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Re: Notice of Availability, Reef Fish Fishery of the Gulf of Mexico, Amendment 53; 86 Fed. Reg. 70078 (Dec. 9, 2021)

Dear Mr. Hood:

We submit this letter on behalf of A.P. Bell Fish Company, Southern Offshore Fishing Association, and the Gulf of Mexico Reef Fish Shareholders' Alliance in response to the above referenced notice regarding Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico: Red Grouper Allocations and Annual Catch Levels and Targets ("Amendment 53").

Amendment 53 is unlawful and irrational. It would maximize bycatch of red grouper, minimize yields, increase management uncertainty and thus undermine conservation of the stock, and unfairly penalize commercial fishermen by taking away their quota to cover dead discards by recreational anglers. The analyses purporting to support this action are flawed, relying on secret data undisclosed to the public, an economic theory NMFS itself has rejected as "not valid," and tricks to artificially inflate the projected economic benefits of reallocation. If approved, Amendment 53 would violate numerous provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). It would also violate the Administrative Procedure Act ("APA") and National Environmental Policy Act ("NEPA").

Amendment 53 is a continuation of unfair and unlawful favoritism of the recreational sector at the expense of commercial fishermen in the Gulf of Mexico. The makeup of the Gulf of Mexico Fishery Management Council ("Gulf Council" or "Council") is not fair and balanced as required by the MSA, which shows in the actions it takes.[1] There is no representative of the commercial reef

[1] 16 U.S.C. § 1852(b)(2)(B) ("The Secretary…shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council."). *See, e.g.*, Ex. A (National Academy of Sciences, LAPPs in Mixed Use Fisheries) at 14 ("[T]he rise of formal associations

fish fishery on the Council; in the past several decades only one such representative has ever served and only for a single term. Presently, there are only two Gulf Council members associated with commercial fisheries the Gulf Council manages. Private recreational angler interests dominate the Gulf Council and have for decades. The result is perpetual mismanagement, serial overharvesting by recreational anglers, and unlawful efforts to penalize hardworking commercial fishermen, their family businesses, and the American consumers they serve while the private angler sector gets a free pass.[2]

For all of the following reasons the National Marine Fisheries Service ("NMFS") should disapprove Amendment 53 and remand it to the Gulf Council pursuant to 16 U.S.C. § 1854(a)(3).[3]

A. Amendment 53 Violates MSA National Standard 9

1. Amendment 53 will maximize bycatch of red grouper.

National Standard 9 requires fishery management plans ("FMPs") to minimize bycatch and bycatch mortality to the extent practicable.[4] Amendment 53 violates this standard because it will dramatically increase bycatch relative to maintaining the status quo allocation between the commercial and recreational sectors. Contrary to Congress's command to minimize bycatch, Preferred Alternative 3 in Action 1 would maximize bycatch compared to all the other alternatives the Council considered.

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representing commercial fishing shareholders is seen as a counterweight to large nongovernmental organizations representing environmental or recreational fishing interests, especially at the Council level.").

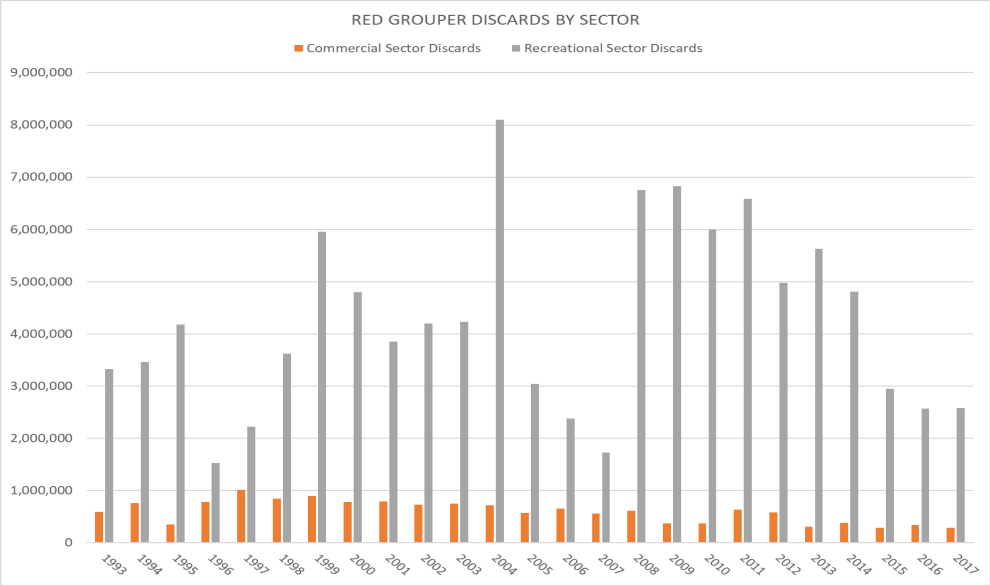
[2] *See, e.g., Guindon v. Pritzker*, 31 F. Supp. 3d 169 (D.D.C. 2014) (holding that NMFS violated numerous MSA provisions by repeatedly failing to hold the recreational sector accountable to its quotas); *Guindon v. Pritzker*, 240 F. Supp. 3d 181 (D.D.C. 2017) (striking down a reallocation that effectively rewarded the recreational sector for overharvesting as not "fair and equitable"); 82 Fed. Reg. 27777, 27779 (June 19, 2017) (NMFS re-opening the private angler fishing season, despite projecting that "the private recreational sector will substantially exceed its annual catch limit" as a result); 87 Fed. Reg. 51 (Jan. 3, 2022) (NMFS announcing a settlement with Texas in which NMFS abandoned its own "best available" data showing overharvesting by Texas in favor of Texas's uncertified recreational catch data which showed no overage). NMFS is also violating its own regulations at 50 C.F.R. § 622.23(b) by failing to enforce paybacks of serial overharvesting of red snapper by recreational anglers under state management. *See* Ex. B (NMFS website page (https://media.fisheries.noaa.gov/2021-11/Gulf_red_snap_Private_%26_Charter_landings_Nov2021.pdf) showing red snapper landings (in MRIP-CHTS data) versus state landings estimates).

[3] These comments adopt and incorporate by reference the Minority Report Regarding the Gulf of Mexico Fishery Management Council's Approval of Amendment 53 (Red Grouper Allocations and Annual Catch Levels and Targets) to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Aug. 9, 2021) ("Minority Report") submitted by four Gulf Council members who opposed Amendment 53, including all arguments in, and information supporting, that report.

[4] 16 U.S.C. § 1851(a)(9); *see also id*. § 1853(a)(11).

The recreational sector discards an average of 3.71 million red grouper each year.[5] An estimated 11.6% of these fish die after being discarded.[6] Dead discards from the recreational sector average 870,000 pounds of red grouper each year, but have reached 1.92 million pounds.[7] Commercial sector discards are comparatively minimal – "less than a tenth of recreational discard[s]."[8]

Figure 1. Red Grouper Discards by Sector (#s of fish)[9]



Amendment 53 will exacerbate this problem because reallocating more quota to the recreational sector will dramatically increase dead discards. Under Preferred Alternative 3, the commercial sector loses 1.19 million pounds of quota compared to maintaining the existing allocations under Alternative 2. But the recreational sector only gains an increase of 550,000 pounds: the remaining 640,000 pounds go to covering increased dead discards from recreational anglers.[10]

Amendment 53 explains that "total landings have to be constrained more to account for the greater numbers of dead discards from recreational red grouper fishing estimated by the [Marine Recreational Information Program – Fishing Effort Survey ("MRIP-FES")]."[11] Private anglers are

[5] Am. 53 at 200.

[6] Ex. C (SEDAR 61 Stock Assessment Report), at p. 12.

[7] Am. 53 at 199.

[8] Am. 53 at 200. *See also* Am. 53 at p. xiv ("the recreational sector discards are an order of magnitude greater than the commercial sector").

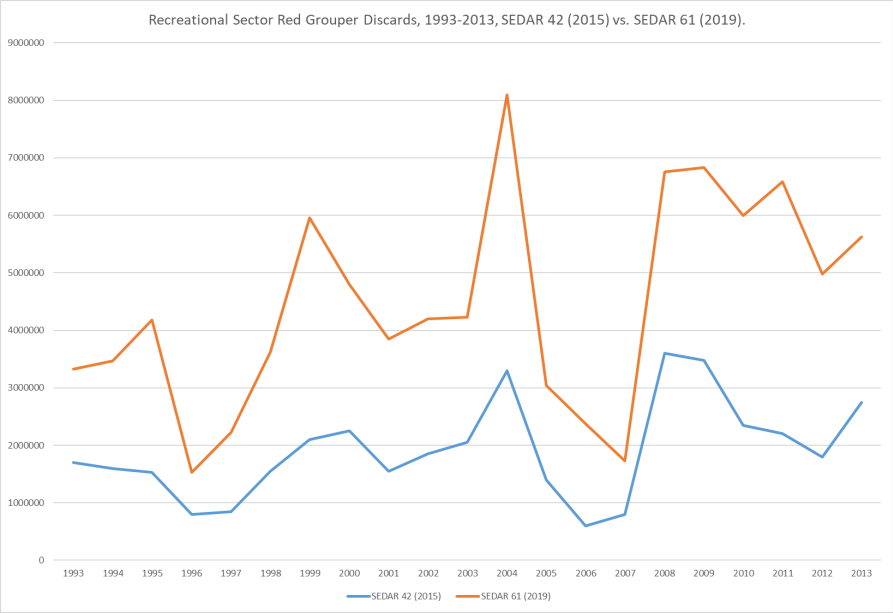
[9] Am. 53 at 198-199.

[10] *See* Am. 53, p. xx, Table 1.

[11] Am. 53 at p. xiv.

evidently discarding as much or more dead fish than they're taking home.[12] This is a waste of limited natural resources. As the Minority Report points out,[13] fish that would otherwise be served to consumers in restaurants and fish markets will instead be floating off dead in the Gulf of Mexico after anglers discard them.

Figure 2. Effect of FES Calibration on Recreational Discard Estimates[14]



Amendment 53 only looks at one side of the coin: it rewards the recreational sector for higher landings in the past, but does nothing to address the new information learned about higher discards that accompany those landings.

Indeed, 13 years ago when the Council first adopted the base years used for allocation (1986-2005) under Amendment 30B, the Council was under the impression that dead discards between the recreational and commercial sectors were roughly equivalent:

> The proportion of dead discards to landings for red grouper is similar between the two sectors and the proposed shifts in allocation are small, so the difference in red grouper dead discards among [reallocation] alternatives would be minimal.[15]

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[12] If 640,000 pounds of quota goes to cover discards associated with 550,000 pounds of landings, then anglers would evidently be discarding 1.16 pounds of red grouper for each pound landed. But Amendment 53 fails to specify how these calculations were made.

[13] Minority Report at p. 8.

[14] *See* Am. 53 at 199 (Table B.1); SEDAR 42 at 177 (Table 4.9.5). This comparison only spans 1993 to 2013 because only those years were covered in both SEDAR 42 (Ex. Z) and SEDAR 61. *See also* Ex. ZZ (SEDAR 12) at p. 28, Table 1.

[15] Ex. D (Amendment 30B) at p. 45.

Now, faced with new information that recreational dead discards are *10 times higher* than the commercial sector,[16] the Council did nothing to address them. Instead it adopted the same base years for allocation and formulaically plugged in the higher recreational landings, but ignored how a key finding about discards supporting the prior allocation scheme had drastically changed. This is irrational decision making, particularly in light of the statutory command to minimize bycatch to the extent practicable.[17]

2. NMFS's excuses for increased discards are unjustified.

Material revisions made to Amendment 53 after the Council voted on it[18] try to explain away these increased discards but none of these post-hoc justifications have merit.

Amendment 53 now asserts that "projected discards are higher for the recreational sector due to the new allocations based on FES-adjusted MRIP data, rather than due to any change in how the recreational sector prosecutes the fishery."[19] This statement merely reaffirms that the Council learned new information about how the recreational sector prosecutes the fishery with higher discards, and failed to do anything about it.

Amendment 53 also reverses course on the effect of "closed seasons" for red grouper. The Council-adopted version of Amendment 53 stated that "[c]losed season discards are not believed to be significant in the recreational red grouper sector."[20] The "final" version of Amendment 53 (that the Council never reviewed or approved) states that closed seasons "likely do[] impose some negative impacts on the red grouper stock."[21]

But NMFS carries its post-hoc assumption too far: NMFS now asserts that reductions in bycatch from maintaining the existing allocations "could be partially or fully diminished because anglers

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[16] Am. 53 at p. 200. In addition, since Amendment 30B, the commercial sector IFQ program took effect. Commercial sector dead discards "have been considerably lower since" implementation of the IFQ program. Am. 53 at 215. The Council did not take this changed circumstance into account, either.

[17] 16 U.S.C. § 1851(a)(9); *see also id*. § 1853(a)(11).

[18] Three months elapsed between the time the Council took final action on Amendment 53 and when Amendment 53 was submitted to NMFS for approval. Significant changes were made to the document (presumably by NMFS) in that time period that the Council never reviewed or approved, many of which responded to arguments made in the Minority Report. Attached as Ex. E is a redline showing these revisions. Under the MSA, the "fishery management plan" must be prepared by the Council, not NMFS. *See, e.g.*, 16 U.S.C. § 1853(a). Thus, whatever changes NMFS made to Amendment 53 after the Council voted on it are not properly part of the FMP. Instead they are post-hoc justifications that were not part of the Council's deliberation, and therefore cannot be considered when evaluating the FMP's compliance with MSA requirements. These and other procedural defects render Am. 53 invalid.

[19] Am. 53 at 15.

[20] Ex. F (Draft Amendment 53 (June 2021)) at 195.

[21] Am. 53 at 205.

may still catch red grouper while fishing for other species and would be forced to discard them."[22] In other words, reallocation might have no impact on discards whatsoever, because anglers may catch and discard the same amount of red grouper whether their season is open or closed. If that were true, then the projected annual catch limits ("ACLs") for all the reallocation alternatives in Action 1 would be the same; they are not. NMFS's bald new assertion conflicts with the SSC's determinations about catch limits from various allocation scenarios, and contradicts NMFS's own statement that a closed season "does reduce red grouper catch and mortality."[23] This is arbitrary and capricious reasoning.

NMFS also asserts that the "effects of closed seasons on red grouper discards are not known,"[24] which is a concession that there is no standardized bycatch reporting methodology ("SBRM") for the recreational sector of the Gulf reef fish fishery as the MSA requires.[25] To the extent MRIP-FES is intended to serve as that methodology, it fails because it's not comparable to the stringent reporting that occurs in the commercial sector. The commercial sector is limited access, all commercial fishermen must report effort and landings data in logbooks, and 20% of commercial fishermen must also file mandatory discard reports.[26] Those reports along with observer data are used to determine total commercial discards. The recreational sector, by contrast, is open access and anglers do not even need a federal permit to fish for red grouper.[27] Any reporting is random and voluntary if anglers happen to be intercepted at dockside or decide to mail in a form months later. The two systems are not comparable or statistically equivalent. Recreational data sources have a higher level of uncertainty than commercial data "because self-reported data is not considered as reliable and not all recreational fishermen are surveyed."[28] "Recreational discard data are all self-reported, and thus are highly uncertain and difficult to validate."[29]

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[22] Am. 53 at 207 (emphasis added).

[23] Am. 53 at 205.

[24] Am. 53 at 205.

[25] 16 U.S.C. § 1853(a)(11).

[26] Ex. G at 26 ("Since 2001, commercial reef fish fishermen have been required, if selected, to report the number and average size of fish being discarded by species (includes sea turtles and ESA-listed fish) and the reasons for those discards (regulatory or market conditions). These bycatch data are collected using a supplemental form sent to a stratified, random sample of the commercial reef fish permit holders (20% coverage).").

[27] Ex. G at 24 ("Anglers on privately owned or rented vessels do not need a federal permit to harvest reef fish in federal waters.").

[28] Ex. G at 62. The percent standard error (PSE) for private angler red grouper discard estimates is 18.5. *Id*. at 42.

[29] Ex. H (Gulf Council's Sustainable Fisheries Committee Report, Jan. 26, 2022) at 2.

The MSA requires standardization "to assess the amount and type of bycatch occurring in the fishery."[30] Having non-standardized reporting across sectors in the mixed-use reef fish fishery does not meet this MSA requirement.

NMFS also justifies higher discards from the recreational sector by claiming reallocation will increase net economic benefits.[31] But NMFS relies on a methodology that NMFS itself found "not valid" and "not useful" when it promulgated Amendment 28 a few years ago. *See* Section E.1 below.

At bottom, Amendment 53 acknowledges that "managers must balance the competing objectives of maximizing yield, ending overfishing, and reducing bycatch to the extent practicable."[32] But there is no "balancing" here: Amendment 53 reduces yields,[33] increases uncertainty and thus risk of overfishing,[34] and increases bycatch.[35] Because Amendment 53 fails on all these scores, NMFS must disapprove it.

B. Amendment 53 Violates National Standard 4

National Standard 4 requires that an allocation "promote conservation" and be "fair and equitable."[36] Amendment 53, by contrast, degrades conservation and unfairly penalizes the commercial sector.

Under National Standard 4, it is not sufficient that an allocation change is conservation neutral; the plain language requires an allocation to "promote" conservation. NMFS claims that the risk

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[30] 16 U.S.C. §1853(a)(11).

[31] Am. 53 at 289 ("although Alternative 2 would increase net economic benefits in the commercial sector, it would also decrease net economic benefits in the recreational sector by a significantly larger amount, which would not only result in a decrease in net economic benefits to the Nation, but in fact the largest decrease of the alternatives considered").

[32] Am. 53 at 219.

[33] Am. 53 at 230 ("[I]ncreases in recreational allocation are accompanied by a decrease in the overall ACL to mitigate the effects of increased [recreational] bycatch…Bycatch is considered wasteful because it reduces overall yield obtained from the fishery.").

[34] *See* 50 C.F.R. § 600.350(b); Am. 53 at 109 ("Alternatives that result in larger allocations to the recreational sector could increase the likelihood of overfishing because of the uncertainty in determining recreational landings."); xxiii ("allocating a greater percentage of the ACL 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"); 125 ("Recreational landings are generated based on estimates of catch, and they have substantial uncertainty associated with them. In addition, recreational landings are not timely, with lags often exceeding several months from when fishing takes place and landings estimates are generated."); 137 (noting "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").

[35] Preferred Alternative 3 would result in roughly 640,000 pounds of additional dead discards compared to maintaining the existing allocations under Alternative 2. *See* section A(1), *supra*.

[36] 16 U.S.C. § 1851(a)(4).

of overfishing is "the same" between the allocation alternatives because the resulting ACLs all have the same probability of overfishing.[37] That contention is fatal because the allocation change will not "promote" conservation, (i.e., reducing bycatch or the risk of overfishing). That contention is also wrong. The calculated probability of overfishing associated with the reallocation alternatives does not account for the increased uncertainty associated with increased bycatch, which admittedly increases risk of overfishing.[38] Indeed, the overfishing limit ("OFL") set by Amendment 53 *unlawfully excludes dead discards* (see Section C below), so the probability calculations exclude a major source of fishing mortality that is increased by reallocating more quota to the recreational sector. In addition, recreational landings are uncertain estimates, and Amendment 53 is clear that allocating more fish to that sector increases uncertainty and management risk.[39]

Amendment 53 also violates National Standard 4 because it unfairly forces the commercial sector to subsidize dead discards in the recreational sector. Of the 1.19 million pounds of quota the commercial sector loses under Preferred Alternative 3 compared to Alternative 2, 640,000 pounds go to cover increased dead discards in the recreational sector. The recreational sector should be responsible for its own dead discards.

NMFS's National Standard 4 guidelines explain that, to be fair and equitable, an allocation should "be rationally connected with the achievement of [optimum yield] or with the furtherance of a legitimate FMP objective."[40] Amendment 53 decreases yields and thus thwarts achievement of optimum yield (see Section D below). Nor does Amendment 53 promote any particular FMP objective. Amendment 53 lists the FMP objectives,[41] but nowhere explains how reallocation promotes any single one of them.

C. Amendment 53 Violates MSA Section 303(a)(15)

Section 303(a)(15) of the MSA requires FMPs to "establish a mechanism for specifying annual catch limits…such that overfishing does not occur in the fishery, including measures to ensure accountability."[42] NMFS defines "catch" to mean "fish that are retained for any purpose, as well as mortality of fish that are discarded."[43] The annual catch limit ("ACL") therefore must include

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[37] Am. 53 at 287 ("The risk of overfishing under Alternatives 2-5 in Action 1 is the same. When considering the overfishing limit (OFL) values for the four alternatives, the same probability of overfishing (P*) value of 0.5 was used to determine the value as recommended by the SSC (Table 1.1.3). P* is the chance of overfishing. For setting the acceptable biological catch (ABC), the SSC recommended landing projections be based on a more conservative P* of 0.30 (Table 1.1.3).").

[38] *See supra* note 34.

[39] *See, e.g.*, Am. 53 at p. xxiii.

[40] 50 C.F.R. § 600.325(c)(3)(i).

[41] Am. 53 at 8.

[42] 16 U.S.C. § 1853(a)(15).

[43] 50 C.F.R. § 600.310(f)(1)(i) (emphasis added).

dead discards. Similarly, the overfishing limit ("OFL") must include mortality from all "fishing," which also includes dead discards.[44]

Amendment 53 does not comport with this provision because it sets OFLs and ACLs for the red grouper fishery that exclude dead discards, particularly the significant amount of dead discards occurring in the recreational sector. Instead, estimated dead discards are taken off the top of the maximum allowable catch in an obscure process NMFS has failed to adequately explain, and then the SSC and Council select OFLs and ACLs that cover only red grouper landings. This is a problem in the red grouper fishery because recreational dead discards are significant.

By attempting to account for this significant source of fishing mortality "off the books," the Council and NMFS undermine key conservation goals of the MSA. There is no mechanism to track recreational discards on an annual basis and account for such discards as part of the ACL and OFL. The recreational sector thus has no incentive to avoid or reduce dead discards; the recreational sector can discard red grouper with impunity and it will not affect its fishing seasons or catch limits. No effort is made to assess annually whether the recreational sector discarded more or less red grouper than projected when setting OFLs/ACLs that cover only landings.

When Congress amended the MSA to require ACLs and accountability measures, it did not intend for the Councils to simply exclude a significant source of fishing mortality from these limits. Indeed, inadequate accounting for a significant source of fishing mortality is one possible explanation for why the red grouper stock has not rebuilt on the anticipated schedule.[45]

The flaw in this approach is evident in NMFS's contention that the probability of overfishing is "the same" between the reallocation alternatives (see Section B above). That's only possible because the term "overfishing" in that statement is unlawfully defined to exclude a major source of fishing mortality, namely recreational discards. But Amendment 53 acknowledges that reallocating more quota to the recreational sector will result in increased discards, which increases management uncertainty and risk because these discards are not effectively tracked or accounted for.[46]

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[44] *See* 16 U.S.C. §§ 1802(34), 1802(16) (defining "overfishing" as the "level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis," and defining "fishing" as "catching, taking, or harvesting of fish" or "any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.").

[45] *See* Am. 53 at 3-5 (explaining concerns with stock health and how the latest assessment found "the stock remain[s] below the spawning stock biomass (SSB) at 30% of the spawning potential ratio (SPR) in 2017"). The stock was supposed to have been rebuilt by 2014. *See* 69 Fed. Reg. 1278 (Jan. 8, 2004) (setting a 10-year rebuilding plan).

[46] *See supra* note 34.

D. Amendment 53 Violates National Standard 1 and MSA Provisions Pertaining to OY

National Standard 1 requires management measures to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[47] Amendment 53 frustrates both of these primary objectives of the MSA.

First, because the recreational sector discards 10 times more than the commercial sector, reallocating more quota to that sector will increase dead discards. This necessitates a corresponding reduction in the Total ACL to accommodate these discards: this is why the ACL under Preferred Alternative 3 (4.26 million pounds) is 640,000 pounds less than the ACL under Alternative 2 (4.90 million pounds). "[I]ncreases in the recreational allocation are accompanied by a decrease in overall ACL to mitigate the effects of the increased bycatch."[48]

Amendment 53 explains that "[b]ycatch is considered wasteful because it reduces overall yield from the fishery."[49] To "mitigate the effects of increased bycatch,"[50] Amendment 53 therefore admittedly reduces overall yield. And, because it increases bycatch, it "increase[s] 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 ("OY")] and define overfishing levels, and to ensure that OYs are attained and overfishing levels are not exceeded" as NMFS recognizes.[51]

Optimum yield "is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor."[52] Councils can thus make a deliberate choice to achieve less than the maximum sustainable yield based on those factors. But accommodating increased bycatch is not a "relevant social, economic, or ecological factor" that could be used to reduce OY, particularly under a statutory scheme that requires bycatch be minimized to the extent practicable. This increase in bycatch is a result of a selected management approach.

Other provisions of the MSA require an FMP to "assess and specify" the OY for the fishery and "the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield."[53] The Councils must also "review on a continuing basis, and revise

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[47] 16 U.S.C. § 1851(a)(1).

[48] Am. 53 at 214.

[49] Am. 53 at 215. *See also* Ex. G (Review of Standardized Bycatch Reporting Methodology for the Gulf of Mexico and Joint Gulf of Mexico-South Atlantic Fishery Management Plans) at 22 ("reducing bycatch provides biological benefits to managed species as well as benefits to the fishery through less waste, higher yields, and less forgone yield").

[50] Am. 53 at 214.

[51] 50 C.F.R. § 600.350(b).

[52] 16 U.S.C. § 1802(33)(B).

[53] 16 U.S.C. §§ 1853(a)(3), 1853(a)(4).

as appropriate," the assessment and specification of OY and its achievement.[54] The assessment should include "a summary of information utilized in making such specification; an explanation of how the OY specification will produce the greatest benefits to the nation and prevent overfishing and rebuild overfished stocks; and a consideration of the economic, social, and ecological factors relevant to the management of a particular stock, stock complex, or fishery."[55]

Amendment 53 does not do any of this. Secretarial Amendment 1 set OY for red grouper in 2004.[56] To the extent reallocation to the recreational sector reduces OY, then Amendment 53 should have included a re-assessment and re-specification of OY with the information above. It does not. To the extent reallocation does not change OY, then it sets a lower ACL to accommodate recreational discards and thus reduces yields away from OY. Either way the Amendment fails to comply with MSA requirements.

E. The Economic Justifications for Amendment 53 Are Flawed

The economic analyses in Amendment 53 suffer from numerous flaws. They are based on a theory NMFS itself has found invalid, fail to use the best available science, and use tricks to wrongly inflate valuations for the recreational sector. The Council's Scientific and Statistical Committee ("SSC") never reviewed these analyses,[57] which likely explains their shortcomings. These analyses must be corrected and reconsidered by the Council after input from the SSC.

1. <u>The economic theory underlying Amendment 53 is inapplicable here.</u>

Amendment 53 states that Preferred Alternative 3 is "expected to result in the greatest net economic benefits to the nation."[58] That conclusion is based upon a discredited application of economic theory.

The commercial and recreational sectors are different. In the commercial sector, the Individual Fishing Quota ("IFQ") program creates a market that efficiently allocates quota among commercial fishermen. The recreational sector, by contrast, is effectively open access: there is no market to efficiently allocate quota among anglers. Recreational access is not allocated according to willingness to pay ("WTP"). In other words, anglers cannot compete for access to red grouper through price – instead they must show up during the season and compete with their time. The large incidence of recreational red grouper discards also demonstrates that these fishermen's time spent catching red grouper is not efficiently expended.

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[54] 16 U.S.C. § 1852(h)(5).

[55] 50 C.F.R. § 600.310(e)(3)(iii).

[56] Am. 53 at 288 ("Secretarial Amendment 1 defined the OY as yield at 75% of F_{MSY} (GMFMC 2004a).").

[57] *See* Ex. I (June 25, 2021 Council minutes) at 168 (NMFS Regional Administrator stating: "at least with regard to the economic analyses in this document, yes, they haven't gone before the SSC").

[58] Am. 53 at 22.

Quota is thus efficiently allocated across the commercial sector, but not across the recreational sector. Therefore, it is not possible to determine that shifting quota from the commercial sector to the recreational sector will produce any change in net economic benefits to the nation. There is simply no mechanism for an angler with a higher WTP to utilize the reallocated quota.

This fallacy is well established in the fisheries context[59] and was acknowledged by the Council and NMFS in Amendment 28 to the Reef Fish FMP:

> *The resource allocation within the commercial sector, which is managed under an IFQ system, would constitute a reasonable approximation for an efficient resource allocation… However, the open access management approach in the recreational sector cannot be conducive to an efficient allocation of red snapper within the recreational sector. As suggested by Holzer and McConnell (2014), by Abbott (2015) and in a recent report (OECD 2014), changes in net benefit estimates based on the generally accepted application of the equimarginal principle (as done in previous allocation studies including the 2013 Agar and Carter study in Appendix G) 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.*[60]

An appendix to Amendment 53 makes the same point:

> *However, if use within each sector is not allocated according to those who value the resource most, then information about access to the resource in each sector may also be necessary to determine the efficient allocation among sectors.*[61]

But it is undisputed that use within each sector is not allocated according to those who value the resource the most. Only the commercial sector is allocated in this way. Valuations cannot be sorted on the recreational side. Amendment 53 does not present both commercial and recreational per-pound value estimates for comparison, and never addresses the "equimarginal principle" underlying the quoted statements above.

Experience with red snapper reallocation showed that the equimarginal principle (that economic efficiency is maximized when incremental net benefits are equalized across sectors) does not

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[59] *See* Ex. J (Holzer, J. and K. McConnell. 2014. Harvest allocation without property rights. *Journal of the Association of Environmental and Resource Economists*. http://dx.doi.org/10.1086/676451); Ex. K (Abbott, J.K. 2015. Fighting over a red herring: the role of economics in recreational-commercial allocation disputes. *Marine Resource Economics* 30(1). https://doi.org/10.1086/679464.)).

[60] Ex. L (Amendment 28 to the Reef Fish FMP) at 90 (emphasis added).

[61] Amendment 53 at 244.

hold when each sector's quota is not efficiently managed within the sector.[62] Yet reallocation under Amendment 53 is still motivated by comparison of net benefits conditioned on a recreational management regime that does not exist. In other words, it is arbitrary to use WTP for valuation of the recreational sector when assessing net benefit changes because there is no market in which such values can or will be realized. Red grouper quota is not efficiently managed within the recreational sector, and therefore the net benefit estimates are misspecified. The approach used for Amendment 53 is "not…valid" and "not useful" for the same reasons that approach was rejected in Amendment 28.[63]

NMFS's reliance on this approach is both wrong, as a matter of economics, and capricious after just rejecting it in the last reallocation FMP amendment.

2. Amendment 53 is not based upon the best available economic information

Even if the economic theory underlying Amendment 53 was applicable here, the Council did not use the most recent data in the model. Amendment 53 uses an estimate of $110 per fish to determine the consumer surplus valuation of incremental catch by anglers, citing a 2012 paper.[64] But more recent work shows much lower valuations. Specifically, some of the same authors of the 2012 paper published new work in 2021, prior to the Amendment's finalization, estimating the value of incremental grouper allocation at $46 per fish (within a range of $16 to $137) in the recreational sector, less than half the value used in Amendment 53.[65] Amendment 53 does not acknowledge the 2021 paper or explain why it relies on the older 2012 paper in light of more recent work.

The effect of using outdated data is material. By using $46 per fish instead of $110 per fish, the projected changes in recreational sector net economic benefits from reallocation are far less than projected in Amendment 53. Specifically, while the Amendment estimates recreational sector net economic benefit savings of $11 million by selecting Preferred Alternative 3 instead of Alternative 2 assuming consumer surplus of $110/fish, the savings are reduced to $5.4 million by assuming $46/fish. Using the most recent data, the benefits of Preferred Alternative 3 are less than half of what is projected in the amendment.

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[62] Ex. L (Amendment 28) at pp. xiv, 90.

[63] *Id*.

[64] Am. 53 at 101 (citing Carter and Liese (2012)).

[65] *See* Ex. M (Carter, D.W., C. Liese, and S.J. Lovell. 2021.The Option Price of Recreational Bag Limits and the Value of Harvest. Marine Resource Economics 37(1). https://doi.org/10.1086/717284. The value is estimated for incremental catch of grouper generically, not red grouper specifically.).

Table 3. Recreational Net Economic Benefits Using Most Recent Consumer Surplus Data

Recreational Total Expected Change in Net Economic Benefits (2019 dollars)		
Alternative	CS $110	CS $46
Alt 2	-$17,731,289	-$8,234,514
Preferred Alt 3	-$6,658,235	-$2,838,884
Alt 4	-$7,233,754	-$3,104,722
Alt 5	-$6,850,077	-$2,927,497
Alt 6	-$12,341,533	-$5,528,630

Looking at estimated changes in total commercial and recreational sector net economic benefits is even more striking. Amendment 53 estimates net economic benefit savings of $7.6 million by choosing Preferred Alternative 3 over Alternative 2 and assuming recreational consumer surplus of $110/fish. If instead we assume recreational consumer surplus is $46/fish per the latest study, total economic benefits shrink to just $1.9 million. This undercuts the analysis in Amendment 53 and suggests the benefits projected in the amendment are inflated. The Council should have had this analysis based on more recent data.

Table 4. Net Economic Benefits Using Most Recent Recreational Consumer Surplus Data

Commercial + Recreational Total Expected Change in Net Economic Benefits (2019 dollars)		
Alternative	CS $110	CS $46
Alt 2	-$15,892,678	-$6,395,903
Preferred Alt 3	-$8,295,706	-$4,476,351
Alt 4	-$8,704,748	-$4,575,716
Alt 5	-$8,413,649	-$4,491,069
Alt 6	-$12,341,533	-$5,528,630

Indeed, by using the lower end of the range of values projected in the 2021 paper ($16 per fish), Alternative 2 (maintaining the existing allocations) is the net benefit maximizing alternative. To help demonstrate this, Table 5 below uses Alternative 2 as the baseline for comparison (FES units but existing allocations) and shows the changes in net economic benefits projected using NMFS's methodology and three different consumer surplus values. Relative to Alternative 2, at $16 per fish Preferred Alternative 3 has a negative value. This would mean that economic *losses* will result from reallocating quota to the recreational sector. Amendment 53 does not acknowledge and the Council did not consider this contrary information, but it directly undercuts the Council's determination.

Table 5. Net Benefits Relative to Alternative 2 (Status Quo Allocations)

Recreational + Commercial Total Expected Change in Net Economic Benefits Relative to Alternative 2 (2019 dollars)			
Alternative	CS $110	CS $46	CS $16
Preferred Alt 3	$7,596,972	$1,919,552	-$741,738
Alt 4	$7,187,929	$1,820,188	-$695,942
Alt 5	$7,479,028	$1,904,835	-$708,069
Alt 6	$3,551,144	$867,273	-$390,791

Other recent work similarly suggests that the recreational sector valuations used in Amendment 53 are inflated. Jungers et al. (2021)[66] propose a recreational regulatory system where quota could be allocated efficiently through markets, making cross-sector value comparison appropriate. The policy context in the paper is Gulf of Mexico red snapper, but the management approach and findings are just as applicable to red grouper.

Jungers et al. (2021) find that a hypothetical harvest tag for red snapper would trade at a price of approximately $15 per fish. Assuming 6.3 pounds per red snapper, this is $2.38 per pound of recreational red snapper, an estimate much lower than others in the literature.[67] This significantly undermines the economic efficiency case for reallocating red snapper quota to the recreational sector. Compared with a commercial red snapper IFQ lease price of $3 per pound during the same time period, opening up a quota market between commercial and recreational sectors could

[66] Ex. N (Jungers, B., J.K. Abbott, P. Lloyd-Smith, W. Adamowicz, and D. Willard. 2021. "A la Carte" Management of Recreational Resources: Evidence from the US Gulf of Mexico. Manuscript submitted for publication. https://www.joshuakabbott.com/uploads/9/5/6/1/95618488/recreation_a_la_carte_wp.pdf).

[67] *See* Agar, J. J. and D.W. Carter. 2014. Is the 2012 allocation of red snapper in the Gulf of Mexico economically efficient? NOAA Technical Memorandum NMFS-SEFSC-659.

lead to market reallocation *to the commercial sector*. Alternatively, in the absence of an intersector quota market, NMFS and the Council could more credibly justify political reallocation to the commercial sector on the basis of improving net economic benefits, as each sector would be rationalized with efficient internal quota allocations.

While the approach developed by Jungers et al. (2021) is applied to red snapper, that fishery shares its management approach with red grouper: i.e., IFQs for the commercial sector and regulated open access for the recreational sector. Therefore, the efficiency case for reallocating red grouper to the recreational sector is just as dubious as the red snapper case.

3. Amendment 53 uses tricks to inflate recreational sector valuations

Apart from using old data showing inflated recreational values, Amendment 53 uses other tricks to make it seem like the economic benefits from reallocation are greater than they really are.

Preferred Alternative 3 would effectively codify the "status quo" by re-setting the recreational sector's ACL to match that sector's landings as measured by FES. The stated need for Amendment 53 is to "ensur[e] that the historical participation by the recreational and commercial sectors is accurately reflected by the sector ACLs."[68] So in reality, there will be no economic benefits from reallocation on the recreational side; that sector will continue catching what it has been in these new FES units. The impact change is zero and WTP change is zero. By contrast, the harm to the commercial sector is real: commercial fishermen will lose 1.19 million pounds of quota from what they would otherwise have had. The analyses in Amendment 53 are thus misleading in suggesting that reallocation will produce any net benefits.

In addition, different catch limits were used to assess economic effects. For the commercial sector, "economic effects…are analyzed as a function of the ACT." [69] But for the recreational sector, "economic effects…are analyzed as a function of the ACL." [70]

The difference is material because the ACT is lower than the ACL. Specifically, the commercial sector ACT is 5% lower than its ACL, and the recreational ACT is 9% lower that its ACL. Amendment 53 thus uses and apples-to-oranges comparison, using the buffered ACT for the commercial sector but the un-buffered ACL for the recreational sector. This affects the number of pounds of quota used in the analyses. In effect, recreational values are 9% inflated by this approach.

It is possible that the differential treatment is explained by the choice in Action 2 to manage the commercial sector to its ACT but to manage the recreational sector to its ACL (see Section G below). But that choice is not rational, and NMFS's own data shows that the recreational sector

[68] Am. 53 at 8.

[69] Am. 53 at 98-99; Table 4.1.3.1.

[70] Am. 53 at 101; Table 4.1.3.4.

should be managed to its ACT in any event given its management uncertainty and overharvesting of red grouper in 2020 and 2021. In addition, the commercial sector ACT buffer is not due to management uncertainty, but to account for multi-use allocation. That 5% of quota will still be harvested, it might just be a combination of red and gag grouper. That is not a reason to exclude that catch from the economic analysis.

F. Amendment 53 Relies on Secret, Inconsistent, and Unexplained Data

A fundamental principle of administrative law is that an agency cannot rely on secret data, but must make publicly available the technical studies and data it has employed to develop regulations.

> To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.[71]

This is particularly true in the MSA context. NMFS's own regulations recognize that the MSA "provides broad public and stakeholder access to the fishery conservation and management process, including access to the scientific information upon which the process and management measures are based."[72] Unfortunately, Amendment 53 is erected upon a pile of secret and unexplained data and methodologies that precludes meaningful public review and renders the action procedurally defective. Below is a list of the most egregious examples.

1. SEFSC ACL Monitoring Datasets

Amendment 53 repeatedly cites the Southeast Fisheries Science Center's ("SEFSC") ACL Monitoring Datasets as the source of landings estimates used to calculate allocation percentages.[73] NMFS confirmed by email that these datasets are "not available to the public."[74] Yet they are the very basis for reallocation, and have errors and inconsistencies that call them into question.[75] Indeed, the SEFSC's ACL Monitoring Datasets conflict with landings estimates used in the latest stock assessment, and conflict with other data that *are* publicly available from

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[71] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

[72] *See* 50 C.F.R. § 600.315(a)(6)(iv)(A); *see also Washington Trollers Ass'n v. Kreps*, 645 F.2d 684 (9th Cir. 1981).

[73] See, e.g., Am. 53 at pp. xiii, xx, 5, 14, 16, 19, etc.

[74] *See* Ex. O (email from SEFSC confirming that these datasets "are not available to the public, and would need to be a request sent to the science center"). A request was sent but no data were provided.

[75] For example, the recreational landings data used for Amendment 53 (see Table 2.1.2 on p. 19) do not match the recreational landings data used in SEDAR 62 (see Ex. P (SEDAR 61 Executive Summary) at pp. 8-9).

NMFS's own website.[76] Which dataset is the best available science and how did NMFS make that determination? No one has been able to tell us.

NMFS maintains its own landings estimates in secret, they are not generally available to the public until pasted into a document like Amendment 53, they conflict with landings information that is available to the public through NMFS's own website, and NMFS refuses to make disclosures about its secret data. These data are not appropriate for any rulemaking, much less for allocation decisions.

In addition, at the present time there are numerous sources of recreational landings data, all of which conflict with one another, and NMFS uses some datasets for some purposes and other datasets for other purposes. NMFS purports to use Coastal Household Telephone Survey ("CHTS") data to manage the red snapper fishery,[77] but in reality NMFS manages that fishery with the Gulf States' own landings data.[78] The Council itself recently stated "that consensus has not been reached on which of the survey methods [Marine Recreational Information Program or various state surveys] is both most precise and accurate with respect to producing private recreational red snapper catch and effort data."[79]

Moreover, Florida's Gulf Reef Fish Survey ("GRFS") landings data for red grouper generate estimates more in-line with CHTS than FES.[80] NMFS has certified GRFS and found it "statistically appropriate."[81] Yet Amendment 53 fails to explain why FES estimates, and not GRFS estimates, should be the basis for reallocation. An explanation is required because NMFS is effectively using GRFS to manage red snapper, but now proposes to use FES to manage red grouper.

All of this is arbitrary because the choice of which data system to use for management is driven by whatever produces the best outcome for the recreational sector. This also violates MSA National Standard 2. NMFS should defer action on reallocation until a reliable and consistent set of recreational landings data is available.

2. Recalibration of recreational red grouper landings

NMFS made available the documents supporting development of the calibration model used to revise historical recreational landings estimates. But what NMFS has never provided is the

[76] *See id.*; also compare Ex. Q (showing recreational landings from 1981-2021 from NMFS's website), with Am. 53, Table 2.1.2.

[77] *See* Ex. B; *supra* note 3.

[78] *See id*. If NMFS were actually managing the red snapper fishery with CHTS data (which must be calibrated from FES data as CHTS no longer exists), it would impose paybacks for the observed overages pursuant to 50 C.F.R. §622.23(b). But NMFS has not done so.

[79] *See* Ex. R (NMFS letter to Council re: National Standard 6, quoting Council request for analysis).

[80] Am. 53 at 27.

[81] Am. 53 at 27.

dataset of red grouper landings that were fed into the calibration model, or any explanation about what other inputs or parameters may have been used specifically to adjust red grouper landings. In essence, NMFS employs a black box that spits out new numbers. The public has no knowledge about what goes into the box or what happens in the box. This is troubling because of the uncertainty and imprecision in these estimates to begin with, which may have been compounded by running them through the calibration model.

The allocation formula uses the years 1986-2005, when Marine Recreational Fisheries Statistic Survey ("MRFSS") was used to estimate recreational landings. MRFSS was widely discredited.[82] MRIP was not developed until after the 2006 report from the National Academy of Sciences that was critical of MRFSS.[83] Over time MRIP was improved, such as by improving the Access Point Angler Intercept Survey ("APAIS") and ultimately dispensing with the Coastal Household Telephone Survey ("CHTS") and moving to the Fishing Effort Survey ("FES").

The calibration model compared CHTS to FES landings during 2015-2017 when CHTS was the most unreliable it ever was.[84] So how did NMFS calibrate earlier years, such as 1986-2005, when MRFSS was being used to collect landings data? MRFSS estimates from 1986-2005 evidently went through a series of calibrations (to MRIP, CHTS, APAIS, and FES).[85] That is an elaborate process, fraught with compounding uncertainty, and the public has little idea how NMFS accomplished this or trust in the outcome. No data are available for the public to track the evolution of landings estimates through these serial calibrations.

Published peer-reviewed papers have questioned this approach. Thunberg and Fulcher (2005) find marine recreational fishing participation rates are not stable over time, and therefore recreational fishing participation is unpredictable: "Even subtle changes in participation probabilities among demographic cohorts can lead to an unreliable understanding of the composition of the fishing public."[86] This suggests that recent changes in estimated recreational fishing effort and landings—as now better measured with MRIP-FES compared with MRIP-CHTS or MRFSS—are unrelated to recreational fishing trends during the 1986-2005 baseline years used to set red grouper allocations in Amendment 30B. In other words, projecting recent catch and efforts trends back that far in time is unrealistic, regardless of the latest catch survey

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[82] *See* Ex. S (NAS Report on MRFSS (2006)).

[83] *See id*..

[84] *See* Ex. T (NMFS, *Recommended Use of the Current Gulf of Mexico Surveys of Marine Recreational Fishing in Stock Assessments*) at 25 ("It is clear that CHTS-based estimates since 2000 are not really comparable to CHTS-based estimates prior to 2000, and they have become increasingly less comparable over the more recent years.").

[85] *See* Ex. U at 2 (NMFS website referencing multiple calibrations).

[86] *See* Ex. V (Thunberg, E.M. and C.M. Fulcher 2006. Testing the stability of recreational fishing probabilities. In Sumaila, U.R. and D.A. Marsden (eds.) 2005 North American Association of Fisheries Economists Forum Proceedings. Fisheries Centre Research Reports 14(1). Fisheries Centre, the University of British Columbia, Vancouver, Canada) at 176.

methodology.[87] Amendment 53 does not address changes in recreational participation over time or explain how or why these serial recalibrations have merit in light of such changes.

The problem here is the wide discrepancy in reliability between commercial and recreational landings estimates, and the unfounded assumption for management purposes that they are comparable enough to make allocation decisions.

3. Commercial sector landings

For some reason, commercial sector landing data over the 1986-2005 base period changed significantly between Amendment 30B/SEDAR 12 (2006) and 2021 (See Am. 53, Table 2.1.2). While recreational landings changed due to MRIP-FES and other calibrations, Amendment 53 provides no explanation for the changes in commercial landing data, which are more precise and not subject to any calibration. NMFS says this would require a "forensic analysis."[88] That does not provide a rational explanation to the public for the source of numbers that drive reallocation and harm commercial fishermen's livelihoods. How is the public supposed to assess NMFS's assertion that these revised commercial sector landings are the "best available" science when even NMFS cannot explain how or why they changed over time?

4. Recreational dead discards

Somehow NMFS and/or the SSC projected changes in ACLs based on different allocation scenarios. As more quota is shifted to the recreational sector, the ACLs go down to cover increased dead discards from recreational fishing. Once again, these calculations were never made available to the public. For example, how did NMFS determine that increasing the recreational sector's ACL by 550,000 pounds (comparing Alternative 2 with Preferred Alternative 3) would necessitate a 640,000 pound reduction in the Total ACL? See Table 1 of Am. 53. This suggests that anglers are discarding more pounds than they are landing. What assumptions were used about numbers and sizes of fish being discarded? Where did these numbers come from? Is this the same methodology used to estimate dead discards "off the books" when setting an OFL that excludes dead discards? What is that methodology? The public has no idea.

[87] A NMFS Regional Administrator argued this point in 2015: "Our allocations are mostly all based on our perception of what the historic mix in the fishery is and one of the problems with red snapper, and a number of other species, is those allocations were put in place in Amendment 1, way back in 1990, and they're based on a landings back from I think 1970 to 1986 and that's a problem for us now, because it's hard to correct all those landings that far back… somewhere we need to find a better basis for deciding what the optimal allocation is other than what we think it looked like forty years ago, because I don't think anybody is really going to be happy with that kind of thing." Ex. W (Gulf Council meeting minutes, January 28-29, 2015) at 147.

[88] Am. 53 at 290.

5. The assumption that 2.10mp in CHTS units = 1.00mp in FES units

Much of the analysis in Amendment 53 assumes that the ratio of CHTS estimates to FES estimates is 2.10 to 1.00.[89] The Amendment never explains the basis for this ratio, how it was calculated, or what data were used as inputs. Indeed, the calibration exercise showed wide variation between CHTS to FES landings estimates year over year, not a fixed 2:10:1.00 ratio. See, e.g., Table 2.1.2 of Am. 53. The public has no idea where this ratio came from or basis to assess its validity.

6. Unexplained economic analyses

NMFS used a commercial sector valuation approach that is different from what NMFS used for red snapper reallocation analysis.[90] Instead of using commercial IFQ lease price as a measure of annual rents from a marginal unit of commercial harvest (i.e., WTP or "value" per pound of quota)—a well established framework in the economics literature,[91] based on how much a commercial fisher would be willing to pay in a market for a pound of quota up to the revenue they would get from that pound, less fishing costs—NMFS now estimates commercial sector value by assuming producer surplus is 24% of annual net revenue from grouper fishing, citing an unpublished NMFS white paper.[92] No explanation is given for this departure from past and established practice.

In addition, there are also estimates of changes in consumer surplus based on anticipated changes in ex-vessel prices, but this material is unclear. There is no explanation of the methodology or mechanism through which allocation changes impact producers and consumers, there is no per pound or per-fish commercial value estimate that would allow comparison with recreational quota values (unlike the red snapper analysis), and the public is left to take these estimates as given. Without that information, meaningful public comment cannot be provided.

7. Failure to recalculate historical ACLs for red grouper as was done for other species

Higher recreational landings in the past would have been fed into stock assessments and influenced historical catch limits for both the commercial and recreational sectors. The Council had the ability to recalculate what historical ACLs may have been during 1986-2005 had new estimates about recreational landings been known at the time. The Council performed such

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[89] *See, e.g.*, Am. 53, Table 1; Table 4.1.4.1 ("The recreational ACLs in MRIP-CHTS are calculated using the ratio of 1.00:2.10, representing the conversion of the recreational ACL under Alternative 1 from MRIP-CHTS to MRIP-FES units.").

[90] *See* Ex. L (Amendment 28).

[91] *See, e.g.*, Newell, R.G., J.N. Sanchirico, and S. Kerr. 2005. Fishing Quota Markets. *Journal of Environmental Economics and Management* 4:437-462; Grainger, C.A. and C.J. Costello. 2014. Capitalizing Property Rights Insecurity in Natural Resource Assets. *Journal of Environmental Economics and Management* 67(2):224-40.

[92] Am. 53 at 98-99.

calculations for other species, such as king mackerel,[93] but not for red grouper. The calculations would show that commercial sector landings would likely have been higher over that period as well. But the Council only chose to look at the recreational sector. This, like many other aspects in Amendment 53, skewed the analysis in favor of the recreational sector.

G. Amendment 53 Arbitrarily Applies an ACT Buffer to the Commercial Sector but not the Recreational Sector

Action 2 in Amendment 53 ostensibly sets sector ACTs as accountability measures ("AMs") to help protect against overfishing. But only the commercial sector is subject to an ACT; for the recreational sector, ACT kicks in only when that sector's ACL is exceeded in the prior year. Otherwise the recreational sector is managed to its ACL while the commercial sector is managed to its ACT. There is no basis for this disparate treatment of the sectors.

The recreational sector's ACT is ostensibly set using the ACL/AM Control Rule. But that rule specifies that the recreational buffer should be 9% even without an overage.[94] The Control Rule does not specify that the ACT should only be applied when the ACL is exceeded in a prior year. This is more like a payback, which is a post-season AM, than a true in-season AM designed to prevent overages before they occur. This is a problem because data reporting in the recreational fishery is delayed for months and there is no adequate mechanism to track quota usage in real-time. Thus, an ACT is necessary to "ensure accountability"[95] to catch limits for the recreational sector and prevent overharvesting before it occurs.

In addition, the data used to determine whether an overage has occurred[96] are outdated. Data from NMFS's website indicate that the recreational sector exceeded its quota in 2020 and 2021 (both the 1.00mp ACL codified in regulations, and the 2.10mp ACL in "CHTS units" NMFS illegally uses; see Section I below).[97] That data was not presented to the Council or included in Amendment 53. Thus, even assuming there was some justification for withholding application of the ACT until the ACL is exceeded (there is none), that trigger has now been pulled. An ACT for the recreational sector is required. Amendment 53 wrongly assumes otherwise.

H. Amendment 53 Violates National Standard 8

Under National Standard 8, NMFS must "take into account the importance of fishing resources to fishing communities…in order to (A) provide for the sustained participation of such communities,

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[93] *See* Ex. I at 169.

[94] *See* Am. 53 at 257.

[95] 16 U.S.C. § 1853(a)(15).

[96] Am. 53 at 257.

[97] *See* Ex. Q(red grouper landings, 1981-2021, from NMFS's website).

and (B) to the extent practicable, minimize adverse economic impacts on such communities."[98] NMFS's guidelines recognize that an allocation "may benefit some communities at the expense of others,"[99] but explain that "[d]eliberations regarding the importance of fishing communities…must not compromise the achievement of conservation requirements and goals of the FMP."[100]

Thus, National Standard 8 does not tolerate an action that benefits one fishing community at the expense of another if that action undermines conservation objectives. Yet that is precisely what Amendment 53 does: it codifies a level of participation by the recreational fishing community that, due to increased discards and management risk, undermines achievement of conservation requirements and goals of the FMP while simultaneously maximizing adverse economic impacts to the commercial fishing community.

I. Amendment 53 Violates NEPA

1. The "No Action" Alternative is Unlawful

The action alternatives for Action 1 (Alternatives 2-6) are all evaluated against a "status quo" alternative (Alternative 1) as required by NEPA.[101] Amendment 53 concedes that Alternative 1 is "not legally viable."[102] Comparing action alternatives against an illegal status quo does not provide for meaningful analysis and is therefore unlawful.[103]

But there is a bigger problem. Amendment 53 is not forthcoming about why Alternative 1 is not legally viable. The reality is that NMFS has been illegally managing the recreational sector for years by pretending that the recreational sector's quota is more than twice the quota codified in NMFS's own regulations.

Existing regulations provide that the Total ACL is 4.16mp, of which the commercial sector has an ACL of 3.16mp and the recreational sector has an ACL of 1.00mp (the 76% to 24% allocation set by Amendment 30B).[104] NMFS should be using MRIP-FES to track landings against the recreational sector's 1.0mp ACL (and ACT), based on NMFS's position that MRIP-FES is the best available science. But that is not what NMFS has been doing. NMFS has instead ignored the 1.0mp ACL set by its own regulations and assumed the recreational sector's ACL should be

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[98] 16 U.S.C. § 1851(a)(8).

[99] 50 C.F.R. § 600.345(c)(1).

[100] 50 C.F.R. § 600.345(b)(1).

[101] 40 C.F.R. § 1502.14(c).

[102] *See, e.g.*, Am. 53 at pp. 16, 98, 101.

[103] *See, e.g., Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (finding the "no action" alternative invalid under NEPA where it was based on an unlawful plan).

[104] 50 C.F.R. § 622.41(e).

2.10mp.[105] The new FES data may indeed show that quotas could be modified, but until they are changed through the regulatory process, they must be adhered to using the best available science. NMFS has no authority and has undertaken no public rulemaking process to reset the recreational sector to 2.10mp.

The illegality of NMFS's action is apparent from Table 1 on p. xx of Am. 53:

Table 1. OFL, ABC, total and sector ACLs for **Alternatives 1-6**.

	OFL*	ABC	Total ACL	Comm ACL	Rec ACL
Alternative 1** MRFSS data 1986-2005 (76% commercial:24% recreational)	14.16	13.92	4.16	3.16	1.00
MRIP-FES equivalent			(5.26)		(2.10)
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
Alternative 4*** MRIP-FES data 1986-2009 (60.5% commercial:39.5% recreational)	4.70	4.30	4.30	2.60	1.70
Alternative 5*** MRIP-FES data 1986-2018 (59.7% commercial:40.3% recreational)	4.67	4.28	4.28	2.56	1.72
Alternative 6*** MRIP-FES data but retain commercial ACL at 3.16mp (68.7% commercial:31.3% recreational)	5.03	4.60	4.60	3.16	1.44

*Values for OFL, ACB, total ACL, commercial ACL, and recreational ACL are in mp gw.
**The recreational portion of the current OFL, ABC, and ACLs are based on MRIP-CHTS data.
***The recreational sector ACL is in MRIP-FES units.

If the fictional "MRIP-FES equivalent" total ACL was actually 5.26mp as represented in the second row of Table 1 above, then the recreational sector's status quo 24% share would be 1.26mp, not 2.10mp. Similarly, if the Total ACL was actually 5.26mp, then the commercial sector's status quo 76% share would be 4.00mp, not 3.16mp.

NMFS has simply engineered its own backdoor reallocation, giving the recreational sector 40% of the quota (2.10mp of a fictional 5.26mp Total ACL, while holding the commercial sector to its codified 3.16mp quota) in direct violation of the Reef Fish FMP and NMFS's own regulations. Alternative 1 is illegal because "status quo" reflects NMFS's unlawful reallocation to the recreational sector. Viewed in this light, Amendment 53 is a post-hoc rulemaking to cover an action NMFS took years ago on its own in derogation of the MSA process. This violates NEPA.[106]

[105] *See* Am. 53 at pp. xxiii, 20 ("The current ACT is being tracked using MRIP-CHTS equivalent landings."). NMFS has never explained where its assumed 2.10:1.00 ratio between CHTS and FES is derived from.

[106] *See* 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.") (emphasis added).

The problem here arises from NMFS's ongoing reluctance to hold the recreational sector accountable to its quotas.[107] Under MRIP-FES, NMFS is evidently counting fish better than it was before. But the recreational sector still has a codified quota; NMFS has illegally authorized the recreational sector to catch 2.10mp when its ACL is only 1.00mp. The "no action" alternative is flagrantly illegal for this reason.

2. NMFS Committed to a Course of Action Before the Comment Period Closed on the DEIS.

An agency violates NEPA where it predetermines the result of its environmental analysis.[108] The record makes clear that NMFS has advocated in favor of reallocation all along and that the outcome was predetermined.

As described above, NMFS has already effectuated a reallocation by authorizing the recreational sector to take 40% of landings each year. Amendment 53 would simply adjust the regulations to match NMFS's past (unlawful) practice. Then-NMFS Regional Administrator, Dr. Roy Crabtree, made the motion at the Council to initiate the development of Amendment 53 in October 2019.[109] The current NMFS Regional Administrator, Andy Strelcheck, urged the Council to proceed with Amendment 53 and voted with the Council majority to approve it.[110] That vote was taken on June 25, 2021, three days before the comment period closed on the Draft EIS.[111]

At that point, the policy choice was made. Under the MSA, once the Council acts, NMFS has no authority to select a different alternative; it can only approve, disapprove, or partially approve the Council's action if inconsistent with law.[112] The policy choice was locked in before the comment period closed on the DEIS, and NMFS led the charge.

3. The Range of Alternatives Was Too Narrow

NEPA requires that management actions like Amendment 53 "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action," and "[r]igorously explore and objectively evaluate all reasonable alternatives."[113]

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[107] *See supra* note 3.

[108] *See, e.g., Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010).

[109] *See* Ex. X (Reef Fish Committee minutes, Oct. 22, 2019) at p. 102 ("DR. CRABTREE: I am going to make a motion. I move that we ask the SSC to review red grouper projections based on the allocation time series from Amendment 30B (1986 to 2005) and the best available landings used as inputs in the new stock assessment, which is approximately 40.52 percent recreational and 59.48 percent commercial, and direct staff to start work on a plan amendment to update the red grouper allocation and establish catch levels based on the new assessment.").

[110] Ex. I (June 25, 2021 Council minutes) at 157-158, 168, 180.

[111] 86 Fed. Reg. 26514 (May 13, 2021) (comment period on the DEIS closed on June 28, 2021).

[112] 16 U.S.C. § 1854(a)(3).

[113] 40 C.F.R. §§ 1502.13, 1502.14.

A purpose of Amendment 53 is to "revise the red grouper allocation between the commercial and recreational sectors using the best scientific information available" and the need is to "ensur[e] that the historical participation by the recreational and commercial sectors is accurately reflected by the sector ACLs, and that the recreational ACL is consistent with the data used to monitor recreational landings and trigger AMs."[114]

Yet Amendment 53 only looked at reallocating quota to the recreational sector, ostensibly to reflect that sector's historical "participation" as informed by MRIP-FES. But the recreational sector ACL set by Amendment 53 does not reflect historical participation because it excludes red grouper dead discards by anglers, which are caused by anglers' participation in the fishery.

Further, the Gulf Council has an Allocation Policy that requires a comprehensive allocation review where, as here, "relevant new information, e.g., data recalibration," is made available.[115] The data recalibration using MRIP-FES should therefore have triggered an allocation review, looking at a range of allocation changes to better achieve FMP objectives. This allocation review should have included analyses by the SSC and Council Advisory Panels.[116] Amendment 53 nowhere explains why the Council jettisoned its own Allocation Policy[117] and proceeded directly to an allocation change untied to promoting FMP objectives.[118] Had the Council followed its Allocation Policy, a reasonable range of alternatives might have been developed to better achieve FMP objectives. But because the outcome was predetermined to apportion roughly 40% of the quota to anglers, the range of alternatives only achieved that result and was too narrow.

4. NMFS Failed to Take a Hard Look at Environmental Impacts

NEPA requires NMFS to take a "hard look" at environmental impacts of Amendment 53.[119] This standard is not met where an agency relies on incorrect assumptions[120] or minimizes negative side effects.[121]

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[114] Am. 53 at 8.

[115] Am. 53 at 255.

[116] *See* Ex. Y (Gulf Council Allocation Review Procedures).

[117] *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (when an agency decides to depart from official policies, it must at a minimum acknowledge the change and offer a reasoned explanation for it). NMFS urged the Council to adopt allocation policies following a GAO Report GAO-20-216 authorized by the Modern Fish Act. The Council adopted a policy. But Amendment 53 departs from that policy without a reasoned explanation.

[118] The only explanation for how Amendment 53 achieves FMP objectives was added to the document after the Council voted on it and the Minority Report pointed out this flaw. The Council never reviewed or approved that post-hoc justification and it is thus not relevant for assessing compliance with MSA or NEPA requirements.

[119] *See Kleppe v. Sierra Club*, 425 US 390 410.21 (1976).

[120] *See Jayne v. Sherman*, 706 F.3d 994, 1005-06 (9th Cir. 2013).

[121] *See N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006).

All of the defects discussed above demonstrate that NMFS has not taken the requisite hard look at the environmental consequences of Amendment 53. Amendment 53 minimizes the effects of increased bycatch from reallocating quota to the recreational sector, and the attendant effects on management uncertainty and risk of overfishing. For example, by asserting that the "risk of overfishing" is "the same" between allocation alternatives, but defining "overfishing" to exclude dead discards, NMFS minimizes the real effects. Nor does Amendment 53 assess how prior misunderstandings about recreational dead discards may have inhibited stock rebuilding.

I. CONCLUSION

We urge you to disapprove Amendment 53 for the foregoing reasons.

Sincerely,

J. Timothy Hobbs