

IN THIS UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

THE STATE OF TEXAS, and )  
THE STATE OF LOUISIANA )

Petitioners; )

vs. )

Civil Action No. \_\_\_\_\_

ROY E. CRABTREE, in his official )  
capacity as the Regional Administrator )

of the National Marine Fisheries Service, )

ALAN D. RISENHOOVER, in his )

official capacity as the National )

Marine Fisheries Service Director of the )

Office of Sustainable Fisheries, )

performing the functions and duties of the )

Deputy Assistant Administrator for )

Regulatory Programs, REBECCA M. )

BLANK, in her official capacity as acting )

United States Secretary of Commerce, the )

NATIONAL OCEANIC AND )

ATMOSPHERIC ADMINISTRATION, )

an agency of the United States within the )

Department of Commerce, the )

UNITED STATES DEPARTMENT OF )

COMMERCE, and the NATIONAL )

MARINE FISHERIES SERVICE, a )

federal agency and a division of the )

National Oceanic and Atmospheric )

Administration, )

Respondents. )

**PETITION FOR REVIEW AND MOTION FOR EXPEDITED**  
**TREATMENT**

## I. INTRODUCTION: NATURE OF ACTION

1. Petitioners the State of Texas and the State of Louisiana bring this civil action against the United States Department of Commerce and responsible agencies and officials within it, pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706 and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.* (the “Magnuson-Stevens Act” or the “Act”). Petitioners seek review of an unlawfully promulgated “emergency” rule entitled *Recreational Closure Authority Specific to Federal Waters Off Individual States for the Recreational Red Snapper Component of the Gulf of Mexico Reef Fish Fishery* (the “Emergency Rule”). The Emergency Rule was promulgated by Respondent Blank pursuant to a section of the Act that allows the Secretary of Commerce to promulgate emergency rules upon the recommendation of the Gulf of Mexico Fishery Management Council (the “Council” or the “Gulf Council”), of which Texas and Louisiana are members. On Thursday, April 18, 2013, at the Council’s most recent meeting, a majority voted in favor of rescinding the Emergency Rule, but, to date, Respondents have given no indication that they will.

2. The Emergency Rule purports to give Respondent the National Marine Fisheries Service (NMFS)<sup>1</sup> the power to unilaterally – without notice, public comment, or hearing – shorten, or even do away with, the 2013 recreational red snapper fishing season in federal waters in the Gulf of Mexico.<sup>2</sup> Furthermore, this action was undertaken, not for scientific reasons (even though the Act requires NMFS to use the best scientific information available),<sup>3</sup> but solely because Louisiana and Florida were each considering joining Texas in setting a state recreational red snapper fishing season that was not identical to the season NMFS established for federal waters. The Magnuson-Stevens Act, however, is quite clear that the states have a nearly absolute right to regulate fishing within their own waters, subject only to a narrow “preemption” exception that requires public notice and an opportunity for a hearing.<sup>4</sup>

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<sup>1</sup>The motion originally approved by the Council specifically referenced Respondent Crabtree as the authorized representative to set or change the snapper season. The Emergency Rule more generically references NMFS.

<sup>2</sup>The Emergency Rule was published in the Federal Register on Monday, March 25, 2013. *See* Recreational Closure Authority Specific to Federal Waters Off Individual States for the Recreational Red Snapper Component of the Gulf of Mexico Reef Fish Fishery, 78 Fed. Reg. 17882 (March 25, 2013). A copy is attached hereto as Exhibit A.

<sup>3</sup>16 U.S.C. § 1851(a)(2); *see also id.* §§ 1852(g)(1)(A), (E).

<sup>4</sup>*Id.* § 1856(b).

3. Additionally, NMFS's own rules and policies make it clear that emergency rules are supposed to be a rare exception to normal agency notice and comment rulemaking. NMFS has a directive that emergency regulations are to be limited to "extremely urgent, special circumstances," "may not be based on administrative inaction to solve a long-recognized problem," and must be in response to "serious conservation or management problems."<sup>5</sup>

4. Texas's state red snapper season has not matched the federal season for 17 years (since 1996, when the federal season was 365 days), and Florida extended its season beyond the federal season in 2008 without the necessity of an emergency rule. Thus, there must be something about Louisiana's also extending its season that creates "extremely urgent, special circumstances" and "serious conservation or management problems" that did not exist when Texas alone extended its season or in 2008, when both Texas and Florida extended their seasons, but Louisiana did not.<sup>6</sup>

5. Additionally, ordinary notice and comment rulemaking has been initiated on this same subject for rules that can be in place for the 2014 season. In fact, at the

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<sup>5</sup>See *Policy Guidelines for the Use of Emergency Rules*, 62 Fed. Reg. 44421 (Aug. 21, 1997). This policy guideline was reaffirmed and converted to an NMFS directive on March 31, 2008. See National Marine Fisheries Service Instruction 01-101-07 at <http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-07.pdf> (last visited April 18, 2013). A copy of this directive is attached as Exhibit B.

<sup>6</sup>After 2008 and prior to this year, Florida's season matched the federal season.

most recent Council meeting, a majority voted to move towards, not a final version of the Emergency Rule, but instead a “state-centric” regulatory scheme known informally as “regional management,” under which, in direct contrast to the Emergency Rule, the individual states would have significant latitude to regulate fishing in both federal and state waters off their coasts. Under this regional management concept, the fishing seasons will be set, not by the federal government under some final version of the Emergency Rule, but by the states themselves. The federal government will just set poundage quotas.

6. To justify the Emergency Rule, Respondents must therefore demonstrate that Louisiana’s extending its season was not only recent and unforeseen, but also creates circumstances so extreme and conservation or management problems so severe that the Emergency Rule (1) could not have been enacted through normal notice and comment rulemaking in 2012 and (2) cannot await even one federal fishing season of, at most, 27 days duration, while the ordinary rulemaking process takes its course for next season. Additionally, given that the Emergency Rule’s approach has been abandoned for next season and beyond, Respondents must also explain why this emergency approach is necessary for the 2013 season.

7. Respondents cannot make the required showing. In fact, Respondent Crabtree was aware, at least by the spring of 2012, that Louisiana intended to extend

the red snapper season in its waters **in 2012**, but Louisiana was persuaded by Dr. Crabtree prior to the start of the **2012** season to delay this extension for another year, until 2013. Thus, there was plenty of time to address Respondents' concerns through ordinary notice and comment rulemaking prior to the start of the 2013 season. Respondents, however, waited until the Council's February 2013 meeting, when Dr. Crabtree persuaded a bare majority to overturn a prior vote (taken earlier in the day) and approve an emergency motion that ultimately led to the promulgation of the Emergency Rule a few weeks ago on March 25 – although, as noted above, the Council even more recently voted to recommend its withdrawal.

8. The Emergency Rule also fails to comply with several statutorily-applicable national standards in the Magnuson-Stevens Act, and, furthermore, it is at odds with the Act's policy of cooperative federalism. Instead, it appears to be an improper and unlawful attempt, promoted by Dr. Crabtree, to regulate the fishing season in the state waters of Texas, Louisiana, and Florida without notice and the opportunity for a hearing, as specifically required by 16 U.S.C. § 1856.

9. Petitioners request that the Emergency Rule be declared unlawful and be set aside pursuant to the judicial review provisions of the Magnuson-Stevens Act, 16 U.S.C. § 1855(f), and the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), (C)-(D), because it is arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations; and/or without observance of procedure required by law. To the extent necessary and appropriate, Petitioners also request: (1) a declaration under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that the Emergency Rule was improperly promulgated, and is therefore void and of no force and effect; (2) a permanent injunction prohibiting the individual Respondents from enforcing or otherwise acting pursuant to or in accordance with the Emergency Rule; and (3) an order remanding the Emergency Rule to NMFS for notice and comment rulemaking.

## II. PARTIES

10. Petitioners are the State of Texas and the State of Louisiana. The Attorney General of Texas brings this suit at the request of the Texas Parks and Wildlife Department ("TDPW"), to assert the rights of the state and also on behalf of its citizens.<sup>7</sup>

11. The State of Louisiana through its Attorney General, James D. "Buddy" Caldwell, brings this case on behalf of the Louisiana Wildlife and Fisheries Commission and the Louisiana Department of Wildlife and Fisheries (sometimes collectively referred to as "LDWF"). The Louisiana Attorney General, as Chief Legal

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<sup>7</sup>See Tex. Const. Art. 4, §22; Tex. Gov't Code, Chapter 402; *see also* Tex. H.B. 1, Art. IX, §16.01, 82<sup>nd</sup> Tex.Leg., R.S. (2011).

Officer of the State, brings this action pursuant to authority vested in him by La. Const. Art. IV Sec. 8, which authorizes him to “institute, prosecute, or intervene in any civil action or proceeding” as “necessary for the assertion or protection of any right or interest of the state.” The Attorney General also brings this action as *parens patriae* for all Louisiana residents who are adversely affected by Respondents’ failure to comply with the Magnuson-Stevens Act and the APA.

12. Texas and Louisiana are sometimes referred to collectively as “Petitioners.”

13. Respondents are the United States Department of Commerce (“Commerce”), a department of the executive branch of the United States government, the National Oceanic and Atmospheric Administration (“NOAA”), an agency within Commerce, and NMFS, a federal agency that is a division of NOAA. Respondents Rebecca M. Blank, the acting United States Secretary of Commerce (“Secretary”), Alan D. Risenhoover, NMFS Director of the Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, and Roy E. Crabtree, PhD., NMFS Regional Administrator, are sued in their official capacities.



### III. JURISDICTION AND VENUE

14. This Court has subject-matter jurisdiction pursuant to both 16 U.S.C. § 1861(d) and 28 U.S.C. § 1331 (federal question). The Emergency Rule was promulgated by Commerce under the Magnuson-Stevens Act. Pursuant to § 1855(f) of that Act and APA §§ 701 – 706, Texas and Louisiana are expressly permitted to seek direct and immediate judicial review of the Emergency Rule within thirty (30) days of the date the Emergency Rule was published in the Federal Register. Section 1861(d) of the Magnuson-Stevens Act provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter.” Additionally, for the same reasons, this action is also one arising under the laws of the United States for purposes of federal-question jurisdiction under 28 U.S.C. § 1331.

15. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(C) because (1) Respondents are either (a) agencies or instrumentalities of the United States or (b) officers or employees of the United States acting in their official capacities; (2) the first named petitioner, Texas, is a resident of the Southern District of Texas;<sup>8</sup> and (3) no real property is involved in this action. Venue is also proper under § 1391(e)(1)(B) because NMFS and the Council convene periodic meetings in this

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<sup>8</sup>See *Delaware v. Bender*, 370 F.Supp. 1193, 1200 (D. Del. 1974).

district to plan the regulation of red snapper, including recreational red snapper fishing; many of the vessels that fish for red snapper have home ports in this district; and it is anticipated that a substantial part of the impact of the Emergency Rule will be felt in this district. Therefore, “a substantial part of the events or omissions giving rise to the claim” occurred in this district for purposes of § 1391(e)(1)(B).

#### **IV. PETITIONERS’ STANDING**

16. Texas and Louisiana, like all other coastal states, have an historic, independent interest in the quality and condition of their coastal waters, including an ownership interest in the tide-waters within their respective jurisdictions and the fish in them.<sup>9</sup> TDPW and LDWF are the state agencies with primary responsibility for protecting Texas and Louisiana’s fish and wildlife resources.<sup>10</sup> Furthermore, the Magnuson-Stevens Act expressly authorizes states to regulate fishing in their own state waters and to participate in the regulation of the fishing season within the adjacent federal waters. As stated above, the Emergency Rule purports to grant NMFS the unilateral power to shorten the season in federal waters based solely on the fact that state seasons for state waters do not mirror the federal seasons. Furthermore, as explained below, the shorter federal season applies in both federal and state waters

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<sup>9</sup>See La. Const. Art. IX, Sec. 1 and La. C.C. arts. 450, 3143; Tex. Parks & Wild. Code § 1.011.

<sup>10</sup>Tex. Parks & Wild. Code § 12.0011(a).

to all for-hire vessels that have a federal reef fish for-hire permit (charter boat permit), although the Council recently recommended that this rule be set aside for 2013. Under these circumstances, Texas and Louisiana have standing to sue on behalf of their residents and their natural resources, including red snapper. *See State of Louisiana v. Baldrige* 538 F. Supp. 625, 628-29 (E.D. La. 1982).

## V. STATUTORY BACKGROUND

17. The Magnuson-Stevens Act recognizes that the fish off the states' coasts are valuable, renewable resources that—properly managed—can provide continuing yields for commercial and recreational fishermen. 16 U.S.C. §§ 1801(a)(1),(3),(5),(6). The Act creates that management program, which operates through NOAA, a federal agency, NOAA's subdivision NMFS, and Regional Fishery Management Councils consisting of representatives from every coastal state. *Id.* § 1852.

### A. The Council system

18. Put simply, stewardship of this valuable resource is the Council system's purpose. *Id.* § 1801(b)(5). The Councils are charged with preparing, monitoring, and revising fishery management plans (FMPs) under circumstances that (1) enable interested groups “to participate in, and advise on, the establishment and administration of such plans” and (2) “take into account the social and economic

needs of the States.” *Id.* § 1801(b)(5). The Gulf Council consists of voting members from Texas, Louisiana, Mississippi, Alabama, and Florida. *Id.* § 1852(a)(1)(E). With the exception of what are known as “highly migratory species,” over which the Secretary of Commerce has authority,<sup>11</sup> the Gulf Council has authority over the fisheries (fish stocks that can be managed as a unit) in the Gulf of Mexico seaward of those states. *Id.* §§ 1802(13), 1852(a)(1)(E), (3). There are two types of Gulf waters seaward of the states: the individual states’ territorial seas and the Exclusive Economic Zone (EEZ). In Texas, the territorial sea extends 3 marine leagues (9 nautical miles)<sup>12</sup> from the shoreline,<sup>13</sup> and the EEZ extends from there out to 200 nautical miles.<sup>14</sup> In Louisiana, the territorial sea extends three geographical miles

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<sup>11</sup>Red snapper is not a “highly migratory species.” *See* 16 U.S.C. § 1802(21).

<sup>12</sup>A nautical mile (sometimes abbreviated “nm”) is about 1.15 statutory miles. A marine league is 3 nm.

<sup>13</sup>“Shoreline” can mean different things in different contexts. For purposes of maritime zones, NOAA defines it as equivalent to a construct known as the “baseline,” which often, but not always, is equivalent to the mean low water line. *See* the definition of “baseline” and “coast line” at *Glossary*, NOAA Shoreline Website, A Guide to National Shoreline Data and Terms, <http://shoreline.noaa.gov/glossary.html#part1> (last visited April 15, 2013).

<sup>14</sup>*See* 16 U.S.C. § 1802(11); Presidential Proclamation 5030, 48 Fed. Reg. 10606 (Mar. 10, 1983). The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, extended state jurisdiction to ocean waters and submerged lands to three geographical miles, and farther for Gulf coast states if a longer boundary existed at the time the state was admitted to the union and that boundary had been approved by Congress. Pursuant to this, Texas’s and Florida’s territorial seas extend 3 marine leagues (9 nm) into the Gulf. *See United States v. Louisiana*, 363 U.S. 1, 65 (1960).

from its shoreline.<sup>15</sup> The states have jurisdiction over their own waters, and the Council has authority over the EEZ. 16 U.S.C. § 1856.

19. The Magnuson-Stevens Act contemplates that the Council system will operate under cooperative federalism. With one limited exception, nothing in the Act “shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.” *Id.* § 1856(a)(1). A state’s boundaries extend to the limits of its historical territorial sea. *Id.* § 1856(a)(2).<sup>16</sup> The Secretary may step in and regulate within a state’s territorial sea only:

(1) [i]f the Secretary finds, *after notice and an opportunity for a hearing* in accordance with section 554 of Title 5, that--

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan[.]

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<sup>15</sup>At one time, a geographical mile was equivalent to a nautical mile. Under current definitions, the two are very close to each other, but not identical. The Louisiana Wildlife and Fisheries Commission declared the Gulfward Boundary for Louisiana to be 3 marine leagues for the purposes of fisheries management, thereby implementing the will of the legislature as express in Act 336 of 2011. Congress has not recognized the boundary extension, and no case or controversy has been adjudicated in a court of competent jurisdiction regarding the declaration. Louisiana does not seek such a declaration herein.

<sup>16</sup>In 1988, President Reagan extended the beginning of the U.S. territorial sea from 3 nm to 12 nm, but the United States contends that this did not extend state jurisdiction to the new 12 nm line. *See* Proclamation No. 5928 (1988). To the extent that Texas disagrees, that disagreement is not part of, and has no bearing on, this dispute.

*Id.* § 1856(b)(emphasis added).

**B. The Councils' preparation of fishery management plans**

20. The ten national standards set out in 16 U.S.C. § 1851(a)(1)-(10) are the lodestar of any fishery management plan.

- National Standard 2 provides that “[c]onservation and management measures shall be based upon the best scientific information available.”<sup>17</sup>
- National Standard 4 provides, in part, that “[c]onservation 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.”<sup>18</sup>
- National Standard 5 provides that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no measure shall have economic allocation as its sole purpose.”<sup>19</sup>
- National standard 6 provides that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.”<sup>20</sup>
- National standard 8 provides that “[c]onservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of

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<sup>17</sup>16 U.S.C. § 1851(a)(2).

<sup>18</sup>*Id.* § 1851(a)(4).

<sup>19</sup>*Id.* § 1851(a)(5).

<sup>20</sup>*Id.* § 1851(a)(6).

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.”<sup>21</sup>

21. NMFS has published policy guidelines based on these national standards to assist in the development and review of FMPs, amendments, and regulations prepared by the Secretary and the Councils. *See* 50 CFR § 600.305 *et seq.* FMPs and amendments to them are promulgated as regulations. Councils submit their FMPs and FMP amendments to the Secretary of Commerce, who acts through NMFS. NMFS in turn undergoes rulemaking, soliciting public comment and reviewing the FMPs to ensure they are consistent with the national standards and other applicable laws. 16 U.S.C. § 1853(a)(1)(C). NMFS must approve an FMP or FMP amendment if it is consistent with applicable law, and disapprove it if not. *Id.* § 1854(a)(3). NMFS must promulgate final regulations within 30 days of the end of the comment period. *Id.* § 1854(b)(3).

22. All regulations go through this conventional notice-and-comment rulemaking process with only one, narrow exception. The Magnuson-Stevens Act allows the Secretary to promulgate emergency regulations that take effect immediately upon publication, bypassing the requirement of prior notice and

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<sup>21</sup>*Id.* § 1851(a)(8).

comment, when either the Secretary or a Council finds that an emergency exists. *Id.* § 1855(c)(1),(2). When a Council vote is unanimous, the statute provides that the Secretary “shall” promulgate an emergency regulation; when the vote is not unanimous, the Secretary “may” promulgate them. *Id.* § 1855 (c)(2)(A),(B).

23. Of course, the Secretary does not have the absolute, unfettered discretion to declare that an emergency exists, regardless of circumstances. Otherwise, what was obviously intended to be a limited, narrow exception could swallow the rule, rendering the notice-and-comment rulemaking provisions of the Act nugatory. Accordingly, since 1997, NMFS and NOAA have had policy guidelines to use to determine whether an emergency regulation is justified under the authority of the Act. *Policy Guidelines for the Use of Emergency Rules*, 62 Fed. Reg. 44421 (Aug. 21, 1997). These policy guidelines were finalized into a formal NMFS directive (the “policy directive”) in 2008 (*see* note 5, *surpa*, copy attached as Exhibit B). The policy directive sets out criteria to use in determining whether an emergency exists. An emergency, for the purpose of 16 U.S.C. § 1855(c),

- (1) [r]esults from recent, unforeseen events or recently discovered circumstances; and
- (2) presents serious conservation or management problems in the fishery; and
- (3) can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants



to the same extent as would be expected under normal rulemaking process.

*See* Exhibit B.

24. The policy statement accompanying the criteria declares that the only legal prerequisite for the use of the Secretary's emergency authority is the existence of an emergency and that the exercise of this authority should be "limited to extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures. An emergency action may not be based on administrative inaction to solve a long-recognized problem." *Id.* The policy specifically notes a preference for traditional rulemaking: "[c]ontroversial actions with serious economic effects, except under extraordinary circumstances, should be done through normal notice-and-comment rulemaking." *Id.*

### **C. Judicial Review**

25. The Magnuson-Stevens Act authorizes judicial review of regulations promulgated under it. 16 U.S.C. § 1855(f). Review is conducted in accordance with the APA, but the Act prohibits relief postponing the regulation's effective date or preserving the status quo during the pendency of review. *Id.* § 1855(f)(1)(A).

26. The Act also provides for expedited review of regulations, including emergency regulations "[u]pon a motion by the person who files a petition under this

subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.” *Id.* § 1855(f)(4). Concurrently with this Petition for Review, Texas and Louisiana are filing a Motion for Expedited Treatment and a Proposed Scheduling Order (the “Motion”) requesting a schedule that will allow the Emergency Rule to be declared invalid and ineffective prior to the June 9 date when, under current proposals, the federal season in the EEZ off the coast of Louisiana is scheduled to end (or sooner should Respondents seek to end the season even earlier).

27. Expedited treatment is both statutorily required and practically necessary to prevent this case from becoming moot, rendering Petitioners’ right to challenge the Emergency Rule meaningless. Petitioners’ Motion asks the Court to decide the issues raised by this Petition on summary judgment, and to require (1) Petitioners to file their motion for summary judgment by May 3, 2013, and (2) Respondents to respond to this Petition and the Motion for Summary Judgment by May 24, 2013, although Petitioners are willing to waive a response to this Petition. Additionally, the Magnuson-Stevens Act, 16 U.S.C. § 1855(f)(3)(B), requires the Secretary’s response to include the administrative record for the challenged regulations, so the Motion requests that the record also be filed by May 24, 2013.

28. The Magnuson-Stevens Act makes the APA's scope of review provision applicable and specifies that courts should set regulations aside if they are:

- (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; or
- (D) without observance of procedure required by law;

16 U.S.C. § 1855(f)(1)(B) (referencing 5 U.S.C.A. § 706(A)–(D)).

## VI. FACTUAL BACKGROUND

### A. General

29. Red snapper, *Lutjanus campechanus*, is a reef fish found in the Gulf of Mexico and the southeastern Atlantic coast of the United States. The Gulf of Mexico Red Snapper fishery is conducted off the gulf coasts of Texas, Louisiana, Mississippi, Alabama, and Florida. The Gulf states have the following gulf coastlines: Texas – 367 mi., Louisiana – 397 mi., Mississippi – 69 mi, Alabama – 53 mi., and Florida – 770 mi.<sup>22</sup> Red Snapper exhibit a high degree of site fidelity or attraction to particular locations, typically not traveling long distances. In one study, the average distance

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<sup>22</sup>States Report, Gulf of Mexico Regional Ecosystem Restoration Strategy, Gulf Coast Ecosystem Restoration Task Force (Dec. 2011); Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, Figure 2.1 (Feb. 2013). For the Court's convenience, copies of documents that are not attached hereto, and are not cases or statutes, will be provided to the Court under separate cover.

moved over all the fish that could be tracked was about 10 kilometers (about 6 1/4 miles).<sup>23</sup> Thus, fishing off one state's coast is unlikely to affect the population near another state's coast. This is particularly true for Texas, Louisiana and Florida, which together represent approximately 92.5% of the Gulf coast shoreline.

30. In NOAA's most recent Fish Stock Sustainability index, red snapper is classified as "overfished" but not subject to "overfishing."<sup>24</sup> Historically, red snapper was fished at beyond sustainable levels, but in recent years has undergone a sustained recovery pursuant to a long-term recovery plan enacted in 1984. It is "overfished" because its numbers are below desired levels, but there is no overfishing because it is being fished at levels consistent with meeting the targets of its recovery. The next stock assessment is expected to be submitted on June 7, 2013.<sup>25</sup>

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<sup>23</sup>Diamond, S. et al., *Movers and stayers: individual variability in site fidelity and movements of Red Snapper off Texas* in American Fisheries Society, Symposium 60: Red Snapper ecology and fisheries in the U.S. Gulf of Mexico 163–187 (2007).

<sup>24</sup>Fish Stock Sustainability Index, 2012 Fourth Quarter Update, NOAA Fisheries Services. "Overfished" refers to the number and weight of the fish themselves. It means the biomass of the fish is below the level considered necessary to sustain the "maximum sustainable yield." 50 C.F.R. § 600.310(e)(2)(i)(A), (E). "Overfishing" refers to the rate at which fish are being taken. It occurs when fish are being taken at a rate that jeopardizes their capacity to produce a "maximum sustainable yield" on a continuing basis. *Id.* § 600.310(e)(2)(i)(A)-(B). A "maximum sustainable yield" is the "largest long-term catch or yield that can be taken . . . under prevailing [conditions]." *Id.* 600.310(e)(1)(i)(A).

<sup>25</sup>SEDAR 31 Gulf of Mexico Red Snapper, Schedule of Events, [http://www.sefsc.noaa.gov/sedar/Sedar\\_Workshops.jsp?WorkshopNum=31](http://www.sefsc.noaa.gov/sedar/Sedar_Workshops.jsp?WorkshopNum=31) (last visited April 16, 2013).

31. Because of its overfished status, there is an FMP for red snapper, the major components of the plan are size, bag limits and days in which the season is open. The length of the federal recreational red snapper season is calculated based on the quota assigned to recreational fishing pursuant to the red snapper FMP average weight of fish, and estimated catch rates in state and federal waters off the Gulf states.<sup>26</sup>

**B. The Council manages federal waters in the EEZ while the states manage their own waters.**

32. The red snapper fishery in the states' territorial seas is managed by the respective state natural resource agencies. The regulations that these agencies promulgate for state waters need not be the same as the federal regulations. Texas, Louisiana, and Florida all have snapper regulations that differ from the federal regulations in bag limits and length of season. In federal waters, out to the boundary of the EEZ, the red snapper fishery is regulated pursuant to the FMP developed by the Gulf Council and approved by the Secretary pursuant to the Magnuson-Stevens Act.

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<sup>26</sup>Nat'l Marine Fisheries Serv., *Establish Recreational Closure Authority Specific to Federal Waters off Individual States for the Red Snapper Component of the Gulf of Mexico Reef Fishery, Including Environmental Assessment, Finding of No Significant Impact, and Regulatory Impact Review*, § 1.1, at 1 (hereinafter the "Emergency Action Statement"). A copy is attached as Exhibit C and can also be found on the website for the Southeast Regional Office at <http://sero.nmfs.noaa.gov> (last visited April 17, 2013).

The FMP is routinely amended, as demonstrated by the more than 30 amendments to the Reef Fish FMP that have related to red snapper since 1984.<sup>27</sup>

33. A provision of one of those amendments, referred to as Amendment 30B in the minutes of the Council meetings, is now a federal regulation addressing the situation in which state regulations for state waters are different from the federal regulations in the federal waters of the EEZ. 50 C.F.R. § 622.4(a)(1)(iv) (“Amendment 30B”). If the state regulations are less restrictive than the federal (allowing, for example, more fishing days per season or bag limits allowing more fish per person), then people fishing from charter vessels or headboats with federal for-hire reef fish permits must comply with the more restrictive federal regulations regardless of where the fish are caught. *Id.* § 622.4(a)(1)(iv).

34. This means that these federally-permitted vessels may fish in federal or state waters when the federal waters are open, but may not fish in state waters when federal waters are closed even though state waters remain open. Thus, for-hire vessels may only fish in state waters when the federal season is open. If NMFS reduces a state’s federal season to zero days, the vessels possessing for-hire reef permits in that state will be completely prohibited from fishing in state *or* federal

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<sup>27</sup>Peter B. Hood. et al., *A History of Red Snapper Management in the Gulf of Mexico*, in American Fisheries Society, Symposium 60: Red Snapper ecology and fisheries in the U.S. Gulf of Mexico 267-284 (2007).

waters. *Id.* § 622.4(a)(1)(iv). As a practical matter, Amendment 30B is critically important to federally-permitted vessels because Texas, Louisiana, and Florida will, in 2013, have regulations that keep their state waters open for a longer period than that authorized for federal waters.

**C. A brief history of the length of the snapper season.**

35. The Reef Fish FMP, including red snapper, was implemented on November 8, 1984, and frequently amended thereafter.<sup>28</sup> Before 1997, the recreational red snapper season was open year round. The Sustainable Fisheries Act of 1996 required the establishment of quotas that, when reached, require the season close to further fishing for that fishing year. From 1997 through 1999, NMFS used an in-season monitoring process that—based on data collected as the season progressed—projected when the quota would be reached and issued closing dates with a few weeks advance notice.<sup>29</sup>

36. Because it had a data-lag of up to four months, the in-season monitoring process did not provide real-time information. In 2000, the FMP was amended to use a pre-set system instead, based on pounds of fish landed. Under this system, NMFS

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<sup>28</sup>Final Regulatory Amendment to the Reef Fish Fishery Management Plan, to set Total Allowable Catch for Red Snapper §1.3 History of Management at 3-5 (February 2010).

<sup>29</sup>Final Regulatory Amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, Revise Fall Recreational Fixed Closed Season and Set 2012 and 2013 Quotas for Red Snapper, § 1.3 History of Management at 2-4 (March 2012).

made a pre-season projection of when the quota would be reached and set the fishing dates before the season started. Using this pre-season system, NMFS set the season at April 21 through October 31. This season length remained stable from 2000 through 2007.<sup>30</sup>

37. In 2008, Amendment 27 to the FMP revised the rebuilding plan, shortening the season to June 1 through September 30 and lowering the bag limit from four fish to two fish. The Council requested that all five Gulf states adopt compatible regulations for their state waters. Texas did not—it kept its long-standing year-round season and its four-fish limit. Florida lowered its bag limit to two fish, but kept its old season length, which was 78 days longer than the federal season.<sup>31</sup>

38. Allegedly to account for the fish that would be caught in state waters during these longer state seasons, NMFS estimated the dates at which it claimed that the quota would be reached and calculated the federal season in the EEZ accordingly.<sup>32</sup> This resulted in a dramatically shorter federal season as demonstrated

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<sup>30</sup>Final Regulatory Amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, Revise Fall Recreational Fixed Closed Season and Set 2012 and 2013 Quotas for Red Snapper, § 1.3 History of Management at 2-4 (March 2012).

<sup>31</sup>Final Regulatory Amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, Revise Fall Recreational Fixed Closed Season and Set 2012 and 2013 Quotas for Red Snapper, § 1.3 History of Management at 2-4 (March 2012).

<sup>32</sup>*Id.*



in Table 1.1 of the Emergency Action Statement in the recent supporting documents (*see supra* note 25 above, copy attached as Exhibit C).

**D. Over the years, the Council has wrestled with the issue of how best to manage the snapper season.**

39. The red snapper fishery has consistently met all targets set by the recovery plan, but, since 1996, the federal snapper season has been steadily shortened, from year-round to less than a month. Now, under the Emergency Rule, NMFS can, in the exercise of its sole, unfettered discretion, take it to zero.

40. As Table 1.1 of the Emergency Action Statement (Exhibit C) indicates, once NMFS left the stable 194-day season that was in place from 2000 to 2007, the trend downward accelerated. The shift from the 2007 season to the 2008 season was a watershed. The deliberations of the Council and its Reef Fish Management Committee (“Committee”) reflect that, since 2008, the Council has considered a wide variety of approaches for regulating the red snapper fishery. These approaches range from one that is entirely federal to a regional management plan (described below) that would leave a great deal of autonomy to each state to manage the fish and waters off its coast within the harvest parameters set by NMFS.<sup>33</sup>

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<sup>33</sup>See [http://www.gulfcouncil.org/resources/council\\_meeting\\_briefing\\_books.php](http://www.gulfcouncil.org/resources/council_meeting_briefing_books.php) (last visited April 17, 2013).

41. The most “federal” option considered is the preemption of state waters by the Secretary (the “preemption option”). Under this option, authorized by 16 U.S.C. § 1856(b), the Secretary would regulate state waters under the FMP and its federal regulations. The preemption option is only available upon notice and the opportunity for a hearing. 16 U.S.C. § 1856(b).

42. The preemption option was discussed during consideration of a motion at the April 2008 Council meeting.<sup>34</sup> The motion failed but was reurged and tabled at the next Council meeting in June 2008.<sup>35</sup>

43. Another largely federal option is what is now known as “Amendment 30B.” It was originally proposed – and rejected – as an emergency rule at the April 2008 Council meeting.<sup>36</sup> Thereafter, Amendment 30B was promulgated through the normal rulemaking procedure. *See* 50 C.F.R. § 622.4(a)(1)(iv). In a January 2013 Committee meeting, Dr. Crabtree told the Committee that Amendment 30B, which requires federally-permitted boats to obey federal regulations even in state waters with different regulations, was in response to Florida’s longer 2008 season, and he

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<sup>34</sup>Minutes of the April 10-11, 2008, Gulf Council Meeting at 82, 91 (modified to specify Texas and Florida); 95 (failed).

<sup>35</sup>Minutes of the June 5, 2008, Gulf Council Meeting at 155, 157 (tabled).

<sup>36</sup>Minutes of the April 10-11, 2008, Gulf Council Meeting at 96, 104.

agreed it was intended to be punitive,<sup>37</sup> even though (1) the Magnuson-Stevens Act clearly provides that NOAA can interfere with a state's regulation of fishing within its territorial sea only under the most limited of circumstances and (2) nothing in the Act authorizes either NMFS or the regional councils to enact punitive regulations to punish states for exercising their statutorily-recognized rights to manage the fisheries within their territorial seas.

44. Notwithstanding Amendment 30B, Gulf states continued to exercise their rights under 16 U.S.C. § 1856(a)(1) to regulate fishing in state waters and offer their recreational fisherman a longer snapper season than the ever-shortening federal one. Texas has never departed from its year-round season, in place and well-established when the federal season began to shrink after 1996. As the preamble to the Emergency Rule indicates, at the time it was promulgated (March of this year), both Florida and Louisiana were expected to extend their seasons as well, and, now, both have voted to do so. What the preamble omits, however, is that, as discussed in more detail below, Louisiana actually voted to do so last year, in 2012, only to be persuaded to postpone extending its state season until 2013.

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<sup>37</sup>Minutes of the January 7-8, 2013, meeting of the Gulf Council Reef Fish Management Committee at 52.

45. At the other end of the federal—state spectrum, the Council and Committee have also considered the more state-autonomous option of regional management. At a June 19, 2012, Committee meeting, Joe Shepard of LDWF reported that, in addition to lengthening its state season beyond the federal one, Louisiana had also decided to explore regional management. Under regional management, the Council would set a landing allocation (i.e., each state would be given a poundage portion of the Gulf-wide quota), and each state would manage that allocation by setting bag limits, season length, and measures for tracking the harvest. Regional management would also allow recreational fishermen and for-hire vessels to harvest in federal waters off the coast of each Gulf state under the applicable state’s regulations implemented to manage its allocation.

46. Mr. Shepard explained that Louisiana prefers regional management, which would make state regulations applicable in both the state waters and the federal EEZ, over the system of inconsistent regulations in state and federal waters. A motion authorizing Louisiana to develop a pilot project for regional management passed the Committee unanimously.<sup>38</sup> Regional management was discussed again at

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<sup>38</sup>Minutes of June 19, 2012, Gulf Council Reef Fish Management Committee meeting at 4-6, 29.

the Committee's January 2013 meeting, including the fact that regional management may require eliminating Amendment 30B.<sup>39</sup>

47. The themes of regional management and federal control of the season length were very much at play at the Council's February 8, 2013, meeting. The Regional Administrator (Crabtree) made a motion for an emergency rule to allow NMFS to close the EEZ to all recreational fisherman off states whose regulations are inconsistent with the federal regulations.<sup>40</sup> He explained that this would be a state-by-state approach so that the EEZ would only close off each individual, inconsistent state.<sup>41</sup> The motion failed by a vote of 8 for and 9 against.<sup>42</sup>

48. Later in the morning, the Council passed a nearly identical motion to provide NMFS with the same authority but as a permanent amendment to the Red Snapper FMP, after full notice and comment rulemaking.<sup>43</sup> But, after a lunch recess,

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<sup>39</sup>Minutes of January 7-8, 2013, Gulf Council Reef Fish Management Committee Meeting at 185-93.

<sup>40</sup>Minutes of February 7-8, 2013, Gulf Council Meeting at 169.

<sup>41</sup>Minutes of February 7-8, 2013, Gulf Council Meeting at 173.

<sup>42</sup>Minutes of February 7-8, 2013, Gulf Council Meeting at 189.

<sup>43</sup>Minutes of the February 7-8, 2013 Gulf Council Meeting at 192-193.

the motion for an emergency rule was renewed at Dr. Crabtree's urging, and this time it passed by a vote of 10 for and 7 against.<sup>44</sup>

### **E. The Emergency Rule**

49. On February 25, 2013, seventeen days after the Council's post-lunch revote in favor of an emergency rule, the Southeast Regional Office of NMFS produced the Emergency Action Statement (*see supra* note 26, copy attached as Exhibit C).<sup>45</sup> This document is the chief supporting document listed on the website with the Emergency Rule, which was published in the Federal Register on Monday March 25, 2013.

50. In addition to setting boundary lines to delineate the waters off Alabama, Louisiana, and Mississippi, the Emergency Rule amends 50 C.F.R. § 622.43 to add paragraph (a)(1)(iv), which reads:

(iv) *Recreational quota for red snapper.* The bag and possession limit for red snapper in or from the Gulf EEZ is zero, off specified Gulf states and on specified dates as determined by NMFS and announced in the **Federal Register**. If one or more Gulf states establish less restrictive red snapper regulations than Federal regulations, NMFS may reduce the recreational red snapper season in the Gulf EEZ off those states (including a zero-day season) by the amount necessary to compensate for the additional harvest that would occur in state waters as a result of those inconsistent state regulations.

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<sup>44</sup>Minutes of February 7-8, 2013, Gulf Council Meeting at 166, 189, 195, 204.

<sup>45</sup>A copy of the Emergency Action Statement can also be found on the website for the Southeast Regional Office <http://sero.nmfs.noaa.gov> (last visited April 17, 2013).

51. The preamble explaining the Emergency Rule offers no justification for it. Instead it just recites general, boilerplate principles regarding the red snapper fisheries and the quota, such as that the red snapper season's length, which gets shorter just about every year, is set based on that year's quota, the average weight of fish landed, and the estimated catch rates. Because NMFS is responsible for ensuring that the harvest in the entire Gulf—including fish caught in state waters—stays within the quota, the estimated catch rate takes into account the expectations for each state's waters, including the longer seasons and greater bag limits Texas and Louisiana have now set for their waters. To account for the additional fish expected to be caught in state waters, NMFS adjusts the length of the season in the federal waters of the EEZ.

52. The preamble further states that the 2013 season was originally estimated at 27 days, but because Louisiana<sup>46</sup> and Florida were expected to join Texas in granting a longer season and/or greater bag limit for their state waters (which they have since done), the season would have to be shortened Gulf-wide to 22 days. This is consistent with past practices, but rather than adopting a Gulf-wide season, the Emergency Rule authorizes (for the first time ever) a state-by-state adjustment,

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<sup>46</sup>As discussed below, Louisiana published its notice of intent to establish a longer season and a bag limit of three red snapper on June 20, 2012, and that Final Rule was published on February 20, 2013. Thus contrary to the Emergency Rule's statement that NMFS anticipated that Louisiana would establish regulations that differed from the federal regulation, thereby purporting to create an "emergency," NMFS knew months earlier that Louisiana had, in fact, adopted a different season.

allowing different season lengths in the EEZ off each individual state, taking into account the estimated catch rates in the waters of the states with longer state seasons. The tentative federal season lengths are 12 days for Texas, 9 for Louisiana, and 21 for Florida, and 28 days each for Alabama and Mississippi.<sup>47</sup> 78 Fed. Reg. 17882, 17883 (*see* Exhibit A).

53. The Gulf-wide approach has not been entirely jettisoned, however. The preamble notes that if this individual-state approach is not enough to keep the harvest within the quota, there may still have to be season-length adjustments to the EEZ in the rest of the Gulf. The preamble also explains that the Council has and continues to consider the option of the Secretary's preempting state jurisdiction over state waters as allowed by the Magnuson-Stevens Act, 16, U.S.C. 1856(b) (under very limited circumstances, which include notice and comment rulemaking), as well as other options.

54. The preamble acknowledges that an emergency rule must meet all three criteria set by the policy directive: (1) the emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency present serious conservation or management problems in the fishery; and (3) the immediate benefits

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<sup>47</sup>It is possible that the Gulf-wide season was originally estimated at 28 days instead of 27 days and that the 27-day figure in the preamble and elsewhere is a typographical error.



of emergency regulations outweigh the value of the advance notice, public comment, and deliberative consideration associated with normal rulemaking. 78 Fed. Reg. 17882, 17883.

55. As to the first criteria, the preamble claims that “the recently discovered circumstance is that states other than Texas intend to implement recreational red snapper regulation in state waters that are less restrictive than Federal regulations.” *Id.* According to the preamble, the possibility of catch rates in state waters exceeding the quota presents the serious conservation problem necessary to meet the second criteria.

56. The preamble devotes extensive attention to the third criteria, claiming that advance notice of the various EEZ season closing dates for the individual states allows the public to plan their fishing activities. The preamble emphasizes that because of Amendment 30B, 50 C.F.R. § 622.4(a)(1)(iv), advance notice is particularly important to charter/headboat vessels and their customers because “[r]elative to this emergency rule, that means if the EEZ off a particular state is closed to recreational red snapper harvest, then vessels with a Federal charter vessel/headboat permit may not harvest red snapper in those state waters.” *Id.* They, as well as private anglers “need as much time as possible to adjust their business plans and plan their fishing seasons to account for these closures.” *Id.* Thus, the

preamble claims, due to the need to plan this season's fishing trips "[p]roviding prior notice and opportunity for public comment on this action would be contrary to the public interest." *Id.*

**F. The most recent Council meeting.**

57. The Emergency Rule was rushed into place before the most recent Council meeting, which was held on April 16-18. At this meeting, a majority of the Council voted to recommend rescinding the Emergency Rule and suspending Amendment 30B, on an emergency basis for red snapper for the 2013 season.<sup>48</sup> In addition, the Council voted to begin the process that, if completed, will lead to a regional management system beginning with the 2014 season. Among other things, this will, as a practical matter, render Amendment 30B irrelevant, since the individual Gulf states will regulate the length of the fishing season both in their state territorial seas and in the federal EEZ off their state coasts.<sup>49</sup>

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<sup>48</sup>Because these votes were not unanimous, however, the Secretary is not required to act on them.

<sup>49</sup>The minutes of the most recent meeting are not yet available. Petitioners will, however, provide evidence of these events with their motion for summary judgment, which they intend to file by May 3.

**VII. CLAIM FOR RELIEF: THE EMERGENCY RULE IS UNLAWFUL AND SHOULD BE SET ASIDE**

58. Petitioners repeat and incorporate by reference the allegations and averments of paragraphs 1-57 above as if set forth in full.

59. Under the APA, agency action may be held unlawful and set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ; in excess of statutory jurisdiction, authority or limitations . . . ; or without observance of procedure required by law.” 5 U.S.C. § 706(2).

60. The Emergency Rule is unlawful and should be set aside for three related reasons. First, it does not meet NMFS own criteria necessary to establish an emergency. Second, it does not comport with the National Standards, and, third, it violates Magnuson-Stevens Act’s policy of cooperative federalism by improperly attempting to regulate the red snapper fishing season in state waters without a statutorily sufficient basis for doing so.

**A. Because the Emergency Rule does not meet the three criteria necessary to qualify as an emergency, the Secretary, acting through NMFS, lacks authority to promulgate it.**

**(a) The 3 criteria for establishing an emergency have not been met.**

Criteria (1): The circumstances must be recent, unforeseen, or recently discovered.

61. Louisiana’s decision to have a season longer than the federal one is not recent, unforeseen, or recently discovered. On June 19, 2012, Joe Shepard, a

representative of the LDWF, made a presentation to the Council's Reef Fish Management Committee that included a discussion of Louisiana's regulations.<sup>50</sup> He explained that LDWF would be issuing a notice of intent to establish a red snapper season in state waters for weekends between Palm Sunday and the end of September.<sup>51</sup> Mr. Shepard also explained that LDWF originally planned to implement this for the 2012 season but was persuaded to wait until the 2013 season by a presentation given by the Secretary and Assistant Secretary of LDWF and Dr. Crabtree.<sup>52</sup>

62. Specifically, the Louisiana Wildlife and Fisheries Commission ("LWFC") had considered the adoption of a new red snapper season and bag limit on May 3, 2012, and on June 20, 2012, a notice was published of an intent (1) to extend the season from October 1, 2012 through the Friday before Palm Sunday of the following year, weekends only, and (2) to raise the bag limit to three. The final rule was published in the Louisiana Register on February 20, 2013. LAC 76:VII.335.

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<sup>50</sup>Minutes of the June 19, 2012, Gulf Council Reef Fish Management Committee Meeting at 3-30.

<sup>51</sup>Minutes of the June 19, 2012, Gulf Council Reef Fish Management Committee Meeting at 5.

<sup>52</sup>Minutes of the June 19, 2012, Gulf Council Reef Fish Management Committee Meeting at 5.

63. When Dr. Crabtree made the motion for the Emergency Rule at the February 2013 Council meeting, he was reminded by counsel of the requirement that an emergency rule be based on recent, unforeseen, or recently discovered circumstances.<sup>53</sup> He responded that he had thought Louisiana would not go forward with its new, longer state season because Mr. Shepard had said in June of 2012 that Louisiana would prefer regional management to the current system of inconsistent state and federal regulations.<sup>54</sup> Dr. Crabtree's claimed surprise is refuted by his statements a month earlier at the January Committee meeting at which he coached another Council member to make a motion to have staff develop accountability measures for the Regional Administrator (who is Dr. Crabtree) to close the EEZ adjacent to each "non-compliant" state and then stated his opinion on that motion:

While I'm with you on trying to move towards regional management because I don't want to go down this path, and none of us really want to go down this path, and I think if we get to the February meeting and the word from Louisiana is that they're going to have a compatible season, then I think our rationale to do an emergency rule here probably evaporates, but I think as to where we are right now and the regulations they have on the book, it seems to me we have to give this serious consideration.<sup>55</sup>

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<sup>53</sup>Minutes of the February 8, 2013, Gulf Council Meeting at 175.

<sup>54</sup>Minutes of the February 8, 2013, Gulf Council Meeting at 182.

<sup>55</sup>Minutes of the January 7-8, 2013, Gulf Council Reef Fish Management Committee Meeting at 50, 54.

Dr. Crabtree knew that Louisiana was serious about a longer season and higher bag limit. He had known that when he talked Louisiana out of imposing its own regulations for the 2012 season and waiting until 2013 instead, despite the fact that Louisiana published its notice of intent on June 20, 2012. As an active Council member, he also knew that regional management—which Louisiana preferred—had not materialized, triggering Louisiana’s decision to adopt its own regulations. Louisiana’s new season and bag limits were not recent, unforeseen, or recently discovered. The assertion that emergency criteria (1) has been met is pretense.

Criteria (2): to be an emergency, the situation must present serious conservation or management problems in the fishery

64. The preamble pays lip service to this criteria by claiming that inconsistent state regulation will cause an overage and exceed the quota – but it never explains why or how. There is no dispute that the quota is often exceeded, and nothing has been presented to show that it will be exceeded by any additional amount without the Emergency Rule. In fact, there will be no decrease in net fishing in the Gulf, just a reapportionment of allowable catch from the EEZ off the coasts of Texas, Louisiana, and Florida to a tiny sliver of the EEZ off of Alabama and Mississippi.<sup>56</sup>

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<sup>56</sup>See Five Year Projections of the Recreational Red Snapper Fishing Season Length, NOAA Fisheries Service, Southeast Regional Office (Dec. 12, 2012).

65. All the Emergency Rule does is reapportion the fishing season's days in the EEZ among the Gulf states – rewarding those that have state seasons that mirror the federal season and punishing those that do not. **But NMFS has always had the ability to close the snapper season to avoid overfishing.** Thus, the Emergency Rule is not aimed at remedying a serious conservation problem, nor is it a response to an “emergency.” Instead, it addresses what NMFS has now decided is an inequitable treatment of those states who have adjusted their state seasons to match the federal season. This is not new, and it is certainly no emergency – it has existed in some form since 1997, when NMFS first began to shorten the federal season. The Emergency Rule represents a change of a longstanding practice in how NMFS sets the federal fishing season. As such, it is precisely the sort of issue that can and should be addressed through ordinary notice and comment rulemaking, not an emergency rule.

66. Furthermore, the process of notice-and-comment rulemaking for a permanent rule for the 2014 season and beyond has already begun. Therefore, to sustain the Emergency Rule, Respondents must demonstrate that Louisiana's extension of its state fishing season, when added to the effect of Texas and Florida extending theirs, creates such an immediate and severe conservation or management emergency that it is not possible to await even one federal fishing season of, at most,

27 days duration, while the ordinary notice and comment rulemaking process takes its course for the 2014 season. Nothing in either the Emergency Rule or the supporting documents even attempts to make this showing.

Criteria (3): the immediate benefits of an emergency rule must outweigh the value of the notice, comment, and deliberative process of normal rulemaking.

67. The preamble’s “recreational-fishermen-need-certainty” justification for proceeding on an emergency basis is a fiction for at least two reasons. First, most of the Gulf will have less season, significantly less, from the predicted Gulf-wide season length of 27 days to as few as 9—and, the Emergency Rule warns, possibly zero. The certainty of less – as opposed to even the possibility of more – is hardly a benefit, especially when the earlier prediction of 27 days had already factored in Texas’s longer season. Second, given that the Emergency Rule and its preamble telegraph the possibility that the season will go down to zero days, there is no actual certainty even to the “notice” of fewer than the original 27-day estimate. This justification is irrational.

**(b) NMFS has not met its own policy directive to establish an emergency.**

68. Under NMFS’s policy directive, the only legal prerequisite for use of authority is that an emergency must exist. Use of emergency rules is discouraged: “[c]ontroversial actions with serious economic effects, except under extraordinary



circumstances, should be done through normal notice-and-comment rulemaking.” *See* Exhibit B. An emergency action “should be limited to extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures. An emergency action may not be based on administrative inaction to solve a long-recognized problem.” *Id.* Yet the Emergency Rule’s preamble says that the Council has considered, and is continuing to consider, other options to address the recreational harvest of red snapper. *See* Exhibit A.

69. Dr. Crabtree is aware that an emergency rule should not be used when there is time to use normal rulemaking. As he explained at the January 2013 Committee meeting, in discussing possible changes to bag limits, “I don’t think we have emergency-type criteria there, because we have time to get that done” and that to come back and do an emergency rule, new and unforeseen information is necessary.<sup>57</sup>

70. Accordingly, there simply is no emergency under NMFS’s own policy directive. NMFS knew since at least May 2012 that Louisiana would adopt inconsistent state regulations. Thus, there was plenty of time for notice and comment

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<sup>57</sup>Minutes of the January 7-8, 2013, Gulf Council Reef Fish Management Committee Meeting at 34, 45-46.

rulemaking, as required by the Magnuson-Stevens Act, to address any concerns Dr. Crabtree or anyone else had. Respondents “administrative inaction” did not create an emergency and cannot justify the Emergency Rule.

**B. The National Standards have not been met.**

71. Additionally, the Emergency Rule must be set aside under one or more of subsections 2(A), 2(C), or 2(D) of APA § 706 because of a failure to comply with statutorily applicable national standards. These failures to comply are each one sufficient to support the relief requested.

72. All conservation and management measures, including the Emergency Rule, must, under National Standard 2, be based on “the best scientific information available.” 16 U.S.C. § 1851(a)(2). However one defines this, it has to mean something more than just the *ipse dixit* of Dr. Crabtree and NMFS. Yet no scientific justification has been provided for either (a) the necessity of the Emergency Rule for the 2013 season given that the notice-and-comment rulemaking process has already begun for the 2014 season or (b) the conclusion that the new allocation scheme the Emergency Rule introduces will achieve the same or similar results as the previous measures (even assuming, *arguendo*, that an adequate scientific basis exists for any of the previous measures reducing the federal fishing season in the EEZ). Indeed, the Emergency Rule expressly states that it is based on behavior, not science. No

scientific justification is provided at all, just a few conclusory, unsupported assertions.

73. Additionally, available the scientific evidence shows that adult red snapper are non-migratory species – one study concluded that the average distance moved over all the fish that could be tracked was about 6 1/4 miles.<sup>58</sup> Furthermore, there is scientific evidence that the west Gulf (which includes Texas and Louisiana) is distinct from the east Gulf (which includes Florida). Therefore, even assuming that preservation of the quota of a certain number of pounds of red snapper is scientifically necessary and justifiable, at first blush, the Emergency Rule’s approach – to limit the season in over 92% of the EEZ and possibly cancel it entirely based on the seasons in the Gulf states’ territorial seas – is extreme, unnecessary, and not narrowly tailored to achieve the goal the Emergency Rule purposes to achieve. Given that (a) National Standard 5 requires consideration of efficiency in the utilization of fishery resources and (b) National Standard 6 requires consideration of “variations among, and contingencies in, fisheries, fishery resources, and catches[,]”<sup>59</sup> the burden was on Respondents to consider less extreme alternatives and explain why they would not suffice.

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<sup>58</sup>*See supra* note 23.

<sup>59</sup>16 U.S.C. § 1851(a)(5), (6).

74. Relatedly, the Emergency Rule completely fails to comply with the requirement of National Standard 8 that an attempt be made to minimize the economic impact of the Emergency Rule. Texas estimates that its total loss could be as much as \$1 million per day for each day that the red snapper season is shortened. This is a high price to pay for an Emergency Rule that will affect only the 2013 season. As noted above, there is no evidence that the alleged emergency is so great and so immediate that it cannot be taken care of beginning in 2014 after normal notice and comment rulemaking. Instead, the Emergency Rule was promulgated at the last minute, notwithstanding NMFS's ten-month long prior knowledge that Louisiana would enact a different red snapper season, to deprive the Gulf states of notice and an opportunity to comment and to force Texas and Louisiana to choose between absorbing a significant economic loss or shortening their state seasons to match the proposed federal season. Allowing NMFS, through the Emergency Rule, to force Texas and Louisiana to make this choice would allow Respondents to, in effect, regulate fishing in Texas and Louisiana's territorial seas without complying with the requirements of 16 U.S.C. § 1856, **one of which is notice and the opportunity for a hearing**. The avoidance of this long-standing requirement of the Magnuson-Stevens Act, and indeed, almost all federal rulemaking, appears to be the real goal of the Emergency Rule.

75. Additionally, the Emergency Rule's trumpeting of the now-rejected Amendment 30B as still in place demonstrates that it fails to meet the requirement of National Standard 4, that it be nondiscriminatory. The Emergency Rule by its own terms is *designed* to discriminate among residents of different states based solely on behavior as a punitive measure against all states that set fishing seasons in state territorial seas that do not match the federal season in the EEZ.

76. The Emergency Rule's preamble states that it meets Magnuson-Stevens Act's National Standard 4 because it helps ensure a fair and equitable distribution of fishing privileges among participants in all Gulf states. This statement is neither explained nor rational. As evidenced by the length of the shorelines of Texas (367 miles), Louisiana (397 miles), and Florida (770 miles), (see figure 2.1 at page 6 of the Emergency Action Statement, attached as Exhibit C) only Mississippi (69 miles) and Alabama (53 miles)—about 8% of the Gulf Coast—will receive any benefit from this Emergency Rule. And that benefit is a mere six extra fishing days under NMFS's current proposal, given that the pre-Emergency Rule estimate of the season Gulf-wide was 22 days and the Emergency Rule gives Mississippi and Alabama 28.

77. The Emergency Rule does not conserve or manage the red snapper fishery on the basis of scientific need. It is a naked attempt to impose the federal will of the executive into an area – the regulation of fishing in the states' territorial seas

– that Congress determined should be left to the coastal states. The failure to provide any scientific justification is both arbitrary and capricious under APA § 706(2)(A) and outside Respondents’ statutory authority under APA § 706(2)(C). Similarly, the Emergency Rule’s failure to comply with National Standards 4, 5, 6, and 8 each provides a separate basis for setting it aside under subsections (A) and (C).

**C. The core principle of cooperative federalism enshrined in the Magnuson-Stevens Act has not only not been met, it has been eviscerated. The Act is not intended to interfere with a state’s ability to regulate in its own waters, but NMFS has done exactly that.**

78. The record of the Council and Committee meetings make clear that this Emergency Rule was anticipated and driven by Dr. Crabtree, who wants federal-centric options so that federal employees can control the red snapper fishery. The methods chosen, however, deprived Texas and Louisiana of the opportunity to participate in the rulemaking process through the normal notice and comment period. The emergency process does not provide for public participation, and the preamble’s rote recitation of the emergency criteria is devoid of any information about the red snapper fishery itself, its recovery progress from its historically overfished status, the differences in the snapper population within the Gulf (it’s a long way from Key West to Brownsville) or any other scientific data.

79. Although the Emergency Rule threatens preemption as a possible management option, it is notable that preemption has not occurred. The preemption

provision of the Magnuson-Stevens Act contains an important state-protective feature. If a state requests a hearing, the Secretary “shall conduct such hearing prior to taking any action.” 16 U.S.C.A. § 1856(b)(3).

80. Interference with the states’ seasons without an opportunity for a hearing is contrary to the way cooperative federalism is supposed to work. Congress has expressly stated that the Magnuson-Stevens Act is not intended to diminish a state’s jurisdiction and authority over state territorial waters and that state authority cannot be preempted, even to protect a fishery, without a hearing. 16 U.S.C. § 1856. However, by using the emergency-rule process instead of forthrightly admitting that preemption is the goal so that federal law effectively trumps state law in state waters, Respondents have arbitrarily and capriciously used the narrow emergency rulemaking exception of the Magnuson-Stevens Act to intentionally avoid providing the states, and the public, an opportunity to be heard.

### **VIII. REQUEST FOR EXPEDITED TREATMENT**

81. Pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1855(f)(4), Petitioners respectfully request that the Court “assign the matter for hearing at the earliest possible date and . . . expedite the matter in every possible way.” As set out in the separately-filed Motion for Expedited Treatment, Texas and Louisiana ask that this case be resolved by summary judgment with Petitioners’ Motion for Summary

Judgment due May 3, 2013, and Respondents' Response to the Petition for Review (if any), the administrative record, and their Response to the Motion for Summary Judgment due on May 24, 2013, so that the Court can issue a ruling in time for the June 1 start of the 2013 red snapper season.

### **IX. PRAYER FOR RELIEF**

82. Pursuant to 16 U.S.C. § 1855(f) and 5 U.S.C. §§ 701-706, Petitioners the State of Texas and the State of Louisiana respectfully request that the Court hold unlawful and set aside, pursuant to APA § 706(2)(A), (C), and/or (D), the Emergency Rule entitled *Recreational Closure Authority Specific to Federal Waters Off Individual States for the Recreational Red Snapper Component of the Gulf of Mexico Reef Fish Fishery*, 78 Fed. Reg. 17882 (March 25, 2013). To the extent necessary and appropriate, Petitioners also request (1) a declaration under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that the Emergency Rule was improperly promulgated, and is therefore void and of no force and effect; (2) a permanent injunction prohibiting Respondents from enforcing or otherwise acting pursuant to or in accordance with the Emergency Rule; and (3) an order remanding the Emergency Rule to the National Marine Fisheries Service for notice and comment rulemaking. Additionally, Petitioners request that they be awarded their costs of suit and that they have all other relief to which they are entitled.



Respectfully submitted,

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