

NACO

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To: "Mel" <obfainfo@gulftel.com>
Sent: Friday, March 16, 2007 10:07 AM
Attach: CAA-Shrimp - Order on MSJ.pdf
Subject: Fw: CCA Lawsuit Results- Shrimp Trawl Bycatch & Red Snapper

Dear Gulf Recreational Charter Boats & Anglers,

I am certain by now you have heard about the lawsuit where a Texas Judge determined, ***“The court agrees, and therefore ORDERS that the status quo be maintained during the pendency of the remand. The court further ORDERS that the Secretary of Commerce, consistent with his obligations under the Fishery Act, approve a red snapper rebuilding plan, considering measures to reduce bycatch in the shrimp fishery, within the next nine months”.***

I have attached the final ruling and the highlights are,

- Because the red snapper has been actively fished for at least a century, it is difficult to gauge its optimum stock size. No one contests, however, that the red snapper is severely overfished. Amendment 22 reflects current population at about seven percent of historic abundance. Other studies indicate that red snapper populations are closer to three percent of historic abundance.
- The three main sources of red snapper mortality are the commercial red snapper fishery, the recreational red snapper fishery, and the Gulf of Mexico shrimp fishery. Of these, the shrimp fishery is believed to be the most lethal, accounting for approximately 90% of red snapper mortality. Amendment 22 at 36 (citing Schirripa and Legault, 1999). New information, however, indicates that these proportions might be incorrect and that more red snapper than previously believed die in the commercial and recreational fisheries.
- While the Service has been extending the length of time needed to rebuild red snapper stocks it has also been raising the total allowable catch (TAC) of red snapper. TAC was set at four million pounds in 1991. It was raised to six million pounds in 1993. And to nine million one hundred and twenty thousand pounds in 1996. Amendment 22 retains the current TAC.
- After notice and comment, Amendment 22 was adopted by the Service on June 2, 2005. Its most controversial feature is its conclusion that no further regulatory action is needed to end overfishing and rebuild red snapper stocks by 2032. The Gulf Council bases this conclusion on three assumptions: 1) that the commercial shrimp fishery accounts for ninety percent of red snapper mortality; 2) that bycatch reduction devices (“BRDs”) are forty percent effective in reducing red snapper mortality in the shrimp fishery; and 3) that shrimping efforts in the Gulf of Mexico will be reduced by fifty percent during each of the years of the rebuilding plan.

On scientific or technical questions courts usually defer to the agency’s superior understanding. This does not, however, relieve the Agency of its obligation to “*cogently* (this means clearly) explain why its [decisions]” satisfy statutory requirements. “A regulation cannot stand if it is based on a flawed, inaccurate or misapplied study.” Stock rebuilding plans must have a fair likelihood of succeeding.

- The stock rebuilding plan contained in Amendment 22 is inconsistent with the scientific data cited by the Gulf Council and has a less than fifty percent chance of rebuilding red snapper stocks by 2032. This violates the Service’s duty to adopt a plan that will rebuild

overfished stocks within the time period established pursuant to Title 16 United States Code Section 1854(e)(4), in this case, thirty-one point six years. Two pieces of evidence counsel against the Service's adoption of a plan dependent on a fifty percent reduction in shrimping effort. First, the economic studies before the Gulf Council reflect only an estimated thirty-nine percent reduction in shrimping effort. Second, these studies project the reduction to occur progressively and culminate in 2012. By contrast, the Gulf Council's rebuilding plan, which claims to be based on these studies, depends on a fifty percent reduction in shrimping effort beginning in 1999 and lasting until 2032. Based on this assertion, the Gulf Council concludes that the reduction will in fact be fifty percent and, moreover, will occur immediately beginning in 1999. Neither of these conclusions are warranted.

- In this case, if the Service adopted a plan that rebuilt red snapper stocks in less than the maximum amount of time permitted under law, it could have argued that the resulting cushion made success at least fifty percent likely, but the Service and the Gulf Council did not choose this path. By adopting a plan that projected rebuilt red snapper stocks in close to the longest period permitted under law, the Gulf Council placed a premium on the accuracy of its predictions. The Gulf Council's own graphs reflect that even if the economic analyses are spot on, red snapper stocks will not be rebuilt within the required period. Accordingly, the court will remand Amendment 22 to the Service for promulgation of a rule within the next nine months that has, at least, a fifty percent chance of succeeding.
- Amendment 22 also violates Title 16 United States Code Section 1853(a)(11) by not, to the extent practicable, minimizing bycatch. The Fishery Act provides that fishery management plans must 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." 16 U.S.C. § 1853(a)(11). In this case, Defendants avoided discussing measures to reduce red snapper bycatch in the shrimp fishery by saying they will address the issue in the

Shrimp Fishery Management Plan. This is contrary to the plain meaning of the statute. Accordingly, on remand, the Service will consider and adopt, if practicable, measures to minimize bycatch in the shrimp fishery.

- Defendants have requested that the court stay vacatur (this means vacate) of the final rule because Amendment 22 is part of "a complex plan that involves many interconnected programs and measures." The court agrees, and therefore ORDERS that the status quo be maintained during the pendency of the remand. The court further ORDERS that the Secretary of Commerce, consistent with his obligations under the Fishery Act, approve a red snapper rebuilding plan, considering measures to reduce bycatch in the shrimp fishery, within the next nine months. SIGNED at Houston, Texas, this 12th day of March, 2007.

Now how does this affect us? The way I read it the court has ordered that status quo be maintained until the Secretary approve a red snapper rebuilding plan that considers measures to reduce bycatch in the shrimp fishery within the next 9 months! To me this means 9.12 MP TAC with 4 fish bag limit until action is taken to reduce bycatch in the shrimp trawl fishery. Since the interim rule does not reduce bycatch in the shrimp trawl fishery I think the NMFS may have a problem. I have emailed NOAA General Counsel and Roy Crabtree to request an answer to this question. Please understand though that based on the information coming from the NMFS now that could mean lower TACs in 2008-

2010 to make up for the higher TAC in 2007. I will keep you posted on any further developments.

*Best Regards,
Bobbi Walker*