

August 9, 2021

Dr. Carrie Simmons, Executive Director
Gulf of Mexico Fishery Management Council
2203 N Lois Avenue, Suite 1100
Tampa, FL 33607

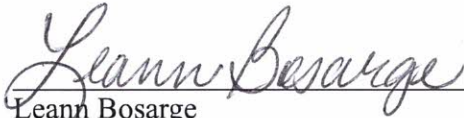
Re: Minority Report Regarding the Gulf of Mexico Fishery Management Council's
Approval of Amendment 53 (Red Grouper Allocations and Annual Catch Levels
and Targets) to the Fishery Management Plan for the Reef Fish Resources of the
Gulf of Mexico

Dear Dr. Simmons:

As voting members of the Gulf of Mexico Fishery Management Council ("Gulf Council"), the undersigned submit the enclosed Minority Report under Section 302(e)(4) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1852(e)(4)) to notify the Secretary of Commerce that we disagree with the Gulf Council's decision to approve Amendment 53—and in particular its selection of Alternative 3 in Action 1 as the Preferred Alternative—which reallocates approximately 32% of the commercial sector's red grouper quota to benefit the recreational sector.

This action is contrary to the provisions of the Magnuson-Stevens Fishery Conservation and Management Act and other laws and should be disapproved. We respectfully request that you transmit the enclosed Minority Report to the Secretary of Commerce.

Sincerely,



Leann Bosarge
*Representative to the Gulf Council from the
State of Mississippi*

John Sanchez
*Representative to the Gulf Council from the
State of Florida*

Susan Boggs
*Representative to the Gulf Council from the
State of Alabama*

Ed Swindell
*Representative to the Gulf Council from the
State of Louisiana*

Enclosure

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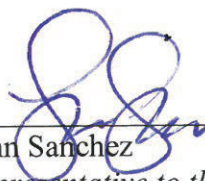
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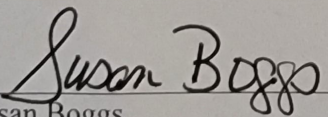
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MINORITY REPORT IN OPPOSITION TO THE GULF OF MEXICO FISHERY MANAGEMENT COUNCIL'S APPROVAL OF AMENDMENT 53 TO THE GULF OF MEXICO REEF FISH FMP

I. Introduction

This statement is submitted by voting members of the Gulf of Mexico Fishery Management Council ("Gulf Council") under Section 302(e)(4) of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"),¹ in disagreement with the Gulf Council's approval of Amendment 53 (Red Grouper Allocation and Annual Catch Levels and Targets) to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico ("FMP") with Alternative 3 in Action 1 as the Preferred Alternative. The Gulf Council approved Amendment 53 with 12 "yes" votes and 5 "no" votes at its June 2021 meeting in Key West, FL.

Amendment 53 would reduce the commercial sector's red grouper allocation from 76% to 59.3%, and would increase the recreational sector's allocation from 24% to 40.7%. In practical terms, however, Amendment 53 would take away nearly one-third (32%) of the commercial sector's quota in order to benefit the recreational sector.² This action does not prioritize or promote conservation and is inherently unfair to hard working commercial fishing families.

The recreational sector discards hundreds of thousands of pounds of dead red grouper each year, and Amendment 53 would increase annual dead discards by 640,000 pounds compared to maintaining the existing allocations. Amendment 53 would take fish from the commercial sector and the American consumers it serves to subsidize more waste of our natural resources.

In addition, Amendment 53 is admittedly "more likely to result in overfishing/overfished status for Gulf red grouper"³ at a time when the stock biomass is at an all-time low and one of the worst red tides in recent memory jeopardizes future stock health. This is poor stewardship of our nation's fishery resources. Neither the Gulf Council's Reef Fish Advisory Panel nor its Ad Hoc IFQ Advisory Panel supported reallocation.⁴

The Secretary of Commerce should disapprove Amendment 53 under section 304(a)(3) of the MSA⁵ because it violates numerous provisions of law. Specifically:

¹ 16 U.S.C. § 1852(e)(4).

² Under Action 1, Alternative 2 (keeping the status quo allocations at 76:24), the commercial sector's ACL would be 3.72 million pounds. Under Preferred Alternative 3, the commercial sector's ACL is 2.53 million pounds, or a reduction of 1.19 million pounds compared to Alternative 2. That is a 32% decrease for the commercial sector.

³ Amendment 53 at p. xxii.

⁴ The Gulf Council's Reef Fish Advisory Panel unanimously concluded that it could not recommend any of the alternatives in Action 1 because it was "unable to reach a consensus due to a lack of confidence in the recreational data used to inform the proposed allocations in the alternatives." See https://gulfcouncil.org/wp-content/uploads/Reef-Fish-AP-Summary_10-06-2020.pdf. The Gulf Council's Ad Hoc IFQ Advisory Panel unanimously supported retaining the existing allocations under Alternative 2 in Action 1. See <https://gulfcouncil.org/wp-content/uploads/B-7c-Ad-Hoc-RS-GT-IFQ-AP-June-2021-Meeting-Summary.pdf>.

⁵ 16 U.S.C. § 1854(a)(3).

- Amendment 53 violates MSA National Standard 4 because it does not promote conservation and is not fair and equitable.
- Amendment 53 violates MSA National Standard 9 because it does not minimize bycatch to the extent practicable.
- Critical information about how the National Oceanic and Atmospheric Administration (“NOAA Fisheries”) recalibrated historical red grouper landings estimates was not made available to the Gulf Council or the public as required by MSA section 302(i)(6) and National Standard 2 Guidelines.
- The Gulf Council ignored its Allocation Policy.⁶

Each of these points is explained below.

II. The Secretary Should Disapprove Amendment 53.

A. Amendment 53 Violates MSA National Standard 4 Because it Does not Promote Conservation and is Not Fair and Equitable.

1. Reallocation Reduces Conservation for a Highly Vulnerable Stock.

National Standard 4 requires that any allocation be “reasonably calculated to promote conservation.”⁷ Amendment 53 fails this standard.

The most recent red grouper stock assessment (SEDAR 61) found that the biomass of red grouper is at the lowest point ever recorded.⁸ Red grouper would be considered overfished but for a recent change to the Minimum Stock Size Threshold (MSST) definition,⁹ and the current determination that the stock is not overfished does not account for the 2018 red tide event “which was known to be a significant mortality event.”¹⁰ The 2005 red tide event killed an estimated 29.5% of the population, while the 2014 red tide event killed an estimated 21.3%.¹¹ While SEDAR 61 does not include a quantitative assessment of the 2018 red tide event because its terminal year of data is 2017, the Gulf Council’s Scientific and Statistical Committee, based on research done by NOAA Fisheries Southeastern Fishery Science Center, determined that the 2018 red tide was as significant as the 2005 event when recommending catch levels to the Gulf Council.¹² Moreover, another red tide and associated fish kill occurring right now in 2021

⁶ See Amendment 53 at Appendix C, D, E and F, pp. 206-244.

⁷ 16 U.S.C. § 1851(a)(4).

⁸ See SEDAR 61, Figure 4.41; see also p. 141 (“Since 2015, total biomass has remained at the lowest levels in the time series” going back to 1985).

⁹ Amendment 53 at p. 41.

¹⁰ Id.

¹¹ See Amendment 53 at p. 28.

¹² See Table 1 and Table 2 from September 2019 Gulf Council Scientific and Statistical Committee (“SSC”) meeting (https://gulfcouncil.org/wp-content/uploads/Standing-Reef-Fish-Socio-Mackerel-SSC-Summary-09-2019_Final-1.pdf); SSC motion on page 7 of the September 2019 SSC meeting summary (https://gulfcouncil.org/wp-content/uploads/Standing-Reef-Fish-Socio-Mackerel-SSC-Summary-09-2019_Final-1.pdf).

appears to be the worst ever recorded,¹³ and it is possible that yet another third of the stock or more could be killed. A precautionary approach in managing this stock is needed.

Unfortunately, Amendment 53 would diminish conservation efforts for red grouper at this critical time. Amendment 53 concedes that “allocating a greater percentage of the ACL to a sector that has more uncertainty in landings” (i.e., the recreational sector) “is more likely to result in overfishing/overfished status for Gulf red grouper.”¹⁴ In addition, Amendment 53 will result in 640,000 pounds more dead discards of red grouper by the recreational sector.¹⁵ NOAA Fisheries’ National Standard 9 guidelines explain that “bycatch can increase substantially the uncertainty concerning total fishing-related mortality, which makes it more difficult to...ensure that...overfishing levels are not exceeded.”¹⁶ Amendment 53 thus increases the level of uncertainty about both landings and discards and thus increases the overall risk of overfishing.

An action that increases the risk of overfishing and substantially increases discards of dead fish, particularly in conjunction with one of the worst red tide fish kills in memory, is not “reasonably calculated to promote conservation” of the red grouper stock.

2. Reallocation is Not Fair and Equitable.

National Standard 4 also requires that any allocation be “fair and equitable to all [U.S.] fishermen.”¹⁷ Amendment 53 is not fair and equitable to commercial fishermen for several reasons.

a. Amendment 53 does not advance FMP objectives.

NOAA Fisheries’ National Standard 4 Guidelines explain that to be fair and equitable, an allocation “should be rationally connected to the achievement of [optimum yield (“OY”)]” and “the motive for making a particular allocation should be justified in terms of the objectives of the FMP.”¹⁸

Amendment 53 does not explain how it helps achieve OY; to the contrary, Preferred Alternative 3 in Action 1 would actually reduce total landings by 640,000 pounds while simultaneously

¹³ See The Guardian, *Florida swamped by red tide – but is fertilizer plant spill making it worse?* (<https://www.theguardian.com/us-news/2021/jul/17/florida-red-tide-fertilizer-plant-spill>) (“Dolphins, manatees and 800 tons of dead fish are piling up on the state’s shorelines in one of the worst algal blooms in years.”). ABC News, *Red Tide is nothing new to Tampa Bay, so why is this year’s bloom so bad?* (<https://www.abctionnews.com/news/in-depth/red-tide-is-nothing-new-to-tampa-bay-so-why-is-this-years-bloom-so-bad>) (“Experts say it’s the worst bloom seen in 50 years.”); Live Science, *Sharks Hide in Florida Canal to Escape Toxic Red Tide Sweeping the Coast* (<https://www.livescience.com/sharks-hide-in-florida-canals-red-tide.html>) (“This year’s red tide, which began back in December 2020, is one of the worst ever in Florida.”). See also Am. 53 at p. 128 (“For red grouper, declines in biomass have been linked to large-scale and persistent red tide events (SEDAR 61 2019).”)

¹⁴ Amendment 53 at p. xxii.

¹⁵ The ABC/ACL under Alternative 2 (status quo allocations) is 4.90mp. The ABC/ACL under Preferred Alternative 3 is 4.26mp. See Am. 53, Table 1, at p. xix. The decrease of 640,000 pounds is needed to cover increased recreational discards resulting from changing the allocation percentages between the sectors. See Am. 53 at p. 92 (“where more fish are allocated to the recreational sector, total landings have to be constrained more to account for the greater dead discards from recreational red grouper fishing”).

¹⁶ 50 C.F.R. § 600.350(b).

¹⁷ 16 U.S.C. § 1851(a)(4).

¹⁸ 50 C.F.R. § 600.325(c)(3)(i).

increasing risk of overfishing.¹⁹ Nor does Amendment 53 explain how Preferred Alternative 3 in Action 1 would advance any particular FMP objective. To the contrary, in our assessment, reallocation frustrates FMP Objectives 1, 2, 4, 5, 6, 9, and 12.²⁰ Amendment 53 is thus inconsistent with National Standard 4 Guidelines and FMP objectives.

The commercial sector is subject to census-level, mandatory, real-time reporting of landings with stringent requirements to ensure compliance and accuracy of what is reported. Landings for the recreational sector, by contrast, are estimated based on model extrapolations of data that is self-reported by a random subset of anglers months after a fishing trip. The accuracy of such estimates is highly uncertain.

One peer reviewer of NOAA Fisheries' calibration model acknowledged that it "is not possible" to evaluate the accuracy of these revised recreational landings estimates:

[Term of Reference 1e for the peer review] seeks the panel to evaluate accuracy of the estimates, when in fact that is not possible...Anglers self-report their trip numbers in these surveys and there is no external validation of effort. The anglers' trips are not counted while they are fishing or when they complete their trip on site, but rather they must recall the number of trips that they took within the past two months. Many anglers do not keep a diary, perhaps some keep a calendar, but there is a possibility that these trips are mis-remembered. While there may be little motivation to exaggerate fishing effort, a variety of factors can result in the reported trips differing from the actual number of trips taken and this type of problem is well documented in the survey literature. To determine accuracy, a validation study would need to be devised that paired an onsite validation with the offsite survey. For such a large scale survey effort, this would be difficult and very expensive.²¹

Amendment 53 nevertheless uses these highly uncertain landings estimates to justify taking away one-third of the commercial sector's quota to benefit the recreational sector. Taking quota away from a highly accountable sector with highly certain landings estimates and diverting it to a sector with massive uncertainty and higher bycatch undermines FMP objectives.

In particular, Amendment 53 thwarts the following FMP objectives among others:

- FMP Objective 2: "To achieve robust fishery reporting and data collection systems across all sectors for monitoring the reef fish fishery, which minimizes scientific, management and risk uncertainty."
- FMP Objective 5: "To minimize and reduce dead discards."
- FMP Objective 12: "To promote and maintain accountability in the reef fish fishery."

¹⁹ See Am. 53 at Table 1, p. xix (showing decrease in ABC/ACL from 4.90mp under Alt. 2 to 4.26mp under Alt. 3); p. xxii (stating that reallocation to the recreational sector "is more likely to result in overfishing/overfished status for Gulf red grouper").

²⁰ See Amendment 53 at p. 8 (listing FMP objectives).

²¹ Cynthia M. Jones, Director, Center for Quantitative Fisheries Ecology, Old Dominion University, *Center for Independent Experts (CIE) Independent Peer Review of the Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES) Calibration Model* at p. 2 (<https://media.fisheries.noaa.gov/dam-migration/mrip-fes-peerreview-cie-jones-2017-08.pdf>).

b. Amendment 53 unfairly forces the commercial sector to subsidize recreational dead discards.

Amendment 53 is also unfair because it reduces the commercial sector's Annual Catch Limit ("ACL") to cover increased dead discards in the recreational sector that is a direct result of reallocation.²²

Under Action 1, Preferred Alternative 3, the commercial sector loses 1.19 million pounds from reallocation compared to maintaining the status quo allocations under Alternative 2, a 32% reduction. Of that 1.19 million pounds, approximately 640,000 pounds go to covering recreational dead discards, and approximately 550,000 pounds go to increasing the recreational sector's ACL.²³ The commercial sector is thus penalized twice: first by an allocation reduction from 76% to 59.3%, and second by the reduction in its ACL to cover increased recreational dead discards. The harm to the commercial sector (loss of 1.19 million pounds) is more than twice the benefit to the recreational sector (gain of 550,000 pounds), in contravention of National Standard 4 Guidelines that require a hardship on one group to be outweighed by benefits to another.²⁴ Indeed, because recreational landings estimates are so uncertain, it is possible that the recreational sector will enjoy a year-round fishing season even without reallocation.²⁵ Yet it is assured that the commercial sector (and the public it serves) will lose one-third of the red grouper they would otherwise have access to.

The commercial sector is fully accountable and operates under an Individual Fishing Quota ("IFQ") program that was designed, in large part, to reduce commercial sector discards.²⁶ It is unfair to force the commercial sector to pay for recreational sector dead discards; those discards should be deducted from the recreational sector's ACL. Otherwise, there is no incentive for the recreational sector to reduce its own discards.

Indeed, lengthy and consistent testimony at the June 2021 Gulf Council meeting in Key West and in prior public hearings showed that the commercial sector has relied on its existing 76% allocation to make investments and decisions about business activities and hiring employees.²⁷ Amendment 53 purports to "correct" for an "error" in how the ACL was apportioned between the sectors over a decade ago under Amendment 30B due to inferior methods of estimating recreational landings. The recreational sector has not suffered because of this purported error; it has presumably been landing more red grouper all along than previously estimated. It is unfair

²² Amendment 53 at p. xiv.

²³ See Amendment 53, Table 1, at p. xiv. Between Alternatives 2 and 3, the ABC/Total ACL drops by 640,000 pounds (from 4.90 million pounds to 4.26 million pounds), while the recreational sector's ACL increases by 550,000 pounds (from 1.18 million pounds to 1.73 million pounds). The total equals the reduction in the commercial sector's ACL of 1.19 million pounds.

²⁴ See 50 C.F.R. § 600.325(c)(3)(i)(B) ("An allocation...may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups.") (emphasis added).

²⁵ See Amendment 53 at p. 21.

²⁶ See Am. 53 at p. 2.

²⁷ Public comment summary document submitted to Gulf Council for Amendment 53 (https://gulfcouncil.org/wp-content/uploads/B-5bi-Amendment-53-Public-Comment-Summary_Final.pdf).

to force the commercial sector to bear the entire burden²⁸ of correcting for that purported error now, particularly given its reliance upon the existing allocations.

c. Amendment 53 unfairly ignores factors that would have boosted the commercial sector's allocation.

The premise of Amendment 53 is to revise the recreational sector's red grouper allocation to reflect its landings over the base period of 1986-2005 using revised landings estimates derived from the new Fishing Effort Survey ("FES"). The problem, however, is that Amendment 53 only examines factors that benefit the recreational sector, and ignores other factors that would have benefitted the commercial sector, artificially skewing the allocation in favor of the recreational sector.

For example, no effort was made to determine what the historical sector ACLs would have been if the Gulf Council had been estimating recreational landings using FES at the time. Because recreational landings estimates using FES are higher, relying on those estimates for management would have shown a more productive stock and generated higher historical ACLs for *both* sectors. Thus, commercial sector landings would have been higher during that time period as well, had FES been available for management purposes. The Gulf Council has asked for this information for other species, like amberjack,²⁹ but refused to consider such information for red grouper. Selectively using FES for one purpose but not other purposes skewed the reallocation in favor of the recreational sector and was unfair to the commercial sector.

In addition, no effort was made to account for recreational overharvesting during the base period of 1986-2005. The recreational sector was subject to an allocation during those years. Specifically, under Amendment 1, the recreational sector was allocated 35% of a grouper complex that included red grouper. In hindsight, it appears that the recreational sector likely exceeded that allocation and is now effectively being rewarded for overharvesting.³⁰ The Gulf Council took action to constrain the recreational sector to its allocation in 2005,³¹ and presumably would have taken similar actions in earlier years had it known the full extent of recreational landings. The failure to account for such action also skewed the reallocation in favor of the recreational sector.

²⁸ See footnote 25.

²⁹ See Reef Fish Committee Report, June 2021, at p. 4 (motion passing without opposition "to request SEFSC run an analysis for Greater Amberjack which shows what the historical ABCs and ACLs would have been with FES back in time.").

³⁰ See, e.g., *See Guindon v. Pritzker*, 240 F. Supp. 3d 181, 195 (D.D.C. 2017) (striking down a reallocation for red snapper under Amendment 28 because that action "enables the recreational sector to catch more fish in the future because they caught more fish in the past, in excess of applicable restrictions... The flaw with that system is that the commercial sector can never obtain an increase in their allocation...").

³¹ See Amendment 30B at p. vii ("For the recreational sector, landings data indicated that the recreational red grouper allocation was being exceeded despite the red grouper bag limit. Consequently, in 2005 an interim rule intended to reduce the red grouper bag limit from two to one fish per person per day, reduce the aggregate grouper bag limit from five to three grouper per day, and implement a one-time closure of the recreational fishery, from November - December 2005, for all grouper species.").

Finally, the commercial sector was also constrained in 2005 when the Gulf Council capped all landings to address recreational overharvesting in 2004.³² It is unfair to credit the recreational sector with higher landings in hindsight when its prior overharvesting forced the commercial sector to stop fishing.

In short, the Gulf Council looked at one factor that increased the recreational sector's allocation and ignored multiple factors that would have cut the other way. It is unfair and arbitrary to cherry pick one factor and base reallocation on that factor alone.

B. Amendment 53 Violates National Standard 9 Because it Does Not Minimize Bycatch to the Extent Practicable.

National Standard 9 requires that management actions “shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.”³³ The MSA defines “bycatch” as “fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards.” Dead discards by recreational anglers thus constitute bycatch because they are fish that are harvested but not kept for personal use.

NOAA Fisheries' National Standard 9 Guidelines explain that bycatch “can, in two ways, impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation.”³⁴ First, bycatch can “increase...the uncertainty concerning total fishing-related mortality;” and second, bycatch “may also preclude other more productive uses of fishery resources.”³⁵ Accordingly, the Guidelines specify that “Councils must...[s]elect measures that, to the extent practicable, will minimize bycatch and bycatch mortality.”³⁶ The Gulf Council failed in this task.

The recreational sector discards millions of red grouper each year. “Red grouper recreational discard estimates averaged 4.25 million fish from 1993 to 2017, with a low of 1.53 million fish in 1996 and a peak of 8.10 million fish in 2004.”³⁷ Commercial sector discards, by contrast, are an order of magnitude lower.³⁸ Amendment 53 would divert fish to the more wasteful sector.

Amendment 53 does not minimize bycatch; it maximizes it. As described above, Preferred Alternative 3 in Action 1 would increase recreational sector dead discards by 640,000 pounds each year over Alternative 2. On its face this action cannot be squared with the plain requirements of National Standard 9 or FMP Objective 5.

Amendment 53 would result in both of the harms the National Standard 9 Guidelines warn about: it would increase uncertainty about total fishing mortality, and it would preclude other more productive uses of fishery resources by redirecting commercial landings (and reducing

³² See Am. 53 at p. 1 (“[T]he recreational sector experienced large increases in red grouper catch in 2004, and so the total catch was held at 6.56 mp gw, with new regulations to control recreational harvest implemented in 2005 and 2006.”) (emphasis added).

³³ 16 U.S.C. § 1851(a)(9).

³⁴ 50 C.F.R. § 600.350(b).

³⁵ Id.

³⁶ 50 C.F.R. § 600.350(d)(3).

³⁷ Amendment 53, Table 3.1.6, p. 35-36.

³⁸ Amendment 53, Table 3.1.3 at p. 31-32 (“Commercial vertical line fleet discards of red grouper averaged about 134,000 fish from 1993-2017, with a low of about 49,000 fish in 1995 and a peak of over 290,000 fish in 2011.”).

consumption by U.S. consumers) to cover these increased dead discards. Each year, 640,000 pounds of red grouper that otherwise would be caught, sold, and eaten in restaurants or at home by American consumers will now be floating dead in the Gulf of Mexico after being discarded by recreational anglers. Congress enacted National Standard 9 to avoid such waste.

Appendix B in Amendment 53 contains a 20-page “Bycatch Practicability Analysis,” but the analysis obscures the obvious: that Action 1, Preferred Alternative 3 will substantially increase bycatch compared to Alternative 2. Appendix B acknowledges that “Alternative 2 is expected to result in a net decrease in bycatch and bycatch mortality,”³⁹ but then compares the effects of Preferred Alternative 3 against “current management.”⁴⁰ But “current management” is not a legally viable option because the catch limits are too high,⁴¹ and so cannot serve as a rational baseline for comparison. Nowhere does Appendix B acknowledge the fact that Preferred Alternative 3 will increase dead discards by 640,000 pounds compared to Alternative 2. Appendix B concludes by finding that reallocation would have “neutral to low positive biological impacts,” but that conclusion ignores the stark differences *between* the other alternatives.

Between the alternatives available, the Gulf Council selected the one that will *maximize* bycatch above all others. This violates National Standard 9.

C. Critical Information About How NOAA Fisheries Recalibrated Historical Red Grouper Landings Estimates Was Not Made Available to the Gulf Council or the Public.

For years, members of the Gulf Council and the public have raised questions about how NOAA Fisheries went about recalibrating decades of recreational red grouper landings. This calibration formed the entire premise for Amendment 53, and yet how NOAA Fisheries generated the numbers driving the reallocation is largely a mystery. The MSA requires more.

Under MSA Section 302(i)(6),⁴² interested parties “shall have a reasonable opportunity to respond to new data or information before the Council takes final action on conservation and management measures.” NOAA Fisheries National Standard 2 Guidelines make clear that the MSA provides for public access “to the scientific information upon which the process and management measures are based.”⁴³ Further, “data and procedures used to produce the scientific information” must be “documented in sufficient detail to allow reproduction of the analysis by others with an acceptable degree of precision,” which is necessary “to conduct a thorough review.”⁴⁴

In this case, questions were raised about how NOAA Fisheries determined a calibration ratio between FES and Coastal Household Telephone Survey (“CHTS”) landings estimates, how NOAA Fisheries applied that calibration ratio retrospectively to adjust decades of historical recreational landings estimates, whether NOAA Fisheries made any modifications to that retrospective adjustment based on the particulars of a given stock (like red grouper), how NOAA

³⁹ Amendment 53 at p. 196.

⁴⁰ Amendment 53 at p. 198.

⁴¹ See Amendment 53 at p. 197 (“Alternative 1 (No Action) is not a legally defensible option”).

⁴² 16 U.S.C. § 1852(i)(6).

⁴³ 50 C.F.R. § 600.315(a)(6)(iv).

⁴⁴ 50 C.F.R. § 600.315(a)(6)(vi)(A).

Fisheries accounted for variations between the old Marine Recreational Fisheries Statistics Survey (“MRFSS,” which was used prior to CHTS) and the new MRIP FES landing estimates in the historical time series, and how NOAA Fisheries determined that these revised estimates are sufficiently reliable to use for reallocation.

These are major questions the public has a right to know the answers to, but to our knowledge no answers were forthcoming to the Council during the development of Amendment 53. We are not aware of publicly available data or information that would permit someone to duplicate NOAA Fisheries’ calibration methodology for red grouper. One of us emailed specific questions to NOAA Fisheries staff about how historical red grouper landings were recalibrated and never received a response.

Another one of us raised a question on the record about whether enough Access Point Angler Intercept Survey (“APAIS”) dockside intercepts occurred with FES to meet the standards for reliability. For some MRIP reporting waves, it appears there were no or very few APAIS intercepts for the mode and area which account for more than 90% of all private angler red grouper landings, and so the model appears to have “borrowed” data from somewhere else. The effect of this seems to have dramatically inflated recreational landings estimates and skewed the reallocation percentages. This methodology also conflicted with the one used by the red grouper stock assessment, which showed significantly lower landings for the majority of the historical time series. This issue was never resolved; the Gulf Council proceeded to take Final Action without obtaining an answer and Amendment 53 does not address it.

The Administration’s commitment to science and transparency should prevail here and result in a disapproval of Amendment 53 and a remand to the Gulf Council to comply with MSA requirements and National Standard 2 Guidelines.

D. The Gulf Council Failed to Follow its Allocation Policy.

The Gulf Council has developed an allocation policy but disregarded it when developing Amendment 53. Under the Council’s allocation policy, certain events trigger an “allocation review.”⁴⁵ Such events may include time-based triggers (e.g., seven year intervals for red grouper), or “data recalibration.”⁴⁶

An allocation review looks to whether the FMP’s goals and objectives are being met by an existing allocation and, if not, management alternatives are developed to adjust the allocation to better achieve FMP goals and objectives. The Council’s policy is expressly based on “adaptive

⁴⁵ See Amendment 53 at p. 242 (letter from Gulf Council to NOAA Fisheries explaining that “the Council adopted the following policy on allocation reviews” and setting forth the policy.).

⁴⁶ See Amendment 53 at p. 243 (“In addition to the allocation reviews scheduled based on the review triggers selected above, the Council may initiate supplemental allocation review at any time. For example, the Council could initiate an allocation review should relevant new information, e.g., data recalibration, be made available.”).

management,”⁴⁷ which is defined as “evaluating successful attainment of management objectives and adjusting strategies in response.”⁴⁸

Thus, when data recalibration of historical red grouper recreational landings estimates was made available, that should have triggered an allocation review.⁴⁹ Instead, the Gulf Council skipped over the allocation review and proceeded directly to a FMP amendment to reallocate quota to the recreational sector. This presumably explains why reallocation under Amendment 53 only ever considered reallocation in favor of the recreational sector, is not tied to achieving any particular FMP objective, and would undermine several FMP objectives.⁵⁰ This is the opposite of “adaptive management.” An allocation review based on adaptive management as required by the Gulf Council’s Allocation Policy would have provided necessary information to evaluate whether reallocation was warranted, but the Gulf Council dispensed with its own process.

The Secretary should thus disapprove Amendment 53 and instruct the Gulf Council to follow its allocation policy and conduct a proper allocation review if it wishes to proceed with reallocation.

III. Conclusion

For the forgoing reasons, we respectfully disagree with the Gulf Council’s decision to adopt Amendment 53 to the Gulf of Mexico Reef Fish FMP and we urge the Secretary of Commerce to disapprove it pursuant to 16 U.S.C. § 1854(a)(3).

Respectfully submitted on August 9, 2021.

⁴⁷ See Amendment 53 at p. 242 (“Consistent with the adaptive management process suggested in the [NOAA Fisheries] Allocation Review Policy (referenced above), the incorporation of the Council’s public input process as secondary public interest-based review triggers will include the consideration of relevant social, economic, and ecological indicators as an intermediate step before determining whether an allocation review is triggered.”).

⁴⁸ See Amendment 53 at p. 211 (“The concept of adaptive management – evaluating successful attainment of management objectives and adjusting strategies in response – has been thoroughly explored in natural resource management literature.”).

⁴⁹ See Amendment 53 at p. 211 (An allocation review is based on adaptive management, and “leads to the decision of whether or not the development an analysis of new alternatives is warranted, and is not, in and of itself, an implicit trigger to consider new alternatives. Instead, the identification of purpose and need for an action and the development of action alternatives (re-allocation) should occur in response to allocation review findings that a re-allocation is warranted.”).

⁵⁰ See Section II(A)(2)(a), above.