

June 1, 2021

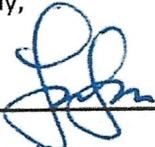
Carrie Simmons, PhD, Executive Director
Gulf of Mexico Fishery Management Council
2203 North Lois Ave., Suite 1100
Tampa, FL 33607

RE: Minority Report regarding Framework Action: Gulf of Mexico Red Snapper Recreational Data Calibration and Recreational Catch Limits

Dear Dr. Simmons:

As voting members of the Gulf of Mexico Fishery Management Council ("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 Council's decision to approve the Framework Action: Gulf of Mexico Red Snapper Recreational Data Calibration and Recreational Catch Limits with a recommendation to delay implementation until January 1, 2023. As approved by the Council, the Framework Action fails to correct a critical data error for two additional fishing seasons thereby allowing the private recreational sector to catch more than its allocation of red snapper. 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.

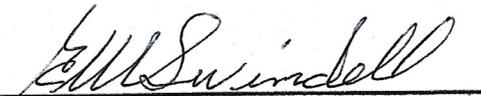
Sincerely,



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



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



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

Enclosure

**MINORITY REPORT IN OPPOSITION TO THE GULF OF MEXICO
FISHERY MANAGEMENT COUNCIL’S APPROVAL OF THE
FRAMEWORK ACTION: GULF OF MEXICO RED SNAPPER
RECREATIONAL DATA CALIBRATION AND
RECREATIONAL CATCH LIMITS TO THE REEF FISH FMP**

I. Introduction

The undersigned, as voting members of the Gulf of Mexico Fishery Management Council (“Gulf Council”), submit this minority report under Section 302(e)(4) of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), in disagreement with the Gulf Council’s approval of the Framework Action: Gulf of Mexico Red Snapper Recreational Data Calibration and Recreational Catch Limits to the Reef Fish Fishery Management Plan (“FMP”) with a substitute alternative as the Preferred Alternative, which will delay the implementation date until January 1, 2023. The Gulf Council approved the Framework Action on April 15, 2021 with 10 “yes” votes, 6 “no” votes, and one abstention. We oppose the Framework Action because it admittedly violates numerous MSA provisions.

The purpose of the Framework Action is to reduce the likelihood of exceeding the red snapper private angling component ACL by calibrating the state catch limits to account for the incompatible monitoring programs used by each Gulf state. The need for this action is to use the best scientific information available to prevent overfishing while achieving optimum yield, consistent with the red snapper rebuilding plan. The Framework Action as adopted by the Gulf Council delays implementation of data calibration for two additional fishing years, thereby knowingly allowing the recreational sector to exceed its quota for additional time in direct violation of MSA requirements.

In effect, the Gulf Council adopted the “no action” alternative for the next two years. The Framework Action itself expressly concedes that taking no action “is inconsistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act,” and is “not a viable alternative.”² Thus, the Gulf Council has deliberately chosen to violate the law for two years, after which calibration would take effect. But a “future plan to comply with the MSA will not save an otherwise deficient FMP.” *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 122 (D.D.C. 2011).

We therefore urge the Secretary to disapprove the unlawful portion of this action and use her authority under MSA Section 305(d) to implement Alternative 2 without the two-year delay inserted by the Gulf Council.³

² Draft Framework Action to the Fishery Management Plan for Reef Fish Resources in the Gulf of Mexico, Gulf of Mexico Red Snapper Recreational Data Calibration and Recreational Catch Limits (hereafter referred to as the “Calibration Framework Action”) (April 2021), at 16, available at <https://gulfcouncil.org/wp-content/uploads/B-8a-Red-Snapper-Data-Calibration-and-ACL-Modification-04072021.pdf>.

³ 16 U.S.C. § 1855(d); see also *Guindon v. Pritzker*, 31 F.Supp.3d 169, 197-98 (D.D.C. 2014) (“If the Council fails to propose a necessary AM, or, as in this case, explicitly rejects an AM over the recommendation of its SSC, NMFS must fulfill its statutory responsibility as a backstop.”) (emphasis added).

II. Executive Summary

On April 15, 2021, the Gulf Council voted 9 to 7 with one abstention to choose a substitute alternative as the Preferred Alternative. The substitute motion read: “In Action 1, to make Alternative 2 the preferred, with an implementation date of January 1, 2023.” The original version of Alternative 2, without the delay in effectiveness added by the substitute motion, is shown below in Figure 1. The Gulf Council then approved the Framework Action with the new Preferred Alternative by a vote of 10 to 6 with one abstention.

Alternative 2: Modify the state-specific red snapper private angling component ACLs using the ratio calibrations developed by the National Oceanic and Atmospheric Administration’s (NOAA) Office of Science and Technology (OST) and the respective Gulf states. These ratios and the resulting ACLs in each state’s currency are as follows:

State	Current ACL – MRIP-CHTS Currency	Ratio	ACL (lbs ww) (State Currency)
Alabama	1,122,662	0.4875	547,298
Florida	1,913,451	1.0602	2,028,641
Louisiana	816,233	1.06	865,207
Mississippi	151,550	0.3840	58,195
Texas	265,105	1.00	265,105
Total	4,269,000		<i>Not additive</i>

Any future increases to state-specific ACLs in 2021 or 2022 would be calibrated based on the ratio calibrations described in **Alternative 2**. Further, under **Alternative 2**, the Gulf of Mexico Fishery Management Council (Council) will review the state specific ACLs in 2022, or as soon as practicable.

Figure 1: Alternative 2 as shown in the framework document.

Under state management via Reef Fish Amendment 50A-F, each Gulf state uses incompatible data collection and landings estimate methodologies to assess how many fish they are landing, and each of those methodologies are different from the overarching NOAA Fisheries methodology. As a result, each state outputs landings estimates in a unique way that cannot be compared directly to each other or to federal data from the Marine Recreational Information Program (MRIP) — essentially, each state reports catch in a different “currency.” Furthermore, there is a mismatch in currency between the states’ landings reporting and the quota that each state was assigned, which comes from stock assessments that incorporate all sources of recreational landings data.

Setting state quotas modelled using one set of data, and then accounting for the landings of those quotas under five different sets of data, is patently arbitrary. Managers, ourselves included, need data in a consistent “common currency” for the purposes of quota setting and inseason monitoring (MSA requirements⁴). As described by both NMFS and Council staff, the issue is like trying to pay for something in one country in U.S. dollars, but having the currency from 5 other countries (like Euros, Yen, etc.), they don’t sum to a coherent number due to lack of a common denominator. The lack of a

⁴ See e.g., 16 U.S.C. § 1853(a)(15).

common currency is preventing accurate catch accounting and allowing the private recreational sector to substantially exceed its quota each year, in violation of several provisions of the MSA. As stated by multiple Gulf Council members and NMFS staff, the multiple data sources from the states must be calibrated in order to prohibit landings in excess of the recreational sector's quota and individual state quotas and to prevent overfishing.⁵ As explained by NOAA General Counsel Mara Levy on April 13, 2021, "the management of red snapper in the Reef Fish Fishery Management Plan (FMP) is currently not in compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), in that the current recreational ACL is being managed in a manner that has resulted, and is expected to continue to result, in ACL overages for that sector."⁶

We, the undersigned Council members who voted in the minority, submit this report to explain our rationale for voting against the Gulf Council's decision to delay calibration for two years. We urge the Secretary to override the Gulf Council's two-year delay and immediately implement calibration to create a common currency for catch accounting for the following reasons:

- A. The need for a common currency has been discussed at length; further delay puts other states and sectors at a continued disadvantage and violates National Standard Four.
- B. The lack of calibration to a common currency is contributing to stock decline.
- C. The majority's recommendation to delay calibration is not supported in the record.
- D. The lack of calibration violates section 407(d) of the Magnuson-Stevens Act.
- E. The recommendation to delay calibration also violates MSA sections 303(a)(15) and 304(b).

III. The Secretary should implement calibration concurrently with the OFL and ABC increases for the following reasons.

A. The need for Common Currency has been discussed at length; further delay puts other sectors at a continued disadvantage and violates National Standard Four.

The Gulf Council's recommendation to delay implementation of Alternative 2 to calibrate private angler data until January 2023 violates the allocation splits set by both Amendment 1 and Amendment 50 and is neither fair nor equitable. The lack of calibration means that private anglers in Alabama and

⁵ See e.g., statement by Chairman Frazer in reference to the need to calibrate, "the intent here is to fulfill our obligation of the council and make sure that we are in compliance with the Magnuson Act" (Transcript of the 283rd meeting of the Gulf Council, January 2021, at 165.) Statement by Andy Strelcheck, "this issue of calibration has been before the council now for a number of meetings. We also have known for quite some time, and have indicated to the states as such, that calibration was needed in order to set quotas and comparable units to what the states are monitoring, and so this is not unforeseen. . . we're obligated to ensure that catch limits aren't exceeded and that we prevent overfishing" (Transcript of the 283rd meeting of the Gulf Council, January 2021, at 186-87.)

⁶ Reef Fish Committee Report, April 13 – 14, 2021, at 7, available at, https://gulfcouncil.org/wp-content/uploads/Tab-B-Reef-Fish-Committee-Report-Apr-04152021_FinalREV.pdf.

Mississippi are effectively allocated a combined 1.268 mp ww⁷ in excess of the private angling ACL, which will lead to long-term negative effects for the health of the stock. Fishermen from all states and sectors are harmed by the negative long-term socioeconomic effects of allowing the recreational ACL to be exceeded, which could harm the sustainability of the stock. It is unjust to allow anglers in some states additional fishing opportunities.

This lack of fairness is not new. The concept of applying a common currency for the purposes of inseason management of the private angling sector of the red snapper fishery has been discussed at length for years. Development of a common currency has been deliberated since the January 2018 Gulf Council meeting where NMFS staff gave a presentation showing that state and federal survey results would not be directly comparable without a calibration.⁸ Later that year, in September 2018, the Gulf States Marine Fisheries Commission hosted a special workshop to develop methods to calibrate the state surveys.⁹ Calibrations have been available since August 2019 when NOAA's Office of Science and Technology (OST) released a White Paper containing simple ratio calibrations that could be applied to the state surveys for calibration.¹⁰ The revised calibrations were endorsed by the Gulf Council's Scientific and Statistical Committee (SSC) in August 2020.¹¹

Despite the availability of calibrations for over 20 months, the Gulf Council has failed to apply them, which has allowed overfishing and inequity to continue. At every Gulf Council meeting in 2020, calibrations were discussed and possible solutions which would constrain private recreational harvest to each state's respective ACL were presented. The Gulf Council has discussed the need to calibrate state data during at least 12 meetings conducted between October 2019 and taking Final Action in April 2021.

There is a substantial disparity between the speed with which the Gulf Council has acted on calibrations versus the speed we have acted on the Great Red Snapper Count. By contrast, when the Great Red Snapper Count was released as "final" on March 24, 2021,¹² the SSC and Gulf Council moved with shocking speed to increase catch levels. A Framework Action to increase the overfishing limit (OFL) and acceptable biological catch (ABC) was approved at the April 2021 Gulf Council meeting, a mere matter of

⁷ Calibration Framework Action at 51.

⁸ Gulf of Mexico Fishery Management Council. Using recreational effort or biomass to determine allocation. Farmer, N. and M. Karnauskas (January 22, 2018).

⁹ NOAA Fisheries, Office of Science and Technology/Gulf States Marine Fisheries Commission Red Snapper Workshop IV Report, New Orleans, LA (September 12-13, 2018), available at https://gulfcouncil.org/wp-content/uploads/2020_08-Stg-RF-Eco-Socio.zip.

¹⁰ NOAA Fisheries Recommends Source of Recreational Catch Statistics for Assessing Gulf Reef Fish Stocks, published August 7, 2019, available at <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-recommends-source-recreational-catch-statistics-assessing-gulf-reef>. White paper available at <https://media.fisheries.noaa.gov/dam-migration/94100569.pdf>.

¹¹ NOAA Science and Technology Calibration Workshop for Red Snapper 2020 (Aug. 5, 2020), <https://gulfcouncil.org/meetings/council/aug-calibration-workshop-rs-2020/>.

¹² Final Report of the Great Red Snapper Count Released (March 24, 2021), <https://www.fisheries.noaa.gov/feature-story/final-report-great-red-snapper-count-released>.

weeks after receiving the Great Red Snapper Count.¹³ We are dismayed that a legally-required calibration to correct catch overages and return some fairness to the fishery has been delayed for years, while a presumed increase in quota can be acted upon within weeks. This inconsistency can rightfully be perceived as cherry picking science to the advantage of one sector on the backs of all others. It is also an example of delaying something that will constrain the private recreational sector while fast-tracking something that will increase fishing opportunities for that same sector.

In addition, the majority's vote to delay necessary calibration until 2023 violates National Standard Four of the MSA because it discriminates between residents of different states, is not fair and equitable, is not reasonably calculated to promote conservation, and allows some participants to acquire an excessive share of the catch.

National Standard Four declares 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 fishermen, then three requirements must be met:

- A. The allocation must be “fair and equitable to all such fishermen”;
- B. It must be “reasonably calculated to promote conservation”; and
- C. It must be “carried out in such manner that no particular individual, corporation or other entity acquires an excessive share of such privilege.”¹⁴

As explained in *Guindon v. Pritzker* (2017), “an allocation is reasonably calculated to promote conservation if an allocation encourages a rational, more easily managed use of the resource.”¹⁵ Here, allocation is being allowed to remain in five different currencies for two additional years. Without a common currency to track catch by the private recreational sector, managers, fishermen, and other interested stakeholders are unable to determine whether catch levels have been exceeded and whether the stock is being put in jeopardy. Accounting for landings in uncalibrated units while doling out quota in calibrated units is not rational and makes management harder, not easier.

The *Guindon* court went on to explain that “[i]ndeed, National Standard Four and its implementing regulations permit allocations that sacrifice the interests of one group of fishermen to benefit the fishery as a whole.”¹⁶ However, the opposite is happening here. The lack of calibration to a common currency is benefiting private anglers in two states at the detriment of the fishery as a whole. It will put the fishery in jeopardy of catch overruns and could have adverse effects on the entire fishery's rebuilding plan. “When an agency blinds itself to the high likelihood that its actions will cause overharvesting, the Court cannot characterize those actions as ‘reasonably calculated to promote

¹³ Framework Action, Modification of Annual Catch Limits for Gulf of Mexico Red Snapper, Tab B, No. 7(d), April 2021, available at <https://gulfcouncil.org/wp-content/uploads/B-7d-Modification-of-Red-Snapper-ACLs-04082021.pdf>.

¹⁴ 16 U.S.C. § 1851(a)(4).

¹⁵ *Guindon* at 193-194 (citing *C & W Fish v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) and 50 C.F.R. § 600.325(c)(3)(ii) (internal quotations omitted)).

¹⁶ *Guindon* at 195 (citing 50 C.F.R. § 600.325(c)(3)(i)(A)–(B)).

conservation.”¹⁷ Delaying calibration discriminates against anglers in some of the states and against the commercial and for-hire sectors, favoring private anglers in Alabama and Mississippi. It is not fair and equitable, is not reasonably calculated to promote conservation, and it allocates excessive shares to AL and MS.

B. The lack of a common currency is contributing to stock decline.

There is now evidence that expected decline in red snapper stock abundance in the Eastern Gulf of Mexico is indeed occurring. NOAA’s Southeast Fisheries Science Center recently presented a traditional interim update of red snapper of the eastern Gulf of Mexico. Figure 2 (shown below) of the report indicates a sharp decline in abundance since the 2016 terminal year assessment.¹⁸ This decline also coincides with the private angling sector exceeding its ACL for several years (2017-2019). Furthermore, public comments from fishermen suggested fishing is becoming increasingly difficult in the eastern Gulf of Mexico. Delaying calibrations will amplify the current decline, increase likelihood of localized depletions, decrease the quality of fishing in the Eastern Gulf for all sectors, impose economic harm on commercial fishing businesses and jeopardize red snapper’s rebuilding plan.

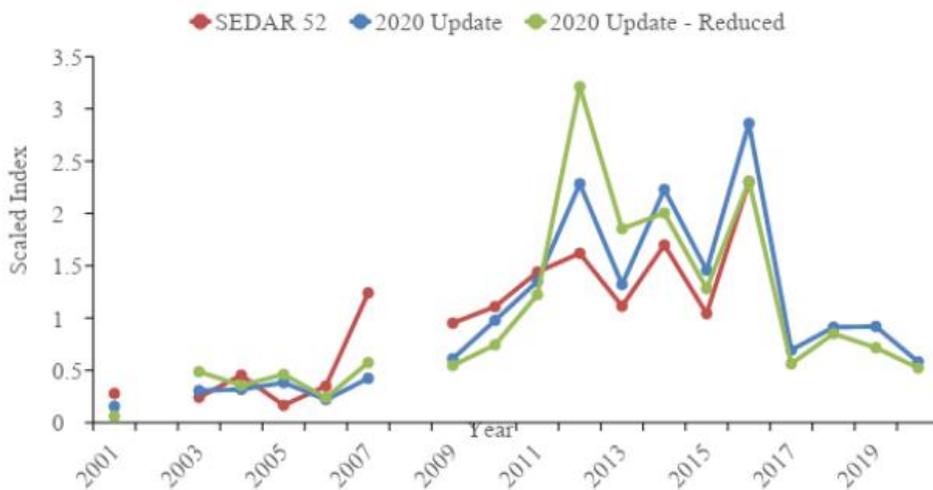


Figure 2. Comparison of relative indices of abundance for the Eastern Gulf of Mexico (EGOM) red snapper abundance using varying spatial subsets of the NMFS BLL data over time. 2020 - Update Reduced represents the abundance of Red Snapper if the reduced sampling area in 2020 was used to develop the index back in time. The 2020 Update index uses samples similar to those used in SEDAR 52 from 2001-2019, and uses the abundance from the reduced sampling area in 2020 (Pollack 2021, Figure 2).

¹⁷ *Guindon*, 31 F. Supp. 3d at 201.

¹⁸ NOAA Fisheries - Southeast Fisheries Science Center, A “Traditional” Interim Assessment for Gulf of Mexico Red Snapper (March 23, 2021), <https://gulfcouncil.org/wp-content/uploads/B-7b-Traditional-Interim-assessment-report-RS.pdf>

The red snapper stock has repeatedly shown higher than expected recruitment over its rebuilding history, even as the recreational sector exceeded its quota 75% of the fishing seasons between 2001 and 2016.¹⁹ However, the most recent stock assessment indicates a stalling of the rebuilding progress in the Eastern Gulf of Mexico using data through 2016²⁰ given the spatial imbalance of fishing effort and stock abundance.²¹ Projections from that assessment using Gulfwide quotas prior to state management predict a declining abundance in the Eastern Gulf. The implementation of state management effectively shifted additional quota and fishing to the Eastern Gulf of Mexico due to the lack of calibration. Overages have continued since that assessment and overages to the private angler ACL triggered overfishing to occur in 2019 as shown in Figure 3 below.²² While preliminary landings data is showing that overfishing did not occur in 2020, the Majority’s recommendation to delay calibrations until 2023 means that overfishing could occur in 2021 and 2022 and abundance will continue to decline in the Eastern Gulf.

2019 Gulf of Mexico Red Snapper Landings versus OFL

Sector	Landings (lb ww)	ACL	% ACL
Private	5,434,758	4,269,000	127%
For-Hire	2,558,734	3,130,000	82%
Commercial	7,658,140	7,701,000	99%
Total	15,651,632	ACL=15,100,000 (104%) OFL=15,500,000	

Source: SEFSC MRIP CHTS and TPWD ACL data sets provided July, 2020, LA Creel, and the IFQ program database.



¹⁹ Framework Action, Modification to the Recreational Red Snapper Annual Catch Target Buffers (October 2018), available at <https://gulfcouncil.org/wp-content/uploads/Final-Draft-Red-Snapper-Recreational-ACT-Modification-110218-revised.pdf>.

²⁰ <http://sedarweb.org/docs/postsedar/RS%20Summary.pdf>

²¹ SEDAR 52 Stock Assessment Report (April 2018), available at http://sedarweb.org/docs/sar/S52_Final_SAR_v2.pdf.

²² Gulf of Mexico Red Snapper Landings (Sept. 29, 2020), available at https://gulfcouncil.org/wp-content/uploads/B-6a-SERO_RS_CouncilSlides091020updated.pdf.

Figure 3: 2019 landings presented to the Gulf Council at the September 2020 meeting which show that the private angler component landed 27% over its ACL, while the for-hire and commercial sectors remained below their ACLs.

Years of sacrifices and tough choices by fishermen and managers have begun rebuilding this valuable fishery. Red snapper is more than halfway through its 27-year rebuilding plan, and it is critical for Gulf fishermen and communities to meet the deadline of achieving a rebuilt stock by 2032. Delaying calibration until 2023 will be detrimental to the stock and will once again be rewarding the private recreational sector for its repeated overages and lack of accountability to the detriment of other sectors.

C. The majority's recommendation to delay calibration is not supported in the record.

Under the MSA, regulatory actions are reviewed under the standard set forth in the Administrative Procedure Act (APA).²³ Under Section 706 of the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁴ In 2014, the *Guindon v. Pritzker* court struck down a framework action that failed to prohibit the retention of red snapper after the recreational quota had been reached. As explained in that court opinion, to meet the APA standard an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁵ “An agency acts arbitrarily and capriciously ‘if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise.’”²⁶

While the Gulf Council record contains ample rationale for choosing the calibration in Alternative 2 as the Preferred Alternative, the record lacks any rationale for delaying the implementation of the preferred alternative until January 2023.

The Purpose and Need statement for the action reads as follows:

The purpose of this action is to **reduce** the likelihood of exceeding the red snapper private angler component ACL by adjusting the state catch limits to account for the monitoring

²³ 16 U.S.C. § 1855(f)(1) (A court “shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of [the APA].”).

²⁴ 5 U.S.C. § 706(2)(A). See also, *Guindon v. Pritzker*, 31 F.Supp.3d 169, 185 (D.D.C. 2014) (Under the APA’s “narrow” standard of review, “a court is not to substitute its judgment for that of the agency,” and “will defer to the [agency’s] interpretation of what [a statute] requires so long as it is ‘rational and supported by the record.’” (internal citations omitted)).

²⁵ *Guindon v. Pritzker* (2014) at 185 (internal citation omitted).

²⁶ *Id.* at 185-186 (citing *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144–45 (D.C.Cir.2005) (quoting *State Farm*, 463 U.S. at 48, 103 S.Ct. 2856)).

programs used by each Gulf state. The need for this action is to use the best scientific information available to prevent overfishing while achieving optimum yield, consistent with the red snapper rebuilding plan.²⁷

Delaying the implementation of Alternative 2 for two additional private angler fishing seasons is equivalent to choosing Alternative 1 (no action) for 2021 and 2022. As clearly explained in the calibration Framework Action document, taking no action will allow Mississippi and Alabama to catch excess fish and cause the private recreational sector to exceed its ACL each season. “[P]redicted landings from these two states would be expected to cause the private angling ACL to be exceeded by 1.268 mp ww, which could lead to long-term negative effects for the health of the stock.”²⁸ Therefore, the approved action does not fulfill the Purpose and Need – it will not “*reduce* the likelihood of exceeding the red snapper private angling component ACL.”²⁹ Instead, it will *increase* the likelihood of exceeding the ACL by explicitly allowing ACL overages for two more years. The rationale to delay implementation is not discussed anywhere in the document and no rationale is provided for its adoption. Counter to the APA, the decision to delay is not rational and is not supported by the record.

In fact, the record is replete with confirmation that, without data calibration, private angler red snapper state management violates the MSA.³⁰ On April 13, 2021, as the April 2021 Reef Fish Committee Report shows, NOAA General Counsel Mara Levy explained that “the management of red snapper in the Reef Fish Fishery Management Plan (FMP) is currently not in compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), in that the current recreational ACL is being managed in a manner that has resulted, and is expected to continue to result, in ACL overages for that sector.”³¹ The majority’s vote to delay calibration until January 2023 endorses this same faulty management that violates the MSA.

At the Gulf Council meeting in January 2018, NOAA Fisheries presented that the state and federal survey results would not be directly comparable without a calibration.³² At the October 2019 Gulf Council

²⁷ Draft Framework Action to the Fishery Management Plan for Reef Fish Resources in the Gulf of Mexico, Gulf of Mexico Red Snapper Recreational Data Calibration and Recreational Catch Limits (hereafter referred to as the “Calibration Framework Action”) (April 2021), Section 1.2. Purpose and Need, at 8 (emphasis added), *available at* <https://gulfcouncil.org/wp-content/uploads/B-8a-Red-Snapper-Data-Calibration-and-ACL-Modification-04072021.pdf>.

²⁸ Calibration Framework Action at 51.

²⁹ Calibration Framework Action at 8 (emphasis added).

³⁰ See, e.g., Acting Regional Administrator, Andy Strelcheck, Recording from April 2021 Gulf Council meeting. Available at: <https://gulfcouncil.org/about/stafflogin/> (FTP site) (“The intent here is we need to have comparable quotas across states, among states since we are running five different survey programs, we need to have surveys that are counting landings in the same units as the quotas, and we need to make sure obviously those quotas aren’t exceeded, so all of those reasons have not changed in the timeframe we have been working on this action.”).

³¹ Reef Fish Committee Report, April 13 – 14, 2021, at 7, *available at*, https://gulfcouncil.org/wp-content/uploads/Tab-B-Reef-Fish-Committee-Report-Apr-04152021_FinalREV.pdf.

³² Gulf of Mexico Fishery Management Council, Farmer, N. and M. Karnauskas, “Using recreational effort or biomass to determine allocation” (January 22, 2018).

meeting, (before Amendment 50 was promulgated) Gulf Council Chairman Dr. Tom Frazer, reading from the Reef Fish Committee report, stated that the “committee’s expectation is that the calibrations developed in 2020 will be available for use in 2021.”³³ NOAA Fisheries has formally acknowledged the problem, stating in the response to public comments for the Final Rule for Amendment 50A-F that without calibration, the rule is not compliant with the Magnuson-Stevens Act.³⁴ NOAA Fisheries further indicated that each state’s landings will be compared to the revised (i.e. calibrated) ACL to determine overages and paybacks.³⁵ As the record shows, calibration is necessary to prevent the recreational sector from exceeding its quota. The Gulf Council’s vote to delay calibration for two years is not supported by the record and is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

D. The lack of calibration violates MSA section 407(d).

A provision of the MSA applies specifically to the Gulf of Mexico red snapper fishery: Section 407(d) requires that red snapper management measures must establish separate quotas for recreational fishing and commercial fishing, and when those quotas are reached, the retention of fish is prohibited for the rest of the year. It further states that quotas for each sector cannot allow harvest in excess of allocations. Subsection 407(d), in full, provides that:

(d) CATCH LIMITS.—Any fishery management plan, plan amendment, or regulation submitted by the Gulf Council for the red snapper fishery after the date of enactment of the Sustainable Fisheries Act shall contain conservation and management measures that--

(1) establish separate quotas for recreational fishing (which, for the purposes of this subsection shall include charter fishing) and commercial fishing that, when reached, result in a prohibition on the retention of fish caught during recreational fishing and commercial fishing, respectively, for the remainder of the fishing year; and

(2) ensure that such quotas reflect allocations among such sectors and do not reflect any harvests in excess of such allocations.³⁶

Congress added this provision as part of the Sustainable Fisheries Act of 1996.³⁷ At that time, the recreational sector had exceeded its allocation in every year since 1990.³⁸ This troubling trend would

³³ Gulf of Mexico Fishery Management Council, Full Council Report, at 92, *available at* <http://gulfcouncil.org/wp-content/uploads/GMFMC-Full-Council-October-2019.pdf>, accessed February 2, 2021.

³⁴ Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendments 50A-F, Final Rule, 85 Fed. Reg. 6819, at 6822 (Response to Comment 5) (Feb. 6, 2020), <https://oceanconservancy.org/wp-content/uploads/2020/06/Response-to-Comment-5.pdf>.

³⁵ *Id.* at 6822 (Response to Comment 5).

³⁶ 16 U.S.C. § 1883(d).

³⁷ See Pub.L. 104–297, § 207(b), 110 Stat. 3559, 3614 (1996).

³⁸ Gulf Council, Regulatory Amendment to the Reef Fish Fishery Management Plan to Set 1997 Commercial Red Snapper Season and Authorize Recreational Quota Closures (March 1997), available at <https://gulfcouncil.org/wp->

continue with the recreational sector exceeding its quota in 9 of 11 years between 2002 and 2013.³⁹ Unfortunately, the NOAA Fisheries has established a pattern of failing to prohibit the retention of fish far after the recreational quota has been reached. By the mid-2000s, red snapper was severely overfished, with the population between three and seven percent of its historic abundance.⁴⁰

As noted by the NOAA Fisheries Southeast Regional office (SERO) Acting Regional Administrator, Andy Strelcheck, NMFS has lost federal lawsuits related to red snapper recreational catch limits being exceeded in the recent past (2014 and 2017).⁴¹ With the majority's vote to impermissibly delay calibration, the agency now finds itself in the same situation: The FMP is failing to keep the private recreational sector within its quota, in violation of MSA section 407(d)'s prohibition on quota overages and other provisions of the law.

In 2014, the D.C. District Court in *Guindon v. Pritzker* interpreted section 407(d)(1) for the first time, explaining:

The provision's first clause imposes on NMFS an obligation to “establish a quota,” and the second clause essentially explains how the quota must function—i.e., to “result in a prohibition on the retention of fish.” *Id.* Thus, the Court concludes that under Section 407(d), NMFS must close the season, and may not reopen it, whenever the agency determines that the quota has been reached. The Court will also presume that NMFS has complied with the statute if it implements some effective mechanism to prohibit the retention of fish above the quota. This might include setting a season length in advance based on a projection of when the quota will

[content/uploads/March-1997-Regulatory-Amendment-Mar-1997-Set-1997-Commercial-Red-Snapper-Season-and-Auth-Rec-Quota-Closures.pdf](#), at 11, 18, 21 (“Unlike its commercial counterpart, the recreational sector has not been subjected to closure. Instead bag and size limits have been the major tools used to keep this sector within its allocation. Since 1991, the recreational sector has been exceeding its allocation, initially by about 7 percent in 1991, 16 percent in 1992, 84 percent in 1993, 60 percent in 1994, and 42 percent in 1995. Due to these overages, additional restrictions on the recreational sector have been suggested.”).

³⁹ Gulf of Mexico Fishery Management Council, Final Draft Framework Action, *Recreational Accountability Measures for Red Snapper* (Aug. 2014), at 3, available at <http://www.gulfcouncil.org/docs/amendments/Red%20Snapper%20Accountability%20Measures%20Framework%20Action.pdf>. (“Commercial quotas began in 1990. Recreational allocations began in 1991 and recreational quotas began in 1997.”)

⁴⁰ *Coastal Conservation Ass'n (CCA) v. Gutierrez*, 512 F. Supp. 2d 896, 898 (S.D. Tex. 2007) (“No one contests, however, that the red snapper is severely overfished. Amendment 22 reflects current population at about seven percent of historic abundance. Other studies indicate that red snapper populations are closer to three percent of historic abundance.” (internal citations omitted)).

⁴¹ Reef Fish Committee Report, April 13 – 14, 2021, at 8, available at https://gulfcouncil.org/wp-content/uploads/Tab-B-Reef-Fish-Committee-Report-Apr-04152021_FinalREV.pdf (“... we have lost several lawsuits in over the last decade related to recreational management. 2017 obviously was an increase in the fishing season length and we, we as an agency, didn't even choose to defend that justification for setting the season longer. Back in 2014 we lost a lawsuit to the commercial industry who sued related to allocation decisions, and part of the argument, at least in that lawsuit, was that the recreational sector had frequently exceeded their quotas and shouldn't benefit from any shift in allocation.” (Recording from April 2021 Gulf Council meeting. Available at: <https://gulfcouncil.org/about/stafflogin/> (FTP site)).

be met, but such a projection must be accurate and conservative enough to effectively accomplish the statutory mandate.⁴²

In 2017, a second case also titled *Guindon v. Pritzker* took a look at 407(d)(2). It stated that “section 407(d)(2) requires that a quota established pursuant to section 407(d)(1) must reflect and not exceed the allocation for that sector.”⁴³ In short, the quota (ACL) may not exceed the allocation (percentage split between sectors). The allocation is currently split as 51% commercial and 49% recreational, with the recreational allocation subdivided between the private angling and federal for-hire subsectors at 57.7% and 42.3% respectively.

However, in 2018, 2019 and 2020 (all years since state management has been in practice), the quota granted to the recreational sector exceeded its 49% allocation because of a lack of calibration. The majority of the Gulf Council has now voted to continue to allow a quota that does not reflect the proper allocation and will allow harvest above that 49% allocation. The framework action to delay calibration violates MSA section 407(d) because it establishes a quota for the recreational sector that will fail to prohibit the retention of fish above the quota for two additional years and will allow harvest above the allocation.

E. The recommendation to delay calibration violates MSA sections 303(a)(15) and 304(b).

First, delay in calibration will cause ACLs to be exceeded in violation of MSA Section 303(a)(15) by dispensing with measures to ensure accountability to catch limits and deliberately exceeding them.⁴⁴ Section 303(a)(15) provides that every FMP must “establish a mechanism for specifying annual catch limits in ... implementing regulations ..., including measures to ensure accountability.” However, delaying calibration until 2023 expressly rejects accountability to stay within catch limits by leaving the data flaw in place.

Second, delay in calibration will cause a de facto reallocation in violation of the FMP and MSA Section 304(b).⁴⁵ Amendment 1 to the Reef Fish FMP required that the annual catch be allocated between recreational and commercial sectors based on historical percentages. The regulations implementing Amendment 1 set the allocation at 51 percent commercial and 49 recreational, an allocation still in effect today.⁴⁶ Section 304(b) of the MSA requires consistency between the FMP and implementing regulations.

⁴² *Guindon v. Pritzker*, 31 F.Supp.3d 169, 192-193 (D.D.C. 2014).

⁴³ *Guindon v. Pritzker*, 240 F.Supp.3d 181, 196-197 (D.D.C. 2017).

⁴⁴ 16 U.S.C. § 1853(a)(15). See *Guindon*, 31 F. Supp. 3d at 200 (the resulting “scheme does not ‘ensure accountability’ [to catch limits] within the meaning of Section 303(a)(15)”).

⁴⁵ 16 U.S.C. § 1854(b).

⁴⁶ See Calibration Framework Action document at 12.

The mismatch between the states' catch reporting via state units and the quota they were assigned in via MRIP units is resulting in additional allocation to the private angling sector. This skews the 51/49 percent allocation split between the recreational and commercial sector set by Amendment 1, and also skews the allocation among the Gulf States set by Amendment 50. This is inconsistent with the FMP.⁴⁶ The *Guindon v. Pritzker* court found a "de facto reallocation" in 2014 when NOAA Fisheries reopened a fall season for recreational anglers despite the fact that the sector had already exceeded its quota.⁴⁷ Similarly, delaying calibration will cause a de facto reallocation because the private recreational sector will be allowed to land additional fish due to landings data using incompatible units.

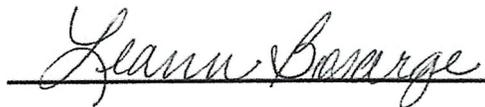
IV. Conclusion

The majority's vote to delay calibration for two additional fishing seasons sanctions a management system that does not comply with the Magnuson-Stevens Act. State landings data must be calibrated to MRIP because initial state allocations were given to each state in MRIP units. Therefore, there is a mismatch between the states' reported landings and the quota they were assigned. The implementation of state management effectively shifted additional quota and fishing to the eastern Gulf of Mexico due to the lack of calibration. This is not a thought exercise: the lack of a common currency is contributing to ongoing stock decline and all states and sectors will bear the negative consequences.

We urge the Secretary to implement the necessary data calibration concurrently with the framework action to increase the OFL and ABC for all sectors. The Gulf Council has had ample time to fix this legal deficiency and has failed to do so; further delay is improper. We also recommend the Gulf Council begin drafting an FMP amendment to revise the current private angler state allocations that incorporates the existing calibration ratios to ensure a fair and equitable allocation of fish to each state.



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⁴⁶ See *Guindon*, 31 F. Supp. 3d at 201 ("NMFS essentially guaranteed that the actual catch allocation would skew widely from the 51/49 allocation, as indeed it did. This violated Section 304(b).").

⁴⁷ *Guindon*, 31 F. Supp. 3d at 201.