UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
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SER 24:SB

MAY 14 2013

Mr. Doug Boyd, Chairman
Gulf of Mexico Fishery Management Council
2203 North Lois Avenue, Suite 1100
Tampa, Florida 33607

Dear Mr. Boyd:

Thank you for your letter of April 25, 2013, requesting that the recently published emergency rule (78 FR 17882) be rescinded. The emergency rule provides NOAA Fisheries the authority to close federal waters to red snapper fishing on a state-by-state basis. The emergency rule was requested by the Gulf of Mexico Fishery Management Council (Council) at its February 2013 meeting, being approved by a vote of 10 to 7.

Your letter begins by stating that at the time of the Council's request, the impact of this rule on the federal recreational red snapper season was unknown, and that the short federal seasons off each state were subsequently calculated and made public. Your letter goes on to indicate that the Council is now concerned that the differential seasons are socially and economically disruptive, and in violation of national standard 4 (NS4) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

NOAA Fisheries disagrees that the Council was unaware that the federal recreational red snapper season would be shorter if states enacted less restrictive seasons in their state waters. NOAA Fisheries provided preliminary estimates of federal seasons at the October 2012 Council meeting. This presentation[1] indicated that certain states would have substantially reduced federal seasons under certain scenarios, including zero days open in federal waters.[2] A similar presentation[3] was made to the Reef Fish Committee (Committee) during its special January 2013 meeting. The presentation indicated that the federal season could be as short as two weeks,[4] which prompted the discussion that led the Committee to recommend the emergency rule. In addition, when the Council was considering the emergency rule, NOAA Fisheries advised the Council that the federal season off Texas could be as short as 11 days and Louisiana's federal season could be as short as 1-2 weeks.[5] Discussions of shortened seasons by other Council members occurred as well, during the overall deliberations.[6] Thus, the rationale in your letter that the shortened seasons constitute recent and unforeseen information is not supported in the record. In fact, the discussions and conclusions regarding the emergency rule, at both the

[1] Tab B Number 13 in the October 2012 Council briefing book.
[2] Pages 107-108 of the October 2102 Council minutes and pages 91-98 in the October 2012 Reef Fish Committee Report.
[3] Tab SP Number 3(b) in the January Reef Fish Committee briefing book.
[4] Pages 22-28 in the January 2013 Reef Fish Committee Report.
[5] Pages 167-168 and 185-186 of the February 2013 Council meeting minutes.
[6] Pages 170, 175, 177, 196 and 198, among others, of the February 2013 Council meeting minutes.

Committee and Council level, were driven by the Committee's and Council's understanding that the recreational red snapper season would be shorter because of states with less restrictive regulations, and that federal seasons off those states should be shorter than federal seasons off states with consistent regulations.

The February 14, 2013, request from the Council for the emergency rule now sought to be eliminated stated *"[t]he Council feels that [the status quo] is not fair or equitable to the fishermen from states that are compliant, in violation of National Standard 4 [NS4]."* This rationale was included in the *Federal Register* notice for the emergency rule,[7] and in the supporting documentation and analyses for the rule. Your most recent letter contains a complete reversal from this prior position.

NOAA Fisheries disagrees with the Council's more recent determination that the emergency rule is in violation of NS4 by discriminating between residents of different states, leading to greater social and economic disruptions for for-hire vessels fishing off states with consistent regulations. NOAA Fisheries agreed with the Council's original assertion in their February 14 letter that, without the emergency rule, residents of different states would receive unequal overall benefits from a uniform federal recreational red snapper season. Without the emergency rule authority to adjust recreational fishing seasons off individual states, anglers fishing off states with less restrictive regulations would receive the benefits of additional overall fishing opportunities (state and federal waters), whereas anglers fishing off states with consistent regulations would be adversely affected with reduced overall fishing opportunities (state and federal waters). The emergency rule provides a mechanism to allow a more proportional overall harvesting opportunity among the states. Council deliberations[8] readily reflect the Council was certainly aware of this issue, and that their discussions regarding the request for an emergency rule were considered in that context, and were the basis for their final determination to request the emergency rule. NOAA Fisheries fails to see how this same issue is now considered recent and unforeseen information subsequent to the publication of the emergency rule, and the basis for a reversal of a decision based on the same information.

The rationale provided in the letter also alludes to the rule that requires for-hire vessels to abide by federal regulations, whether fishing in state or federal waters. Your letter suggests this puts an unfair burden on for-hire vessels and their customers that is not placed on anglers who fish from private vessels. The rule,[9] at 50 CFR 622.20(b)(3), is commonly referred to as the 30B rule, as it was an action in Amendment to the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico. It was first effective for the recreational red snapper fishing season of 2009; thus, the effects of the 30B rule are not recent and unforeseen.[10] The rule has been in effect for four consecutive fishing years, and its expected effects were extensively evaluated in Amendment 30B and the associated rulemaking, and its resultant effects over the last four years are discussed throughout the Council's deliberations at the February 2013 meeting.

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[7] 78 FR 17883 (March 25, 2013).
[8] Pages 170-177 of the February 2013 Council minutes.
[9] 74 FR 17603 (April 16, 2009).
[10] Page 196 of the February 2013 Council minutes.

Your letter suggests that the 30B rule, which prohibits harvest by for-hire vessels while allowing harvest by private anglers, would result in the re-allocation of harvest from one component of the recreational sector to the other. Should the Council ever decide to allocate harvest between these two components of the recreational sector, this shift would affect the historical harvest often used to support resource allocations. Harvest patterns among various components of fisheries shift over time, due to interest or regulations. Currently, there is no allocation of harvest between these two components of the recreational sector, and while existing regulations may affect the resulting distribution of harvest since 2009, there is no explicit allocation, and therefore, nothing to re-allocate. In addition, should the Council decide to create a specific allocation of harvest between these components of the recreational sector, it would be required to consider these issues in establishing a fair and equitable allocation, in accordance with national standard 4.

Your letter concludes with three possible options to rescind the existing emergency rule: (1) another emergency action, (2) correction of an erroneous rule, and (3) non-implementation.

Your letter suggests there is recent and unforeseen information that would justify a second emergency rule, yet the record identified above does not support that conclusion. Further, the letter does not provide any additional rationale contrary to what was provided for the initial emergency rule. NOAA Fisheries has concluded that a compelling rationale is necessary to now support a second emergency rule completely contrary to the rule just promulgated.

As to the second suggestion that NOAA Fisheries correct an erroneous rule, NOAA Fisheries disagrees that the emergency rule was published erroneously. Your letter suggests the Finding of No Significant Impact in the Environmental Assessment (EA) is incorrect in regard to addressing criteria 7 and 8. Your letter suggests the EA did not consider the differential impacts to for-hire sectors of different states. NOAA Fisheries agrees the EA did not consider impacts of the 30B rule implemented and in effect since 2009; those effects were analyzed in Amendment 30B. It appears the Council has misinterpreted the criterion 7 question, which asks: "*Are significant social or economic impacts interrelated with natural or physical environmental effects*?" NOAA Fisheries agrees with the Council conclusion that there may be differing effects on various segments of the recreational sector; however, this question is asking if there will be social and economic impacts because of some change to the natural or physical environment that is expected to occur from the implementation of the rulemaking. The answer to that question is "no"; the rule does not change the overall way fishing is conducted nor the amount of fish caught, only the distribution of that harvest. It should be noted that the response to criterion 7 did acknowledge the following: "*These effects cannot be quantified because the incidence (which states may adopt inconsistent regulations) or magnitude of regulatory inconsistency (how the regulations may differ) is unknown.*" At the time the Council voted to request the emergency rule on February 8, 2013, and while the EA was completed, it was unknown if Louisiana and Florida would actually establish less restrictive regulations. Louisiana announced their notice of intent to set their season on February 20, 2013, and Florida informed the Council of their recreational red snapper season selection at the April 2013 Council meeting. Nevertheless, the criterion 7 conclusion noted that fishermen off non-consistent states would receive additional benefits while fishing their extended state waters season, but would not receive as much benefit as fishermen in consistent states in regard to their federal fishing season. Similarly, the Council has apparently misinterpreted the intent of criterion 8, which asks: "*Are the effects on the quality*

of the human environment likely to be highly controversial?" NOAA Fisheries agrees that many actions proposed by the Council and implemented by NOAA Fisheries are controversial with the public because the actions, which are intended to benefit the resource, may not be favorable to the public. This question is asking if the effects are controversial because of the degree or nature of the potential effects. The answer to that question is "no"; the analyses used in the EA is based on the best available science, and the effects are intended to be equally distributed across the recreational sector.

Finally, in regard to the third option suggested, non-implementation, NOAA Fisheries agrees the regulatory language provides the Regional Administrator with the option to implement state-specific recreational red snapper fishing seasons or a Gulf of Mexico-wide federal waters recreational red snapper fishing season. In accordance with Section 407(d) (16 U.S.C §1883) of the Magnuson-Stevens Act, and in accordance with regulations at 50 CFR 622.8(b), NOAA Fisheries is required to prohibit the recreational harvest of red snapper when the established recreational quota is met. The emergency rule is only providing authority to close federal waters off a specific state if its inconsistent regulations result in harvest in excess of what would be harvested pursuant to consistent regulations. However, as noted above, NOAA Fisheries has determined that not implementing state-specific seasons would be inconsistent with NS4. Without the emergency rule, anglers aboard for-hire and private vessels, who are fishing off states with less restrictive recreational red snapper regulations, would be allowed to harvest a disproportionate share of the recreational red snapper quota compared to the historical proportion of landings in those states, while anglers fishing off states with consistent regulations would be unnecessarily restricted.

In summary, NOAA Fisheries finds the Council's request to remove the current emergency rule, which provides the Regional Administrator the authority to adjust recreational red snapper fishing seasons in federal waters off individual states, is not warranted. The Council has failed to provide sufficient and compelling reason for its request to reverse its previous decision.

Sincerely,

Roy E. Crabtree, Ph.D.
Regional Administrator