)(ii) of this section). While the ABC is allowed to equal OFL, NMFS expects that in most cases ABC will be reduced from OFL to reduce the probability that overfishing might occur.

(i) Expression of ABC. ABC should be expressed in terms of catch, but may be expressed in terms of landings as long as estimates of bycatch and any other fishing mortality not accounted for in the landings are incorporated into the determination of ABC.

(ii) ABC for overfished stocks. For overfished stocks and stock complexes, a rebuilding ABC must be set to reflect the annual catch that is consistent with the schedule of fishing mortality rates (i.e., Frebuild) in the rebuilding plan.

(4) Setting the annual catch limit—

(i) General. ACL cannot exceed the ABC and may be set annually or on a multiyear plan basis. ACLs in coordination with AMs must prevent overfishing (see MSA section 303(a)(15)). If an Annual Catch Target

(ACT), or functional equivalent, is not used, management uncertainty should be accounted for in the ACL. If a Council recommends an ACL which equals ABC, and the ABC is equal to OFL, the Secretary may presume that the proposal would not prevent overfishing, in the absence of sufficient analysis and justification for the approach. A “multiyear plan” as referenced in section 303(a)(15) of the Magnuson–Stevens Act is a plan that establishes harvest specifications or harvest guidelines for each year of a time period greater than 1 year. A multiyear plan must include a mechanism for specifying ACLs for each year with appropriate AMs to prevent overfishing and maintain an appropriate rate of rebuilding if the stock or stock complex is in a rebuilding plan. A multiyear plan must provide that, if an ACL is exceeded for a year, then AMs are implemented for the next year consistent with paragraph (g)(3) of this section.

(ii) Sector–ACLs. A Council may, but is not required to, divide an ACL into sector–ACLs. If sector–ACLs are used, sector–AMs should also be specified. “Sector,” for purposes of this section, means a distinct user group to which separate management strategies and separate catch quotas apply. Examples of sectors include the commercial sector, recreational sector, or various gear groups within a fishery. If the management measures for different sectors differ in the degree of management uncertainty, then sector–ACLs may be necessary so that appropriate AMs can be developed for each sector. If a Council chooses to use sector–ACLs, the sum of sector–ACLs must not exceed the stock or stock complex level ACL. The system of ACLs and AMs designed must be effective in protecting the stock or stock complex as a whole. Even if sector–ACLs and sector–AMs are established, additional AMs at the stock or stock complex level may be necessary.

(iii) ACLs for State–Federal Fisheries. For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further divided. For example, the overall ACL could be divided into a Federal–ACL and state–ACL. However, NMFS recognizes that Federal management is limited to the portion of the fishery under Federal authority. See 16 U.S.C. 1856. When stocks are co-managed by Federal, state, tribal, and/or territorial fishery managers, the goal should be to develop collaborative conservation and

management strategies, and scientific capacity to support such strategies (including AMs for state or territorial and Federal waters), to prevent overfishing of shared stocks and ensure their sustainability.

(iv) Relationship between OY and the ACL framework. The dual goals of NS1 are to prevent overfishing and achieve OY on a continuing basis. The ABC is an upper limit on catch that prevents overfishing within an established framework of risk and other considerations. As described in paragraph (e)(3) of this section, ecological, economic, and social factors, as well as values associated with determining the greatest benefit to the Nation, are important considerations in specifying OY. These types of considerations can also be considered in the ACL framework. For example, an ACL (or ACT) could be set lower than the ABC to account for ecological, economic, and social factors (e.g., needs of forage fish, promoting stability, addressing market conditions, etc.). Additionally, economic, social, or ecological trade-offs could be evaluated when determining the risk policy for an ABC control rule (see paragraph (f)(2) of this section). While OY is a long-term average amount of desired yield, there is, for each year, an amount of fish that is consistent with achieving the long-term OY. A Council can choose to express OY on an annual basis, in which case the FMP or FMP amendment should indicate that the OY is an “annual OY.” An annual OY cannot exceed the ACL.

...

(g) Accountability measures (AMs)—

(1) Introduction. AMs are management controls to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs should address and minimize both the frequency and magnitude of overages and correct the problems that caused the overage in as short a time as possible. NMFS identifies two categories of AMs, inseason AMs and AMs for when the ACL is exceeded. The FMP should identify what sources of data will be used to implement AMs (e.g., inseason data, annual catch compared to the ACL, or multi-year averaging approach).

(2) Inseason AMs. Whenever possible, FMPs should include inseason monitoring and management measures to prevent catch from exceeding ACLs. Inseason AMs could include, but are not limited to: An annual catch target (see paragraph (g)(4) of this section); closure of a fishery; closure of specific areas; changes in gear; changes in trip size or bag limits; reductions in effort; or other appropriate management controls for the fishery. If final data or data components of catch are delayed, Councils should make appropriate use of preliminary data, such as landed catch, in implementing inseason AMs. FMPs should contain inseason closure authority giving NMFS the ability to close fisheries if it determines, based on data that it deems sufficiently reliable, that an ACL has been exceeded or is projected to be reached, and that closure of the fishery is necessary to prevent overfishing. For fisheries without inseason management control to prevent the ACL from being exceeded, AMs should utilize ACTs that are set below ACLs so that catches do not exceed the ACL.

(3) AMs for when the ACL is exceeded. On an annual basis, the Council must determine as soon as possible after the fishing year if an ACL was exceeded. If an ACL was exceeded, AMs must be implemented as soon as possible to correct the operational issue that caused the ACL overage, as well as any biological consequences to the stock or stock complex resulting from the overage when it is known. These AMs could include, among other things, modifications of inseason AMs, the use or modification of ACTs, or overage adjustments. The type of AM chosen by a Council will likely vary depending on the sector of the fishery, status of the stock, the degree of the overage, recruitment patterns of the stock, or other pertinent information. If an ACL is set equal to zero and the AM for the fishery is a closure that prohibits fishing for a stock, additional AMs are not required if only small amounts of catch (including bycatch) occur, and the catch is unlikely to result in overfishing. For stocks and stock complexes in rebuilding plans, the AMs should include overage adjustments that reduce the ACLs in the next fishing year by the full amount of the overage, unless the best scientific information available shows that a reduced overage adjustment, or no adjustment, is needed to mitigate the effects of the overage.

(4) Annual Catch Target (ACT) and ACT control rule. ACTs, or the functional equivalent, are recommended in the system of AMs so that ACL is not exceeded.

An ACT is an amount of annual catch of a stock or stock complex that is the management target of the fishery, and accounts for management uncertainty in controlling the catch at or below the ACL. ACT control rules can be used to articulate how management uncertainty is accounted for in setting the ACT. ACT control rules can be developed by the Council, in coordination with the SSC, to help the Council account for management uncertainty.

(5) AMs based on multi-year average data. Some fisheries have highly variable annual catches and lack reliable inseason or annual data on which to base AMs. If there are insufficient data upon which to compare catch to ACL, AMs could be based on comparisons of average catch to average ACL over a three-year moving average period or, if supported by analysis, some other appropriate multi-year period. Councils should explain why basing AMs on a multi-year period is appropriate. Evaluation of the moving average catch to the average ACL must be conducted annually, and if the average catch exceeds the average ACL, appropriate AMs should be implemented consistent with paragraph (g)(3) of this section.

(6) AMs for State–Federal Fisheries. For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments must, at a minimum, have AMs for the portion of the fishery under Federal authority. Such AMs could include closing the EEZ when the Federal portion of the ACL is reached, or the overall stock's ACL is reached, or other measures.

(7) Performance Standard. If catch exceeds the ACL for a given stock or stock complex more than once in the last four years, the system of ACLs and AMs should be reevaluated, and modified if necessary, to improve its performance and effectiveness. If AMs are based on multi-year average data, the performance standard is based on a comparison of the average catch to the average ACL. A Council could choose a higher performance standard (e.g., a stock's catch should not exceed its ACL more often than once every five or six years) for a stock that is particularly vulnerable to the effects of overfishing, if the vulnerability of the stock has not already been accounted for in the ABC control rule.

50 C.F.R. § 600.325(c)(3), National Standard 4—Allocations

(3) Factors in making allocations. An allocation of fishing privileges must be fair and equitable, must be reasonably calculated to promote conservation, and must avoid excessive shares. These tests are explained in paragraphs (c)(3)(i) through (c)(3)(iii) of this section:

(i) Fairness and equity.

(A) An allocation of fishing privileges should be rationally connected to the achievement of OY or with the furtherance of a legitimate FMP objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. For instance, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of long-time participants in the fishery. On the other hand, there is a rational connection between an objective of harvesting shrimp at their maximum size and closing a nursery area to trawling.

(B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as “fair and equitable,” if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo. Where relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.

(ii) Promotion of conservation. Numerous methods of allocating fishing privileges are considered “conservation and management” measures under section 303 of the Magnuson–Stevens Act. An allocation scheme may promote conservation by encouraging a rational, more easily managed use of the resource. Or, it may promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product. To the extent that rebuilding plans or other conservation and management measures that reduce the overall harvest in a fishery are necessary, any harvest restrictions or recovery benefits must be allocated fairly and equitably among the commercial, recreational, and charter fishing sectors of the fishery.

(iii) Avoidance of excessive shares. An allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.

(iv) Other factors. In designing an allocation scheme, a Council should consider other factors relevant to the FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery by present participants and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing.

50 C.F.R. § 600.350(b), National Standard 9—Bycatch

(b) General. This national standard requires Councils to consider the bycatch effects of existing and planned conservation and management measures. Bycatch can, in two ways, impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation. First, bycatch can increase substantially the uncertainty concerning total fishing-related mortality, which makes it more difficult to assess the status of stocks, to set the appropriate OY and define overfishing levels, and to ensure that OYs are attained and overfishing levels are not exceeded. Second, bycatch may also preclude other more productive uses of fishery resources.

50 C.F.R. § 622.22(b), Individual fishing quota (IFQ) program for Gulf groupers and tilefishes

(b) IFQ operations and requirements—

(1) IFQ vessel accounts for Gulf groupers and tilefishes. For a person aboard a vessel, for which a commercial vessel permit for Gulf reef fish has been issued, to fish for, possess, or land Gulf groupers (including DWG and SWG, as specified in paragraph (a) of this section or tilefishes (including goldface tilefish, blueline tilefish, and tilefish), regardless of where harvested or possessed, a Gulf IFQ vessel account for the applicable species or species groups must have been established. As a condition of the IFQ vessel account, a person aboard such vessel must comply with the requirements of this section, § 622.22, when fishing for groupers or tilefishes regardless of where the fish are harvested or possessed. An owner of a vessel with a commercial vessel permit for Gulf reef fish, who has established an IFQ account for the applicable species, as specified in paragraph (a)(3)(i) of this section, online via the NMFS IFQ website <https://secatchshares.fisheries.noaa.gov>, may establish a vessel account through that IFQ account for that permitted vessel. If such owner does not have an online IFQ account, the owner must first contact IFQ Customer Service at 1-866-425-7627 to obtain information necessary to access the IFQ Web site and establish an online IFQ account. There is no fee to set-up an IFQ account or a vessel account. Only one vessel account may be established per vessel under each IFQ program. An owner with multiple vessels may establish multiple vessel accounts under each IFQ account. The purpose of the vessel account is to hold IFQ allocation that is required to land the applicable IFQ species. A vessel account, or its linked IFQ shareholder account, must hold sufficient IFQ allocation in the appropriate share category, at least equal to the pounds in gutted weight of the groupers and tilefishes on board at the time of advance notice of landing. Allocation must be transferred to the vessel account, so that the vessel account holds sufficient IFQ allocation at the time of the landing transaction (except for any overage allowed as specified in paragraph (b)(3)(ii) for groupers and tilefishes). The vessel account remains valid as long as the vessel permit remains valid; the vessel has not been sold or transferred; and the vessel owner is in compliance with all Gulf reef fish and IFQ reporting requirements, has paid all applicable IFQ fees, and is not subject to sanctions under 15 CFR part 904. The vessel account is not transferable to another vessel. The provisions of this

paragraph do not apply to fishing for or possession of Gulf groupers and tilefishes under the bag limit specified in § 622.38(b)(2) and (5) respectively.

(2) Gulf IFQ dealer endorsements. In addition to the requirement for a Gulf and South Atlantic dealer permit as specified in § 622.20(c)(1), for a dealer to first receive groupers and tilefishes subject to the IFQ program for groupers and tilefishes, as specified in paragraph (a)(1) of this section, or for a person aboard a vessel with a Gulf IFQ vessel account to sell such groupers and tilefishes directly to an entity other than a dealer, such persons must also have a Gulf IFQ dealer endorsement. A dealer with a Gulf and South Atlantic dealer permit can download a Gulf IFQ dealer endorsement from the NMFS IFQ Web site. If such persons do not have an IFQ account, they must first contact IFQ Customer Service at 1-866-425-7627 to obtain information necessary to access the IFQ Web site and establish an IFQ account. There is no fee for obtaining this endorsement. The endorsement remains valid as long as the Gulf and South Atlantic dealer permit remains valid and the dealer is in compliance with all Gulf reef fish and IFQ reporting requirements, has paid all IFQ fees required, and is not subject to any sanctions under 15 CFR part 904. The endorsement is not transferable.

(3) IFQ Landing and transaction requirements.

(i) At the time of advance notice of landing, the IFQ vessel account, or its linked IFQ shareholder account, must contain allocation at least equal to the pounds in gutted weight of grouper or tilefish species to be landed, except as provided in paragraph (b)(3)(ii) of this section. At the time of the landing transaction, the IFQ vessel account must contain allocation at least equal to the pounds in gutted weight of grouper or tilefish species to be landed, except as provided in paragraph (b)(3)(ii) of this section. Such groupers and tilefishes must be sold and can be received only by a dealer who has a valid Gulf IFQ dealer endorsement and an active IFQ dealer account (i.e., not in delinquent status). All IFQ landings and their actual ex-vessel prices must be reported via the IFQ Web site.

(ii) A person on board a vessel with an IFQ vessel account landing the shareholder's only remaining allocation from among any of the grouper or tilefish share categories, can legally exceed, by up to 10 percent, the

shareholder's allocation remaining on that last fishing trip of the fishing year, i.e. a one-time per fishing year overage. Any such overage will be deducted from the shareholder's applicable allocation for the subsequent fishing year. From the time of the overage until January 1 of the subsequent fishing year, the IFQ shareholder must retain sufficient shares to account for the allocation that will be deducted the subsequent fishing year. Share transfers that would violate this requirement will be prohibited.

(iii) The dealer must complete a landing transaction report for each landing of Gulf groupers or tilefishes via the IFQ Web site on the day of offload, except if the fish are being trailered for transport to a dealer as specified in paragraph (b)(5)(iv) of this section (in which case the landing transaction report may be completed prior to the day of offload), and within 96 hours from the time of landing reported on the most recent landing notification, in accordance with the reporting form(s) and instructions provided on the Web site. This report includes date, time, and location of transaction; weight and actual ex-vessel price of groupers and tilefishes landed and sold (when calculating the weight of IFQ groupers and tilefishes during a landing transaction, ice and water weight may not be deducted from the weight of the fish unless the actual weight of the ice and water can be determined); and information necessary to identify the fisherman, vessel, and dealer involved in the transaction. The fisherman must validate the dealer transaction report by entering the unique PIN for the vessel account when the transaction report is submitted. After the dealer submits the report and the information has been verified by NMFS, the online system will send a transaction approval code to the dealer and the allocation holder.

(iv) If there is a discrepancy regarding the landing transaction report after approval, the dealer or vessel account holder (or his or her authorized agent) must initiate a landing transaction correction form to correct the landing transaction. This form is available via the IFQ Web site. The dealer must then print out the form, both parties must sign it, and the form must be mailed to NMFS. The form must be received by NMFS no later than 15 days after the date of the initial landing transaction.

(4) IFQ cost recovery fees. As required by the Magnuson–Stevens Act, the RA will collect a fee to recover the actual costs directly related to the management and enforcement of the IFQ program for Gulf groupers and tilefishes. The fee cannot exceed 3 percent of the ex-vessel value of Gulf groupers and tilefishes landed under the IFQ program as described in the Magnuson–Stevens Act. Such fees will be deposited in the Limited Access System Administration Fund (LASAF). Initially, the fee will be 3 percent of the actual ex-vessel price of Gulf groupers and tilefishes landed per trip under the IFQ program, as documented in each landings transaction report. The RA will review the cost recovery fee annually to determine if adjustment is warranted. Factors considered in the review include the catch subject to the IFQ cost recovery, projected ex-vessel value of the catch, costs directly related to the management and enforcement of the IFQ program, the projected IFQ balance in the LASAF, and expected non-payment of fee liabilities. If the RA determines that a fee adjustment is warranted, the RA will publish a notification of the fee adjustment in the Federal Register.

(i) Payment responsibility. The IFQ account holder specified in the documented IFQ landing transaction report for Gulf groupers and tilefishes is responsible for payment of the applicable cost recovery fees.

(ii) Collection and submission responsibility. A dealer who receives Gulf groupers or tilefishes subject to the IFQ program is responsible for collecting the applicable cost recovery fee for each IFQ landing from the IFQ account holder specified in the IFQ landing transaction report. Such dealer is responsible for submitting all applicable cost recovery fees to NMFS on a quarterly basis. The fees are due and must be submitted, using [pay.gov](https://www.pay.gov) via the IFQ system, at the end of each calendar-year quarter, but no later than 30 days after the end of each calendar-year quarter. Fees not received by the deadline are delinquent.

(iii) Fee payment procedure. For each IFQ dealer, the IFQ system will post, in individual IFQ dealer accounts, an end-of-quarter statement of cost recovery fees that are due. The dealer is responsible for submitting the cost recovery fee payments using [pay.gov](https://www.pay.gov) via the IFQ system. Authorized payment methods are credit card, debit card, or automated clearing house

(ACH). Payment by check will be authorized only if the RA has determined that the geographical area or an individual(s) is affected by catastrophic conditions.

(iv) Fee reconciliation process—delinquent fees. The following procedures apply to an IFQ dealer whose cost recovery fees are delinquent.

(A) On or about the 31st day after the end of each calendar-year quarter, the RA will send the dealer an electronic message via the IFQ Web site and official notice via mail indicating the applicable fees are delinquent, and the dealer's IFQ account has been suspended pending payment of the applicable fees.

(B) On or about the 91st day after the end of each calendar-year quarter, the RA will refer any delinquent IFQ dealer cost recovery fees to the appropriate authorities for collection of payment.

(5) Measures to enhance IFQ program enforceability—

(i) Advance notice of landing—

(A) General requirement. For the purpose of this paragraph, landing means to arrive at a dock, berth, beach, seawall, or ramp. The owner or operator of a vessel landing IFQ groupers or tilefishes is responsible for ensuring that NMFS is contacted at least 3 hours, but no more than 24 hours, in advance of landing to report the time and location of landing, estimated grouper and tilefish landings in pounds gutted weight for each share category (gag, red grouper, DWG, Other SWG, tilefishes), vessel identification number (Coast Guard registration number or state registration number), and the name and address of the IFQ dealer(s) where the groupers or tilefishes are to be received. The vessel must land within 1 hour after the time given in the landing notification except as provided in paragraph (b)(5)(i)(C) of this section. The vessel landing groupers or tilefishes must have sufficient IFQ allocation in the IFQ vessel account, or its linked IFQ shareholder account, and in the appropriate share category or categories, at least equal to the pounds in gutted weight of all groupers

and tilefishes on board (except for any overage up to the 10 percent allowed on the last fishing trip) at the time of the advance notice of landing.

(B) Submitting an advanced landing notification. Authorized methods for contacting NMFS and submitting the report include calling IFQ Customer Service at 1-866-425-7627, completing and submitting to NMFS a landing notification provided through the VMS unit, or providing the required information to NMFS through the web-based form available on the IFQ Web site.

(C) Landing prior to the notification time. The owner or operator of a vessel that has completed a landing notification and submitted it to NMFS may land prior to the notification time, only if an authorized officer is present at the landing site, is available to meet the vessel, and has authorized the owner or operator of the vessel to land early.

(D) Changes to a landing notification. The owner or operator of a vessel who has submitted a landing notification to NMFS may make changes to the notification by submitting a superseding notification. If the initial superseding notification makes changes to one or more of the following: the time of landing (if landing more than 1 hour after the time on the notification), the dealer(s), or the estimated weights of fish to be landed, the vessel does not need to wait an additional 3 hours to land. If the initial superseding notification makes changes to the landing location, the time of landing is earlier than previously specified, or more than one superseding notification is submitted on a trip, the vessel must wait an additional 3 hours to land, except as provided in paragraph (b)(5)(i)(C) of this section.

(ii) Time restriction on offloading. For the purpose of this paragraph, offloading means to remove IFQ groupers and tilefishes from a vessel. IFQ groupers or tilefishes may be offloaded only between 6 a.m. and 6 p.m., local time, unless an authorized officer is present at the offloading at 6 p.m.,

is available to remain at the site while offloading continues, and authorizes the owner or operator of the vessel to continue offloading after 6 p.m.

(iii) Restrictions on transfer of IFQ groupers and tilefishes. At-sea or dockside transfer of IFQ groupers or tilefishes from one vessel to another vessel is prohibited.

(iv) Requirement for transaction approval code. If IFQ groupers or tilefishes are offloaded to a vehicle for transport or are on a vessel that is trailered for transport, on-site capability to accurately weigh the fish and to connect electronically to the online IFQ system to complete the transaction and obtain the transaction approval code is required. After a landing transaction has been completed, a transaction approval code verifying a legal transaction of the amount of IFQ groupers and tilefishes in possession and a copy of the dealer endorsement must accompany any IFQ groupers or tilefishes from the landing location through possession by a dealer. This requirement also applies to IFQ groupers and tilefishes possessed on a vessel that is trailered for transport. A dealer may only receive IFQ groupers and tilefishes transported by a vehicle or a trailered vessel that has a corresponding transaction approval code.

(v) Approved landing locations. IFQ groupers and tilefishes must be landed at an approved landing location. Landing locations must be approved by NMFS Office for Law Enforcement prior to a vessel landing IFQ groupers or tilefishes at these sites. Proposed landing locations may be submitted online via the IFQ Web site, or by calling IFQ Customer Service at 1-866-425-7627, at any time; however, new landing locations will be approved only at the end of each calendar-year quarter. To have your landing location approved by the end of the calendar-year quarter, it must be submitted at least 45 days before the end of the calendar-year quarter. NMFS will evaluate the proposed sites based on, but not limited to, the following criteria:

(A) Landing locations must have a street address. If there is no street address on record for a particular landing location, global positioning

system (GPS) coordinates for an identifiable geographic location must be provided.

(B) Landing locations must be publicly accessible by land and water, and must satisfy the following criteria:

(1) Vehicles must have access to the site via public roads;

(2) Vessels must have access to the site via navigable water;

(3) No other condition may impede free and immediate access to the site by an authorized law enforcement officer. Examples of such conditions include, but are not limited to: A locked gate, fence, wall, or other barrier preventing 24-hour access to the site; a gated community entry point; a guard; animal; a posted sign restricting access to the site; or any other physical deterrent.

(6) Transfer of IFQ shares and allocation. Until January 1, 2015, IFQ shares and allocations can be transferred only to a person who holds a valid commercial vessel permit for Gulf reef fish; thereafter, IFQ shares and allocations can be transferred only to a U.S. citizen or permanent resident alien. However, a valid commercial permit for Gulf reef fish, an IFQ vessel account for Gulf groupers and tilefishes, and IFQ allocation for Gulf groupers or tilefishes are required to possess (at and after the time of the advance notice of landing), land or sell Gulf groupers or tilefishes subject to this IFQ program.

(i) Share transfers. Share transfers are permanent, i.e., they remain in effect until subsequently transferred. Transfer of shares will result in the corresponding allocation being automatically transferred to the person receiving the transferred share beginning with the fishing year following the year the transfer occurred. However, within the fishing year the share transfer occurs, transfer of shares and associated allocation are independent—unless the associated allocation is transferred separately, it remains with the transferor for the duration of that fishing year. A share

transfer transaction that remains in pending status, i.e., has not been completed and verified with a transaction approval code, after 30 days from the date the shareholder initiated the transfer will be cancelled, and the pending shares will be re-credited to the shareholder who initiated the transfer.

(ii) Share transfer procedures. Share transfers must be accomplished online via the IFQ Web site. An IFQ shareholder must initiate a share transfer request by logging onto the IFQ Web site. An IFQ shareholder who is subject to a sanction under 15 CFR part 904 is prohibited from initiating a share transfer. An IFQ shareholder who is subject to a pending sanction under 15 CFR part 904 must disclose in writing to the prospective transferee the existence of any pending sanction at the time of the transfer. Following the instructions provided on the Web site, the shareholder must enter pertinent information regarding the transfer request including, but not limited to: amount of shares to be transferred, which must be a minimum of 0.000001 percent; name of the eligible transferee; and the value of the transferred shares. For the first 5 years this IFQ program is in effect, an eligible transferee is a person who has a valid commercial vessel permit for Gulf reef fish; is in compliance with all reporting requirements for the Gulf reef fish fishery and the IFQ program for Gulf groupers and tilefishes; is not subject to sanctions under 15 CFR part 904; and who would not be in violation of the share or allocation caps as specified in paragraph (b)(8) of this section. Thereafter, share transferee eligibility will only include U.S. citizens and permanent resident aliens who are otherwise in compliance with the provisions of this section. The online system will verify the information entered. If the information is not accepted, the online system will send the shareholder an electronic message explaining the reason(s). If the information is accepted, the online system will send the transferee an electronic message of the pending transfer. The transferee must approve the share transfer by electronic signature. If the transferee approves the share transfer, the online system will send a transfer approval code to both the shareholder and transferee confirming the transaction. All share transfers must be completed and the transaction approval code received prior to December 31 at 6 p.m. eastern time each year.

(iii) Allocation transfers. An allocation transfer is valid only for the remainder of the fishing year in which it occurs; it does not carry over to the subsequent fishing year. Any allocation that is unused at the end of the fishing year is void. Allocation may be transferred to a vessel account from any IFQ account. Allocation held in a vessel account, however, may only be transferred back to the IFQ account through which the vessel account was established.

(iv) Allocation transfer procedures and restrictions—

(A) Allocation transfer procedures. Allocation transfers must be accomplished online via the IFQ Web site. An IFQ account holder must initiate an allocation transfer by logging onto the IFQ Web site, entering the required information, including but not limited to, the name of an eligible transferee and amount of IFQ allocation to be transferred and price, and submitting the transfer electronically. An IFQ allocation holder who is subject to a sanction under 15 CFR part 904 is prohibited from initiating an allocation transfer. An IFQ allocation holder who is subject to a pending sanction under 15 CFR part 904 must disclose in writing to the prospective transferee the existence of any pending sanction at the time of the transfer. If the transfer is approved, the Web site will provide a transfer approval code to the transferor and transferee confirming the transaction.

(B) Multi-use allocation transfer restrictions—

(1) Red grouper multi-use allocation. Red grouper multi-use allocation may only be transferred after all an IFQ account holder's red grouper allocation has been landed and sold, or transferred.

(2) Gag multi-use allocation. Gag multi-use allocation may only be transferred after all an IFQ account holder's gag allocation has been landed and sold, or transferred.

(7) Restricted transactions during the 20-hour online maintenance window. All electronic IFQ transactions must be completed by December 31 at 6 p.m. eastern time each year. Electronic IFQ functions will resume again on January 1 at 2 p.m. eastern time the following fishing year. The remaining 6 hours prior to the end of the fishing year, and the 14 hours at the beginning of the next fishing year, are necessary to provide NMFS time to reconcile IFQ accounts, adjust allocations for the upcoming year if the commercial quotas or catch allowances for Gulf groupers and tilefishes have changed, and update shares and allocations for the upcoming fishing year. No electronic IFQ transactions will be available during these 20 hours. An advance notice of landing may still be submitted during the 20-hour maintenance window by using the vessel's VMS unit or calling IFQ Customer Service at 1-866-425-7627.

(8) IFQ share and allocation caps. A corporation's total IFQ share (or allocation) is determined by adding the applicable IFQ shares (or allocation) held by the corporation and any other IFQ shares (or allocation) held by a corporation(s) owned by the original corporation prorated based on the level of ownership. An individual's total IFQ share is determined by adding the applicable IFQ shares held by the individual and the applicable IFQ shares equivalent to the corporate share the individual holds in a corporation. An individual's total IFQ allocation is determined by adding the individual's total allocation to the allocation derived from the IFQ shares equivalent to the corporate share the individual holds in a corporation.

(i) IFQ share cap for each share category. No person, including a corporation or other entity, may individually or collectively hold IFQ shares in any share category (gag, red grouper, DWG, Other SWG, or tilefishes) in excess of the maximum share initially issued for the applicable share category to any person at the beginning of the IFQ program, as of the date appeals are resolved and shares are adjusted accordingly. A corporation must provide to the RA the identity of the shareholders of the corporation and their percent of shares in the corporation for initial issuance of IFQ shares and allocation, and provide updated information to the RA within 30 days of when changes occur. This information must also be provided to the RA any time a

commercial vessel permit for Gulf reef fish is renewed or transferred and at the time of renewal of the application for an IFQ Account.

(ii) Total allocation cap. No person, including a corporation or other entity, may individually or collectively hold, cumulatively during any fishing year, IFQ allocation in excess of the total allocation cap. The total allocation cap is the sum of the maximum allocations associated with the share caps for each individual share category and is calculated annually based on the applicable quotas or catch allowance associated with each share category.

(9) Redistribution of shares resulting from permanent revocation. If a shareholder's IFQ shares have been permanently revoked, the RA will redistribute the IFQ shares proportionately among remaining shareholders (subject to cap restrictions) based upon the amount of shares each held just prior to the redistribution. During December of each year, the RA will determine the amount of revoked shares, if any, to be redistributed, and the shares will be distributed at the beginning of the subsequent fishing year.

(10) Annual recalculation and notification of IFQ shares and allocation. On or about January 1 each year, IFQ shareholders will be notified, via the IFQ Web site, of their IFQ shares and allocations, for each of the five share categories, for the upcoming fishing year. These updated share values will reflect the results of applicable share transfers and any redistribution of shares (subject to cap restrictions) resulting from permanent revocation of IFQ shares. Allocation, for each share category, is calculated by multiplying IFQ share for that category times the annual commercial quota or commercial catch allowance for that share category. Updated allocation values will reflect any change in IFQ share for each share category, any change in the annual commercial quota or commercial catch allowance for the applicable categories; and any debits required as a result of prior fishing year overages as specified in paragraph (b)(3)(ii) of this section. IFQ participants can monitor the status of their shares and allocation throughout the year via the IFQ Web site.

(11) Gulf grouper and tilefish IFQ program participation for current grouper and tilefish IFQ account holders.

(i) A current participant in the Gulf grouper and tilefish IFQ program must complete and submit the application for an IFQ Account that is available on the website <https://secatchshares.fisheries.noaa.gov>, to certify status as a U.S. citizen or permanent resident alien. The account holder must also complete and submit any other information on this form that may be necessary for the administration of the IFQ account.

(ii) A person with an established IFQ account must update and confirm the account information every 2 years. IFQ accounts are updated through the submission of the application for an IFQ Account. Accounts must be updated prior to the account validity date (expiration date of the account) that is displayed on each account holder's IFQ account page. The RA will provide each participant who has established an online account an application approximately 2 months prior to the account validity date. A participant who is not provided an application at least 45 days prior to the account validity date must contact IFQ Customer Service at 1-866-425-7627 and request an application. Failure to submit a completed application prior to the participant's account validity date will lead to the suspension of the participant's access to his IFQ account until a completed application is submitted. Participants who certify that they are either not a U.S. citizen or permanent resident alien will be ineligible to receive shares or allocation through transfer.

50 C.F.R. § 622.28, Vessel monitoring systems (VMSs)

The VMS requirements of this section apply throughout the Gulf of Mexico and adjacent states.

(a) General VMS requirement. An owner or operator of a vessel that has been issued a commercial vessel permit for Gulf reef fish, including a charter vessel/headboat issued such a permit even when under charter, must ensure that such vessel has an operating VMS approved by NMFS for use in the Gulf reef fish fishery on board at all times whether or not the vessel is underway, unless exempted by NMFS under the power-down exemptions specified in paragraph (d) of this section and in the NOAA Enforcement Vessel Monitoring System Requirements for the Reef Fish Fishery of the Gulf of Mexico. This NOAA Enforcement Vessel Monitoring System Requirements document is available from NMFS Office for Law Enforcement (OLE), Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800-758-4833. An operating VMS includes an operating mobile transmitting unit on the vessel and a functioning communication link between the unit and NMFS as provided by a NMFS-approved communication service provider. NMFS OLE maintains a current list of approved VMS units and communication providers which is available from the VMS Support Center, NMFS OLE, 8484 Georgia Avenue, Suite 415, Silver Spring, MD 20910 or by calling toll free: 888-219-9228. If a VMS unit approved for the Gulf reef fish fishery is removed from the approved list by NMFS OLE, a vessel owner who purchased and installed such a VMS unit prior to its removal from the approved list will be considered to be in compliance with the requirement to have an approved unit, unless otherwise notified by NMFS OLE. At the end of a VMS unit's service life, it must be replaced with a currently approved unit for the fishery.

(b) Hourly reporting requirement. An owner or operator of a vessel subject to the requirements of paragraph (a) of this section must ensure that the required VMS unit transmits a signal indicating the vessel's accurate position at least once an hour, 24 hours a day every day unless exempted under paragraphs (c) or (d) of this section.

(c) In-port exemption. While in port, an owner or operator of a vessel with a type-approved VMS unit configured with the 4-hour reporting feature may utilize the 4-hour reporting feature rather than comply with the hourly reporting requirement specified in paragraph (b) of this section. Once the vessel is no longer in port, the hourly reporting requirement specified in paragraph (b) of this section applies. For the purposes of this section, “in port” means secured at a land-based facility, or moored or anchored after the return to a dock, berth, beach, seawall, or ramp.

(d) Power-down exemptions. An owner or operator of a vessel subject to the requirement to have a VMS operating at all times as specified in paragraph (a) of this section can be exempted from that requirement and may power down the required VMS unit if—

(1) The vessel will be continuously out of the water or in port, as defined in paragraph (c) of this section, for more than 72 consecutive hours;

(2) The owner or operator of the vessel applies for and obtains a valid letter of exemption from NMFS OLE VMS personnel as specified in the NOAA Enforcement Vessel Monitoring System Requirements for the Reef Fish Fishery of the Gulf of Mexico. This is a one-time requirement. The letter of exemption must be maintained on board the vessel and remains valid for all subsequent power-down requests conducted consistent with the provisions of paragraphs (d)(3) and (4) of this section.

(3) Prior to each power-down, the owner or operator of the vessel files a report to NMFS OLE VMS program personnel, using the VMS unit's email, that includes the name of the person filing the report, vessel name, vessel U.S. Coast Guard documentation number or state registration number, commercial vessel reef fish permit number, vessel port location during VMS power down, estimated duration of the power down exemption, and reason for power down; and

(4) The owner or operator enters the power-down code through the use of the VMS Declaration form on the terminal and, prior to powering down the VMS, receives a confirmation, through the VMS terminal, that the form was successfully delivered.

(e) Declaration of fishing trip and gear. Prior to departure for each trip, a vessel owner or operator must report to NMFS any fishery the vessel will participate in on that trip and the specific type(s) of fishing gear, using NMFS-defined gear codes, that will be on board the vessel. This information may be reported to NMFS using the toll-free number, 888-219-9228, or via an attached VMS terminal.

(f) Installation and activation of a VMS. Only a VMS that has been approved by NMFS for the Gulf reef fish fishery may be used, and the VMS must be installed by a qualified marine electrician. When installing and activating the NMFS-approved VMS, or when reinstalling and reactivating such VMS, the vessel owner or operator must—

(1) Follow procedures indicated on a NMFS-approved installation and activation checklist for the applicable fishery, which is available from NMFS Office for Law Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800-758-4833; and

(2) Submit to NMFS Office for Law Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, a statement certifying compliance with the checklist, as prescribed on the checklist.

(3) Submit to NMFS Office for Law Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, a vendor-completed installation certification checklist, which is available from NMFS Office for Law Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 800-758-4833.

(g) Interference with the VMS. No person may interfere with, tamper with, alter, damage, disable, or impede the operation of the VMS, or attempt any of the same.

(h) Interruption of operation of the VMS. When a vessel's VMS is not operating properly, the owner or operator must immediately contact NMFS Office for Law Enforcement, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, phone: 800-758-4833, and follow instructions from that office. If notified by NMFS that a vessel's VMS is not operating properly, the owner and operator must follow instructions from that office. In either event, such instructions may

include, but are not limited to, manually communicating to a location designated by NMFS the vessel's positions or returning to port until the VMS is operable.

(i) Access to position data. As a condition of authorized fishing for or possession of fish in a fishery subject to VMS requirements in this section, a vessel owner or operator subject to the requirements for a VMS in this section must allow NMFS, the USCG, and their authorized officers and designees access to the vessel's position data obtained from the VMS.

50 C.F.R. § 622.41(e), Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs)

(e) Red grouper—

(1) Commercial sector. The IFQ program for groupers and tilefishes in the Gulf of Mexico serves as the accountability measure for commercial red grouper. The commercial ACT for red grouper is equal to the applicable quota specified in § 622.39(a)(1)(iii)(C). The commercial ACL for red grouper in gutted weight is 2.94 million lb (1.33 million kg).

(2) Recreational sector.

(i) Without regard to overfished status, if red grouper recreational landings, as estimated by the SRD, reach or are projected to reach the applicable ACL specified in paragraph (e)(2)(iv) of this section, the AA will file a notification with the Office of the Federal Register, to close the recreational sector for the remainder of the fishing year. On and after the effective date of such a notification, the bag and possession limit of red grouper in or from the Gulf EEZ is zero. This bag and possession limit applies in the Gulf on board a vessel for which a valid Federal charter vessel/headboat permit for Gulf reef fish has been issued, without regard to where such species were harvested, i.e. in state or Federal waters.

(ii) Without regard to overfished status, and in addition to the measures specified in paragraph (e)(2)(i) of this section, if red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (e)(2)(iv) of this section, the AA will file a notification with the Office of the Federal Register to maintain the red grouper ACT, specified in paragraph (e)(2)(iv) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition, the notification will reduce the length of the recreational red grouper fishing season the following fishing year by the amount necessary to ensure red grouper recreational landings do not exceed the recreational ACT in the following fishing year.

(iii) If red grouper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (e)(2)(iv) of this section, the following measures will apply. In addition to the measures specified in paragraphs (e)(2)(i) and (ii) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (e)(2)(ii) of this section, by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(iv) The recreational ACL for red grouper in gutted weight is 2.02 million lb (0.92 million kg). The recreational ACT for red grouper in gutted weight is 1.84 million lb (0.83 million kg).

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ Annie Mullins

Annie Mullins