

Fifth Circuit Upholds Dismissal of Private Angler Challenge to Amendment 40

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Red snapper management in the Gulf of Mexico has been controversial for over 30 years. Tensions have risen so high at times that it can seem as if there is practically a war between the commercial sector and recreational fishermen. Adding fuel to the fire is a new amendment to the fishery management plan governing red snapper harvest in the Gulf of Mexico. In 2013, the Gulf of Mexico Fishery Management Council (Gulf Council) proposed, through Amendment 40, the division of the recreational sector of the red snapper fishery into two components, one for charter boats operating in federal waters and one for private anglers. The Coastal Conservation Association (CCA), a group representing private anglers, challenged National Oceanic and Atmospheric Administration (NOAA) regulations implementing Amendment 40. In January, the Fifth Circuit Court of Appeals upheld the dismissal of the lawsuit by a Louisiana district court.

Background

The Magnuson-Stevens Conservation and Management Act of 1976 (MSA) is the primary federal authority governing fishing in U.S. waters. The goal of the MSA is the conservation and protection of fish populations from multiple threats including overfishing. The MSA established eight Regional Fishery Management Councils to develop fishery management plans for stocks under their respective authorities. The Gulf Council manages red snapper stocks through the Reef Fish Fishery Management Plan (FMP).



Photo of a red snapper; courtesy of Jon Connell.

Prior to Amendment 40, red snapper fishing quotas were divided into two categories: commercial and recreational anglers, which included both charter boats and private anglers. The recreational sector has exceeded its allocated quota almost every year since 1991. The Gulf Council had traditionally responded to these overages by shortening the recreational season.

The Gulf Council only has management authority over federal waters. States exercise independent fisheries management jurisdiction in state waters. As the Gulf

Council shorted the season in federal waters, the five Gulf states lengthened the season in state waters. In 2014, the fishing season for red snapper in federal waters was nine days. The red snapper seasons in state waters ranged from 21 days in Alabama and Mississippi to almost year-round in Louisiana (286 days). In Texas, the red snapper seasons never closed. The fishery was open for 365 days.

NOAA regulations require federally licensed charter boats operating in the Gulf of Mexico reef fishery to comply with the more restrictive federal regulations regardless of where the fish are harvested. Charter boat operators are therefore unable to take advantage of the longer seasons in state waters. The charter boat industry is further limited by a moratorium on the issuance of new charter vessel permits for the fishery that has been in place since 2003. Although there are bag limits for private anglers, there is no restriction on the number of anglers that may fish from private recreational boats. Critics of the current management regime argue that it unfairly benefits private anglers at the expense of the charter industry.

Amendment 40 was the Gulf Council's attempt to address the disparities that had arisen within the recreational sector and provide a mechanism for developing management regimes tailored to the individual components. Amendment 40 breaks the recreational sector into two components: federal charter boats and private anglers. Amendment 40 allocates the red snapper recreational quota between these two sectors and establishes separate season closure provisions for the 2015, 2016, and 2017 seasons.

CCA's Challenge

The CCA filed a lawsuit challenging the regulations issued by NOAA to implement Amendment 40. In January 2016, the U.S. District Court for the Eastern District of Louisiana granted NOAA's motion for summary judgment and dismissed the case. The CCA appealed. On appeal, the CCA asserted that Amendment 40 was improper for three reasons. First, the CCA argued that the MSA prohibits the Gulf Council from regulating charter fishing separately from other recreational fishing. Second, the CCA asserted that the Gulf Council and NOAA failed to adequately assess the economic and

Photo of a red snapper; courtesy of Daniel Kwok.



social effects of Amendment 40 as required by the MSA. Finally, the CCA claimed the date ranges used to calculate quota allocations was arbitrary and capricious.

Section 407 of the MSA mandates that any fishery management plan for red snapper must “establish separate quotas for recreational fishing (which for the purposes of this subsection shall include charter fishing ... and commercial fishing...)”¹ The CCA claims this provision prohibits the Gulf Council from establishing separate quotas for charter boats and private anglers. The Fifth Circuit disagreed. According to the court, Amendment 40 established a sub-quota for charter fishing within the recreational sector – not a separate quota. The court found no language within § 407 that would prohibit the subdivision of recreational and commercial quotas.

Fishery management plans and all subsequent amendments to those plans must comply with ten national standards set forth in the MSA.² National Standard Eight requires regional fishery management councils to “take into account the importance of fishery resources to fishing communities by utilizing economic and social data.”³ In addition, FMPs must include a fishery impact statement that assesses the economic and social impacts of the proposed conservation and management measures on the participants of the fishery.⁴

The CCA argued that these provisions “impose an affirmative duty to collect and generate only quantitative, rather than qualitative, predictions of economic and social effects” and that the Gulf Council and NOAA failed to produce such data.⁵ The court disagreed. First, the court found no evidence that Congress intended to limit the analysis to quantitative data. Furthermore, National Standard 2 only requires that fishery conservation and management measures be “based upon the best scientific information *available*.”⁶ NOAA and the regional councils are not required to produce quantitative data beyond that which is currently available.

Finally, the CCA argued that the Gulf Council’s decision to allocate quotas based, in part, on historic catch data from as early as 1986 was arbitrary and capricious. The CCA asserted that the historic data did not reflect the “dramatic shift” in the red snapper recreational fishery away from charter boats to private angling. In developing Amendment 40, the Gulf Council

considered a number of alternative data sets covering different periods of time. The Gulf Council ultimately relied on two sets of data – one covering 2006-2013 and one covering 1986-2013 – determining that the use of both historic and more recent harvest information was necessary to achieve a fair and equitable allocation. The Fifth Circuit found that the record provided a rational justification for these decisions.

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Conclusion

Although the Fifth Circuit’s ruling is a victory for the Gulf Council, it is unlikely to end the red snapper management controversies in the Gulf of Mexico. Amendment 40 will sunset after the 2017 fishing season unless the Gulf Council takes action to extend the provisions. If history is any indication, the path forward for 2018 and beyond will be fraught with controversy. 🐟

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Endnotes

1. 16 U.S.C. § 1883(d).
2. *See id.* § 1851(a).
3. *Id.* § 1851(a)(8).
4. *Id.* § 1853(a)(9).
5. *Coastal Conservation Association v. U.S. Department of Commerce*, 846 F.3d 99, 108-9 (5th Cir. 2017).
6. 16 U.S.C. § 1851(a)(2) (emphasis added).