

DETERMINING AUTHORITY WITHOUT OWNERSHIP: AN ASSESSMENT OF THE RED SNAPPER CONTROVERSY IN THE GULF OF MEXICO

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I. INTRODUCTION

The management of red snapper fishing, particularly in the Gulf of Mexico, has been one of the most controversial issues in fishery management in the United States for decades.¹ The Magnuson-Stevens Act (“the MSA”) empowered the federal government to manage fisheries across the country with a key focus on conservation in order to facilitate long-term maintenance of what the MSA recognizes as a “valuable and renewable” natural resource.²

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1. Ledyard King, *Red Snapper: Unusual Experiment in Gulf of Mexico May Ripple Nationwide*, USA TODAY (Aug. 8, 2018, 12:50 PM), <https://www.usatoday.com/story/news/politics/2018/08/08/red-snapper-gulf-mexico-being-managed-unusual-pilot-program/916582002/>.

2. 16 U.S.C. § 1801 (2007).

However, the efforts to rebuild a once-devastated red snapper stock have led to extreme divisiveness between the state and federal marine management agencies, and between commercial and recreational fishermen.

Since 2018, the red snapper has not been considered an overfished species. Nevertheless, continued regulation is necessary to save the stock from relapsing, since the population is not yet considered rebuilt.³ While this may seem counterintuitive, the rebuilding goal is based not only on the total number of fish, but on the spawning potential of the population in the fishery.⁴ The Gulf red snapper spawning potential target is 26%.⁵ At this spawning level, the entire population would be laying approximately one fourth of the number of eggs a completely unfished population would lay.⁶ Although the total number of fish has increased to a level that is no longer considered overfished, there remains a disproportionate number of young fish, compared to older fish, that produce more eggs.⁷ The regulations are designed to increase the total population, and to create a mix of different ages, rather than only taking into account the level of fishing taking place.⁸ The debate continues about who is best equipped to manage those regulations, and many disagree that there is even still a need for rebuilding efforts.⁹

Section II of this paper will review the background of fishery management in the United States, discussing the historical interplay between state and federal powers vying for control of submerged lands and natural resources. This section will also discuss the role of fishery management councils and the tools they use to fulfill their statutory duties under the MSA to oversee federal fishery management. This paper will then review the ongoing controversy of the Gulf red snapper fishery specifically, discussing challenges the federal management system has faced, and introducing the arguments for increased state control. The final substantive section will discuss measures being taken to

3. *SEDAR 52 Gulf of Mexico Red Snapper 1-page Summary*, SEDAR (2018), <http://sedarweb.org/docs/postsedar/RS%20Summary.pdf>.

4. *Status of Red Snapper: How has the health of the red snapper changed over time?*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/history-management-gulf-mexico-red-snapper#status-of-red-snapper:-how-has-the-health-of-the-red-snapper-population-changed-over-time?> (last updated Mar. 5, 2019).

5. *Id.*

6. *Id.*

7. *History of Management of Gulf of Mexico Red Snapper*, NOAA FISHERIES <https://www.fisheries.noaa.gov/history-management-gulf-mexico-red-snapper> (last updated Mar. 5, 2019).

8. *Id.*

9. King, *supra* note 1.

reconcile the differences between state and federal management; to address the concerns of red snapper fishermen; and to propose solutions to alleviate these issues.

II. BACKGROUND AND HISTORICAL OVERVIEW

Individual states have always had an important interest in managing their coastal lands and fishery resources.¹⁰ However, the extent of a state's ability to control access to those resources, to the exclusion of federal management measures, has been less well-defined.¹¹ In *McCready v. Virginia*, the Supreme Court held that citizens of a state collectively own the waters, and the fish in them, off a state's coast.¹² This ownership rationale was often used to defend state regulations that favored the fishing rights of in-state residents.¹³ Nearly twenty years later, the Court maintained that states had authority over fisheries, unless Congress declared an affirmative right of control through legislation.¹⁴

However, the Supreme Court has also consistently recognized instances where state regulations impermissibly infringe on areas of federal jurisdiction.¹⁵ The federal government, supported by the Supreme Court, has successfully staked out claims to marginal seas and the underlying resources as a national issue on the theories of commerce and national defense.¹⁶ Although these cases have been primarily in relation to oil rights, they add an element of imprecision to the boundary between state and federal authority in the management of coastal resources. The debate continues over who has the ultimate authority to regulate fishing in coastal waters.

A. Submerged Lands Act

In 1953, Congress enacted the Submerged Lands Act in an attempt to clarify the issue. Under this act, the federal government "releases and relinquishes unto said States . . . all right, title, and

10. ALISON RIESER ET AL., OCEAN AND COASTAL LAW 571–72 (W. Acad. Publ'g ed., 4th ed. 2013).

11. *Id.*

12. *McCready v. Virginia*, 94 U.S. 391, 394 (1876).

13. RIESER ET AL., *supra* note 10, at 572.

14. *Manchester v. Massachusetts*, 139 U.S. 240, 262 (1891).

15. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1942); *Toomer v. Witsell*, 334 U.S. 410 (1948).

16. *United States v. California*, 332 U.S. 19, 38 (1947); *United States v. Louisiana*, 339 U.S. 699, 704 (1950).

interest of the United States, if any it has, in and to all said lands, improvements, and natural resources.”¹⁷ States were given control of all coastal lands and submerged resources up to the seaward boundaries recognized the time it entered the union, effectively awarding control of the nation’s coastal waters and underlying resources to state authority.¹⁸ Specifically, the Submerged Lands Act defined these boundaries in the Atlantic and Pacific Oceans as extending not more than three miles offshore, and, in the Gulf of Mexico, not more than three marine leagues (nine miles) offshore.¹⁹ This provision allowed Texas and Florida to claim nine miles of state controlled waters into the Gulf of Mexico.²⁰

States saw the Submerged Lands Act as a victory, reasserting their rights in the face of federal attempts to gain control of marginal waters and coastal resources.²¹ President Eisenhower seemed to support this view, stating when he signed the Act that he would “always resist federal encroachment upon the rights and affairs of the States.”²² Despite the President’s statement, the federal government argued that the legislation merely granted a small amount of authority back to the states, leaving most of the control with the federal government.²³

Just four years later, in *Corsa v. Tawes*, a United States District Court interpreted the Submerged Lands Act in favor of a states’ right to regulate fishing, stating that “Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit in the Submerged Lands Act of 1953.”²⁴

B. The Magnuson – Stevens Act

1. Fishery Conservation and Management Act of 1976

The Fishery Conservation and Management Act of 1976 (“FCMA”), which later became the Magnuson-Stevens Act, established the exclusive economic zone (“EEZ”) to address

17. Submerged Lands Act, 43 U.S.C. § 1311(b) (1953).

18. 43 U.S.C. §§ 1301(a)(1), (b), 1311(b).

19. 43 U.S.C. § 1301(b).

20. RIESER ET AL., *supra* note 10, at 86; *United States v. Florida*, 363 U.S. 121, 129 (1960).

21. RIESER ET AL., *supra* note 10.

22. *Id.* at 83.

23. *Id.* at 86.

24. *Corsa v. Tawes*, 149 F. Supp. 771, 773 (D. Md. 1957).

concerns about foreign fishing.²⁵ The EEZ began at the boundary of state-controlled waters (either three or nine miles) and extended to 200 miles offshore.²⁶ This first iteration of the Act also created regional fishery councils that were charged with the management of living marine resources within each council's respective region.²⁷ Eight fishery management councils ("Councils") were established by geographic region and remain in place today: Pacific, Western Pacific, Mid-Atlantic, South Atlantic, Caribbean, Gulf of Mexico, New England, and North Pacific.²⁸ The Councils were tasked with the creation of fishery management plans ("FMPs") for each fishery within their regions.²⁹ Although these FMPs were required to include conservation and management measures, those measures were primarily to be focused on maintaining the fishery at levels sustainable for extensive fishing by both foreign and domestic vessels.³⁰ The original FCMA implemented seven national standards to serve as guidelines for the Councils when formulating FMPs.³¹ Three additional standards would later be added in the 1996 amendments.³² 1

The FCMA also discussed the division of authority between state and federal management, although in somewhat imprecise terms. Section 306 made clear that this piece of legislation was not meant to reduce the authority of any state within its coastal boundaries, and that a state had no authority over vessels outside its boundaries, unless the vessel was properly registered under the laws of that state.³³ This caveat allowing states to assert some control over vessels outside their geographic boundaries alluded to Congress's intent not to strictly limit state control to the borders established in the Submerged Lands Act.³⁴

One year after Congress enacted the FCMA, the Supreme Court narrowed the understanding of the Submerged Lands Act in *Douglas v. Seacoast Prods., Inc.*³⁵ The Court declared that Congress's right to preempt state law under the Commerce Clause

25. RIESER ET AL., *supra* note 10, at 571; Fishery Conservation and Management Act, 16 U.S.C. § 1801(a)(3) (1976).

26. *Maritime Zones and Boundaries*, NOAA OFFICE OF THE GENERAL COUNSEL (last updated Mar. 1, 2019), https://www.gc.noaa.gov/gcil_maritime.html.

27. *Id.* § 1852(a).

28. *Id.*

29. *Id.* § 1852(h).

30. *Id.* § 1853.

31. *Id.* § 1851.

32. Sustainable Fisheries Act, 16 U.S.C. § 1851 (1996).

33. 16 U.S.C. § 1856(a).

34. RIESER ET AL., *supra* note 10, at 597.

35. 431 U.S. 265 (1977).

was not diminished by the Act, and therefore Congress had the right to regulate fishing in state waters.³⁶ It also dispelled the idea of ownership established in *McCready* as being “pure fantasy,” stating that neither state nor federal government owned wild fish, birds, or animals prior to their capture.³⁷ With this case, the Court seemed to award ultimate authority over fisheries to federal control.

The back-and-forth understanding of the extent of states’ authority to control fishing regulations continued in the courts, prompting the amendment of the FCMA in 1996. Leading up to these changes, the United States Court of Appeals for the First Circuit rejected a preemption claim in *Davrod Corp. v. Coates*, stating that the Magnuson Act (formerly the FCMA)³⁸ expressly authorized Massachusetts’ regulatory power in the state waters of the Nantucket and Vineyard Sounds.³⁹ Later that same year, the Eleventh Circuit Court of Appeals interpreted the Magnuson Act as giving exclusive control over fishery management beyond state boundaries to the federal government, despite the language in section 306 which suggests a state may retain some regulatory control outside its boundaries if a vessel is licensed in that state.⁴⁰ There was still respect for state management within the coastal boundaries established in the Submerged Lands Act, but how far beyond those boundaries a state might exercise control remained unclear.

2. 1996 Sustainable Fisheries Act

In 1996, the newly renamed the Magnuson-Stevens Act⁴¹ was amended to include several changes to federal efforts to conserve fishery resources under the Sustainable Fisheries Act.⁴²

Congress recognized that revisions to the Magnuson-Stevens act were “critical to put our fisheries back onto a sustainable path and literally avert an environmental catastrophe on a national level . . . We are precariously close to fisheries failures in many of our most commercially important fish stocks, and it is imperative

36. *Id.* at 281–284.

37. *Id.* at 284.

38. The FCMA was renamed the Magnuson Act in 1980. RIESER ET AL., *supra* note 10, at 610.

39. *Davrod Corp. v. Coates*, 971 F.2d 778, 791 (1st Cir.1992).

40. *Southeastern Fisheries Ass’n v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992); 16 U.S.C. § 1856(a) (1976).

41. RIESER ET AL., *supra* note 10, at 610.

42. *See generally* Sustainable Fisheries Act, 16 U.S.C. §§ 1801-1882 (1996).

that we take immediate action if we are to avert disasters.”⁴³ Of the new provisions, some of the most relevant to the red snapper fishery and surrounding controversy were the requirements that management and conservation standards allow for the participation of fishery-dependent communities and work to minimize the economic impact on such communities; that the Secretary of Commerce take actions to identify overfished species and take action to rebuild those stocks; and the mandate to study fishery management and conservation as well as the economic and social features of fisheries.⁴⁴ The provision to study and account for the impact on fishing communities came from the newly added eighth national standard.⁴⁵ These amendments refocused the MSA from its original goal of protection for the domestic commercial fishing industry against foreign competition toward conservation and protection of fisheries for long-term sustainability of the species and the industry.⁴⁶

Key to this newly articulated goal were stricter requirements for FMPs for species identified as overfished or in need of conservation.⁴⁷ Whereas in the original enactment, a FMP was only broadly intended to maintain each fishery at a level to produce the optimum yield,⁴⁸ in the 1996 Sustainable Fisheries Act a FMP was now required to include specific and objective criteria for identifying overfished species, and to establish measures to be taken toward rebuilding efforts.⁴⁹

The 1996 amendments also clarified section 306, explicitly granting state control of fishing vessels beyond the boundaries of state waters under certain circumstances, such as when a vessel is registered under state laws and there are no applicable federal regulations for the fishery, or when the state laws are consistent with the goals of an FMP.⁵⁰ The amended provision also provides that an FMP may delegate management of a fishery to a state.⁵¹ The language includes several indications that states were meant to retain a certain level of authority in federal waters under the

43. *A.M.L Int'l, Inc. v. Daley*, 107 F. Supp. 2d 90, 93–94 (D. Mass. 2000) (internal quotations omitted).

44. Sustainable Fisheries Act, 16 U.S.C. § 1851 (1996); DIGEST OF FEDERAL RESOURCE LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERVICE, <https://www.fws.gov/laws/lawsdigest/fishcon.html> (last visited July 6, 2020).

45. *Id.* § 1851(a)(8).

46. RIESER ET AL., *supra* note 10, at 616–17.

47. *Compare* Fishery Management and Conservation Act, 16 U.S.C. § 1853(a) (1976) and 16 U.S.C. § 1853(a) (1996).

48. 16 U.S.C. § 1801(b)(4) (1976).

49. 16 U.S.C. § 1853(a)(10) (1996).

50. 16 U.S.C. § 1856(a) (1996).

51. *Id.* § 1856(a)(3)(B).

amended act, as long as state management did not conflict with federal regulations. Section 306 begins with the assertion from the original FCMA that, with limited exceptions, nothing in the Act limits or restricts a state's authority within its coastal boundaries.⁵² The amended version of the Act also explicitly carved out a place for state management in federal waters. By including a provision that "[a] State may regulate a fishing vessel outside the boundaries of the State in the following circumstances," Congress made clear that it intended for states to retain an important role in fishery regulation, and would only be ousted by federal regulations in the event of conflicting management strategies.⁵³ Congress seemed to envision state and federal regulations working together to regulate fisheries with a view toward long-term sustainability.

3. 2006 Amendments

The MSA was amended again in 2006 with another push toward sustainability.⁵⁴ In this latest reform, the MSA required annual catch limits to be set for almost all species under the control of the eight Councils.⁵⁵ It also mandated a greater scientific role in the decision-making processes of each Council and called for an immediate end to overfishing, with efforts put in place to replenish depleted stocks.⁵⁶

It has been over a decade since the most recent amendments to the MSA were passed and many feel it is time for another reauthorization.⁵⁷ The movement to update the Act includes a focus on increasing state control and the use of state-gathered data to supplement federal monitoring techniques in response to the continued controversy.⁵⁸

52. *Id.* § 1856(a)(1).

53. RIESER ET AL., *supra* note 10, at 579.

54. *Id.* at 610.

55. DONALD C. BAUR ET AL., OCEAN AND COASTAL LAW AND POLICY 310 (2d ed. 2015); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1853(a)(15) (2006).

56. BAUR ET AL., *supra* note 55, at 310.

57. *Debate Continues Over Magnuson-Stevens Act Reauthorization*, CONSORTIUM FOR OCEAN LEADERSHIP (Oct. 2, 2017), <https://oceanleadership.org/debate-continues-magnuson-stevens-act-reauthorization/>.

58. *Id.*

C. The Parts and Parties Involved

1. Fishery Management Councils and Fishery Management Plans

The Gulf of Mexico Fishery Management Council (“Gulf Council” or “the Council”) is the regional management council under the MSA charged with the maintenance of living resources, including red snapper, in the body of water off the southern United States bordered by Florida, Alabama, Louisiana, Mississippi, and Texas.⁵⁹ Under the MSA, a Council is required to implement an FMP that must be approved by the Secretary of Commerce when it deems a fishery to be in need of “conservation and management.”⁶⁰ The FMPs contemplate issues such as acceptable fishing gear, season lengths, and catch limits for federal waters in each of the eight defined regions.⁶¹

The Councils meet approximately four times per year and vary in size by the number of states or territories associated with the region.⁶² Each Council has members from state and federal agencies, as well as citizen members who are nominated by the governor of each coastal state and appointed by the Secretary of Commerce.⁶³ Each Council is also required to have two advisory committees: a scientific and statistical committee and a fishing industry advisory committee.⁶⁴ The purpose of the former is to “assist it in the development, collection, evaluation and peer review of . . . such statistical, biological, economic, social and other scientific information as is relevant,” while the latter is more broadly tasked with providing recommendations and aiding in developing and amending of FMPs.⁶⁵

Councils are responsible for determining which fisheries within their jurisdiction need conservation measures, and thus which fisheries require management plans.⁶⁶ The Councils have discretion in making this initial designation, but once a fishery has been labeled as needing management, an FMP must be developed.⁶⁷

59. 16 U.S.C. § 1852(a)(1)(E) (2020).

60. *Id.* § 1852(h).

61. *Id.* § 1853.

62. BAUR ET AL., *supra* note 55, at 307–08.

63. 16 U.S.C. § 1852(b).

64. *Id.* § 1852(g)(1), (3).

65. *Id.*

66. *Id.* § 1852(h)(1).

67. *Id.*

While each FMP is unique to the fishery it aims to protect and leaves the managing Council plenty of room for discretionary measures, there are certain mandatory elements for each plan.⁶⁸ The plans must include an economic analysis of the types of fishing that take place (for example, recreational or commercial), the number of vessels, and the actual and potential revenues of the fishery.⁶⁹ An FMP must also include the species within a fishery, and it must identify any areas that might be designated as essential fish habitat (“EFH”).⁷⁰ Along with any identified EFH, the FMP must outline steps that can be taken to conserve these areas.⁷¹

An FMP must also contain the Council’s objectives for the fishery, what standards will be used to measure whether those objectives are met, and a scientific basis for declaring a species overfished.⁷²

Additionally, an FMP may impose catch limits, require permits, designate seasons and zones appropriate for fishing, prohibit certain types of gear, implement catch-share programs, and take other measures at the council’s discretion.⁷³ Catch share programs are some of the main devices an FMP will implement to allocate portions of the total allowable catch within a fishery.⁷⁴ Although these catch-shares may take several forms, individual fishing quotas are used to manage the Gulf of Mexico and several other regions.⁷⁵ The Councils work with the National Marine Fisheries Service (“NMFS”) to assess stocks, set limits, and ensure FMP compliance.⁷⁶ The Councils and NMFS use the Southeast Data, Assessment, and Review (“SEDAR”) to assess the status of a particular species.⁷⁷

2. NOAA/ NMFS

The National Oceanic and Atmospheric Administration (“NOAA”) is a branch of the Department of Commerce and is

68. *Id.* § 1853(a).

69. *Id.* § 1853(a)(2), (5).

70. *Id.* § 1853(a)(2), (7).

71. *Id.* § 1853(a)(7).

72. *Id.* § 1853(a)(10).

73. *Id.* § 1853(b).

74. BAUR ET AL., *supra* note 55, at 311.

75. *2017 and 2018 Gulf of Mexico Commercial Landings*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/southeast/southeast-region-annual-catch-limit-acl-monitoring> (last updated Dec. 10, 2018).

76. *About Us*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/about-us> (last visited Feb. 27, 2020).

77. SEDAR, <http://sedarweb.org/> (last visited Feb. 27, 2020).

responsible for ultimate supervision of the Councils.⁷⁸ As such, all Councils and FMPs are subject to oversight by the head of the department, the Secretary of Commerce.⁷⁹

NMFS oversees in the implementation and enforcement of FMPs.⁸⁰ As a branch of NOAA, it may also, under the Secretary's authority, take over fishery management in the event that a regional council fails to implement or revise a required FMP when required by the MSA.⁸¹

III. NATURE OF THE CONTROVERSY AND THE NEED FOR REFORM

In 1997, the Gulf Council used quotas to manage both the commercial and recreational sectors of the red snapper fishery for the first time.⁸² From then until 2013 there were only two years that recreational fishermen did not exceed their allocation.⁸³ One of those years, 2010, is attributable to the Deepwater Horizon oil rig explosion off the coast of Texas, which significantly reduced the amount of recreational fishing in the Gulf of Mexico for the year.⁸⁴ Commercial fishermen on the other hand have not exceeded their quota since 2004.⁸⁵

The commercial fishing industry has long been concerned with the continued overages by the recreational sector and the lasting implications of what a depleted population might mean for the industry. If the stock cannot be restored or is not managed in such a way as to maintain long-term sustainability, the commercial sector will lose its source of income.⁸⁶ This dissatisfaction came to a head in 2014, in the wake of a particularly controversial management decision.⁸⁷

In *Guindon v. Pritzker*, commercial fishermen sued NMFS under the MSA, the Administrative Procedure Act, and the National Environmental Policy Act, arguing, among other things, that by extending the 2013 recreational fishing season,

78. *About Us*, *supra* note 76.

79. *Id.*; 16 U.S.C. § 1852(a)(3).

80. *About Us*, *supra* note 76.

81. BAUR ET AL., *supra* note 55, at 309; 16 U.S.C. § 1854(c)(1) (2019).

82. See NAT'L OCEANIC & ATMOSPHERIC INST. AWARD NO. NA10NMF4410011, FRAMEWORK ACTION TO THE FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO INCLUDING DRAFT ENVIRONMENTAL ASSESSMENT, REGULATORY IMPACT REVIEW, AND REGULATORY FLEXIBILITY ACT ANALYSIS (2015).

83. *Id.*

84. See *id.* at 10.

85. *Id.* at 9.

86. *Id.*

87. See *Guindon v. Pritzker*, 31 F. Supp. 3d 169 (D.D.C. 2014).

the agency was violating its mandates under the MSA to use the best available science and to act in a manner consistent with conservation.⁸⁸

In 2013, NMFS set the total Gulf red snapper quota for both the commercial and recreational sectors at 8.69 million pounds (“mp”).⁸⁹ The 2012 FMP was explicit that a higher quota should be set only in the case that the 2012 acceptable biological catch (“ABC”)⁹⁰ was not exceeded.⁹¹ Despite going over the ABC in 2012, the Gulf Council increased the quota for 2013.⁹² In making this decision the Council rejected an alternative approach, that it admitted would be more biologically conservative, relying on the fact that it had used ABCs to manage the fishery in the past.⁹³

After reviewing a new stock assessment in May 2013, the Council and NMFS determined that the total quota could be increased to 11mp for 2013 and suggested reopening the recreational season in the fall, contingent on fishing in the summer season not exceeding the newly defined quota.⁹⁴

Before the Council was able to adopt a final rule on the matter, data from the summer season showed that not only had the original quota been exceeded, the new, higher target had been surpassed as well.⁹⁵ This unexpected overage was attributed in part to new sampling methodologies adopted by NMFS during this time.⁹⁶ Because comparing the data from the new sample to the data from the old methods would be too “complicated,” the agency instead chose to act as though the recreational sector caught the anticipated amount for the 2013 summer season.⁹⁷ This assumption was made in the face of the recreational sector’s consistent inability to stay within its quota since the program’s inception,⁹⁸ and the agency’s acknowledgement that the new data was “more accurate and less biased” than data from previous

88. *Id.* at 183–85.

89. *Id.* at 181.

90. Richard K. Wallace & Kristen M. Fletcher, *Understanding Fisheries Management: A Manual for understanding the Federal Fisheries Management Process, Including Analysis of the 1996 Sustainable Fisheries Act*, Miss.-Ala. Sea Grant Consortium, http://sedarweb.org/docs/page/UnderstandFedFishMgmt_2ndEdition_Seagrant96.pdf (last visited Feb. 28, 2020) (defining Acceptable Biological Catch - a term used by a management agency, which refers to the range allowable catch for a species or species group).

91. *Guindon*, 31 F. Supp. 3d at 181.

92. *Id.*

93. *Id.*

94. *Id.* at 182.

95. *Id.* at 183.

96. *Id.*

97. *Id.* at 183–84.

98. NAT’L OCEANIC & ATMOSPHERIC INST., *supra* note 82.

years.⁹⁹ Despite all reason pointing to the contrary, NMFS decided to reopen the season for red snapper fishing for fourteen days in the fall.¹⁰⁰

Commercial fishermen sued NMFS for reopening the season, arguing, among other claims, that reopening the season defied the second national standard of the MSA, which mandates that agencies use the best science available when making fishery management decisions.¹⁰¹ The Court agreed that it was obvious the agency did not use the best available science.¹⁰² Although it conceded that the agency had the discretion to choose between conflicting opinions or competing facts, the Court acknowledged that in this case, the agency was instead choosing to ignore information completely.¹⁰³

The Court also agreed with the plaintiff's claim that NMFS violated the MSA by failing to "[p]rohibit the [r]etention of [f]ish [a]fter the [r]ecreational [q]uota [h]ad [b]een [r]eached. . . ."¹⁰⁴ Under either set of data, the recreational sector exceeded the old and the new quota for 2013 in the summer season, leaving no buffer to justify additional fishing days in the fall.¹⁰⁵

This case exemplifies the ongoing frustrations of the commercial sector with the Gulf Council and NMFS for failing to hold recreational fishermen accountable to specified quotas and for relying on inadequate data.

On the other side of the debate, recreational fishermen are equally unhappy with the Gulf Council's management of the red snapper fishery and are vying for broader state-run fishery programs. Many recreational fishermen report that they have personally observed significant changes in the population and believe that there is no longer a need for limits or short seasons to protect the stock.¹⁰⁶

These fishermen feel that individual states are much better equipped to conduct accurate measurements and manage recreational fishing than the larger federal agencies.¹⁰⁷

99. *Guindon*, 31 F. Supp. 3d at 184.

100. *Id.*

101. *Id.* at 195; 16 U.S.C. § 1851(a)(2).

102. *Guindon*, 31 F. Supp. 3d at 195–96.

103. *Id.* at 195–97.

104. *Id.* at 192.

105. *Id.* at 194.

106. King, *supra* note 1.

107. "We definitely have to get away from the federal government telling us how many fish we can catch . . . We really need the state (managing) and actually doing these research trips. They know how many snapper are out there. When you go out and catch your limit in 10 minutes, there's not a shortage of red snapper." *Id.*

Although the immediate environmentalist reaction tends to be cautionary when considering conservation measures, it would be unfair to view the recreational sector as simply sport fishermen whose hobby can readily be sacrificed for the good of the species. Taking this narrow view would be a failure to evaluate the full implications of recreational quotas. The fishermen concerned with the short seasons and small catch limits are worried not only about the recreational aspect in the traditional sense of enjoyment, but about the economic and social impact on fishing communities, which the Councils are required to take into consideration under the 1996 Sustainable Fisheries Act.¹⁰⁸ Many small businesses in these communities are focused on recreational fishing, including bait and tackle shops, marinas, and for-hire fishing excursions.¹⁰⁹ Because red snapper fishing is so popular among recreational fishermen, much of the business for these small ventures comes from fishing for that particular species, causing concern in many fishing communities about the industry drying up due to inaccurate data showing circumstances grimmer than reality.¹¹⁰

In response to the recreational sector's outcry over the length of the 2017 federal red snapper season, which was the shortest to date at only three days in the month of June, the President extended the season for an additional thirty-nine days.¹¹¹ While this delighted private anglers, the NMFS reports that this decision may have set back the rebuilding process by as many as six years.¹¹² Commercial and charter captains were also frustrated with the extended season, again voicing their concerns over the long-term effects of poor stock management.¹¹³ The President's rash action highlights the importance of bringing the state and federal management systems into alignment to help defuse the tensions between commercial and recreational fishermen.

While for-hire vessels are technically part of the recreational category,¹¹⁴ they operate almost in limbo between the recreational

108. Todd Masson, *2017 Gulf Red Snapper Season Set by Federal Agency*, NOLA (May 2, 2017), https://www.nola.com/sports/article_79ce3526-1e1b-5d2e-a1c9-acb04f51b8ab.html; 16 U.S.C. § 1851(a)(8).

109. Ledyard King & Chris Phillips, *Deal Expanding Recreational Red Snapper Season Panned by Environmentalists*, *Fishing Industry*, USA TODAY (June 15, 2017), <https://www.usatoday.com/story/news/politics/2017/06/15/deal-expanding-recreational-red-snapper-season-panned-environmentalists-charter-industry/401018001/>.

110. Masson, *supra* note 108.

111. See Gov. Scott: *Major Expansion of Federal Red Snapper Season Benefits Entire Gulf Coast*, MADISON FLA. NEWS (June 15, 2017), <http://www.madisonfla.net/blog/gov-scott-major-expansion-federal-red-snapper-season-benefits-entire-gulf-coast/>.

112. King & Phillips, *supra* note 109.

113. *Id.*

114. NAT'L OCEANIC & ATMOSPHERIC INST., FB 18-026, NOAA ANNOUNCES THE 2018 GULF OF MEXICO RED SNAPPER RECREATIONAL SEASONS AND CLARIFIES PERMIT

and the commercial sectors. After all, charter fishing vessels and head boats are for-profit enterprises that also have a stake in the long-term maintenance of the species; but they operate on the ability to take clients fishing in the short-term. In 2015, the recreational sector was divided into two categories: charter and private vessels, with private vessels being awarded just over half of the recreational allocation for the year.¹¹⁵

Because for-hire often fall ideologically and operationally somewhere in-between the traditional leisure fisherman fishing from a private boat and the commercial vessels that sell their product on a large scale, for-hire vessels need to be regulated as a separate category with intermediate restrictions and levels of monitoring. Dividing the recreational sector between the private and charter subgroups is a step in the right direction, but more action is needed to reclassify the fishery into three distinct sectors. This will be discussed in greater detail in section IV(B).

The need for better data is a recurring issue in the present debate and acquiring better data is an essential component to the effective management of the fishery. It was only four years ago that the agency was held in violation of the MSA for flagrantly disregarding the best science available in the decision-making process.¹¹⁶ When the agency did something as simple as changing the time of day it made catch inspections, suddenly the outlook for a particular season changed dramatically.¹¹⁷

Unfortunately, it is very difficult to monitor recreational fishermen, who are not required to log trips or record catch like the commercial fishing industry.¹¹⁸ Similarly, whereas commercial vessels may be required to carry on-board observers to enforce compliance,¹¹⁹ this is an impossible option for each individual fisherman who decides to take his personal boat out for the day. While the state and federal agencies can join forces to conduct dockside inspections, there are nearly 750 public marine ramps in in Florida alone, many of which allow for multiple launches at a

REGULATIONS FOR VESSELS FISHING IN FEDERAL WATERS (2018) [hereinafter FB 18-026, PERMIT REGULATIONS].

115. NAT'L OCEANIC & ATMOSPHERIC INST., *supra* note 82.

116. *Guindon*, 31 F. Supp. 3d at 196–97.

117. *Id.* at 183.

118. *See Types of Recreational Fishing Surveys*, NOAA FISHERIES <https://www.fisheries.noaa.gov/recreational-fishing-data/marine-recreational-information-program-types-surveys> (last updated Dec. 6, 2019).

119. *See Fishery Observers*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/fishery-observers#observer-programs>.

time.¹²⁰ The resources required to constantly monitor all public access points for all the Gulf states would be astronomical in terms of an agency's budget. Even if this level of monitoring were feasible, it would still fail to account for boaters using private docks.

Instead, the recreational sector relies primarily on a variety of surveys that make up the Marine Recreational Information Program ("MRIP").¹²¹ Some of the surveys used by the Gulf Council are intended to intercept fishermen dockside, along beaches, or at other public fishing access points, while other surveys are conducted over the phone.¹²² Although there is a separate survey system in place for for-hire vessels,¹²³ it is evident by the consistent recreational overages and anecdotal accounts of plentiful fish that the current survey system is inadequate.

Another challenge in keeping both recreational and commercial fishermen accountable for their respective quotas is the difference in managing agencies of the two sectors. State agencies are represented on the Council to protect local interests and the two sets of agencies often work together to enact consistent or complimenting regulations.¹²⁴ Unfortunately, trying to reconcile the priorities between state and federal agencies is not always easy.¹²⁵ NMFS has stated that "federal efforts to rebuild the stock by compressing recreational seasons in past years have been undermined by states' decisions to allow much longer red snapper season in their waters."¹²⁶

Even if a fishery is predominantly in federal waters, it may still be subject to joint control. Under the MSA, unless state management will "substantially and adversely" interfere with federal management of such a fishery, the state maintains regulatory authority within the boundaries of state waters.¹²⁷ Although the two sets of agencies attempt to work together, the overlap in regulation may lead to difficulty in measuring and enforcing fishery conservation measures. The historic debate

120. *Florida Public Boat Ramp Finder*, FLA. FISH & WILDLIFE CONSERVATION COMMISSION, <https://public.myfwc.com/LE/boatramp/public/CountySearch.aspx> (last visited Feb. 28, 2020).

121. *Recreational Fishing Survey Coverage*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/recreational-fishing-data/recreational-fishing-survey-coverage> (last updated Apr. 24, 2019).

122. *Types of Recreational Fishing Surveys*, *supra* note 118.

123. *Id.*

124. *Fisheries Management in Federal Waters*, FLA. FISH & WILDLIFE CONSERVATION COMMISSION, <http://myfwc.com/fishing/saltwater/recreational/federal-waters/>.

125. King & Phillips, *supra* note 109.

126. *Id.*

127. 16 U.S.C. § 1856 (b)(1)(B).

between state and federal management has continued in the red snapper fishery to the dismay of both commercial and recreational fisherman, who feel that the current division of authority is an inadequate approach to an ongoing problem.

The need for reform in the Gulf Council's management of the red snapper fishery is inarguable. The continuing tensions between the commercial and recreational sectors and between federal and state governments are not sustainable, as evidenced by the President's actions in 2017. Unless the Council is able to take measures to appease parties on both sides of the issue, the stock will be in danger of relapsing into dangerously low population levels.

IV. PROPOSED SOLUTIONS

A. Exempted Fishing Permits

Fortunately, the Gulf Council has begun to take steps toward balancing state and federal management of the species. Using an experimental program during 2018 and 2019, the Council still set catch limits, but allowed states to manage the private angler portion of the recreational sector and report landings back to NMFS through exempted fishing permits ("EFPs").¹²⁸ EFPs are generally used to allow research when it would otherwise be limited or barred because of existing regulations.¹²⁹ The EFP itself contains specific activities to be exempted from fishing regulations, and permit holders are required to submit catch reports to administrators on completion of the named activities.¹³⁰ In this case, the permits specifically exempt individual state license holders from the federal recreational season closures, allowing them to fish in federal waters during seasons set by each state.¹³¹ This program will give the five Gulf states significantly more

128. *U.S. Secretary of Commerce Applauds Pilot Program to Allow States to Manage Recreational Red Snapper Fishing in the Gulf of Mexico*, NOAA FISHERIES (Apr. 17, 2018), <https://www.fisheries.noaa.gov/leadership-message/us-secretary-commerce-applauds-pilot-program-allow-states-manage-recreational-red> [hereinafter *Pilot Program*]; For the purposes of EFPs, state-licensed for-hire vessels are not exempted with the rest of the private angler component. NAT'L OCEANIC & ATMOSPHERIC INST., FB 18-016, REQUEST FOR COMMENTS: EXEMPTED FISHING PERMITS TO ALLOW STATE PILOT PROJECTS FOR THE MANAGEMENT OF RECREATIONAL RED SNAPPER FISHING IN THE GULF OF MEXICO (2018) [hereinafter FB 18-016, REQUEST FOR COMMENTS].

129. *Southeast Region Exempted Fishing Permits and Letters of Acknowledgement*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/southeast/rules-and-regulations/southeast-region-exempted-fishing-permits-efp-letters> (last updated Dec. 10, 2018).

130. *Id.*

131. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

control than they have enjoyed previously, since this new program will allow state management of the recreational sector even in federal waters.¹³² The program is also an opportunity to test different methods of calculating the total number of fish in an attempt to produce a more accurate assessment of the current population.¹³³

The permits allow those states to manage recreationally caught red snapper in both state and federal waters, and test data collection methods through two-year pilot programs. Each state will set its own 2018 and 2019 private angling red snapper season, monitor red snapper landings, and close the private angling season when the state's quota is reached.¹³⁴

The program seems to be an important step in aligning state and federal regulations; a step that environmental groups hope might become permanent.¹³⁵ A unified season will eliminate the stark difference in the lengths of state and federal seasons, and will hopefully eliminate situations like the one in 2017, in which the President overruled the federal season length to appease recreational fishermen.¹³⁶

States have begun to implement their own data collection methods in an effort to make the experimental program a more permanent solution. "The purpose of these EFPs is to allow states to demonstrate the effectiveness of state management of recreationally caught red snapper and data collection methods through 2-year pilot programs."¹³⁷ In Louisiana, a program designed to be more flexible and responsive than the MRIP is being used to create weekly reports of estimated recreational landings.¹³⁸ Louisiana's system, the LA Creel, was shown in 2015 to be more precise than MRIP methods of data collection.¹³⁹ The LA Creel uses frequent phone and email surveys to supplement dockside interviews and create more up-to-date reports than the MRIP.¹⁴⁰ The weekly reports also give the Louisiana Department of Wildlife and Fisheries notice of when harvests are nearing the permissible limit so that the season

132. *Pilot Program*, *supra* note 128.

133. King, *supra* note 1.

134. *Pilot Program*, *supra* note 128.

135. See King, *supra* note 1.

136. *Id.*

137. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

138. *Hot Topic: Red Snapper*, LA. DEP'T WILDLIFE & FISHERIES, <https://www.wlf.louisiana.gov/page/red-snapper> (last visited Feb. 28, 2020).

139. *LA Creel*, LA. DEP'T WILDLIFE & FISHERIES, <https://www.wlf.louisiana.gov/page/lacreel>.

140. *Id.*

length can be adjusted accordingly.¹⁴¹ Private anglers in Florida are now required to sign up for the Gulf Reef Fish Survey if they intend or attempt to target or possess certain reef fish species, including red snapper.¹⁴² The purpose of signing up for the survey is to create a list of anglers targeting reef fish who can then be contacted for more specific harvest details, and to distinguish those fishermen from others who may be contacted for a more general survey.¹⁴³ This will give the state a better understanding of harvests specific to reef fish species, including red snapper.¹⁴⁴

While the EFPs may seem like the perfect way to usher in a new system of cooperative state and federal management, there are still some concerns with the program. In each state's EFP, the remedy for exceeding the recreational quota in the first year of the program is to reduce the quota the following year.¹⁴⁵ This is the same remedy that has been unsuccessfully employed by NMFS and the Gulf Council in trying to regulate the recreational quota in the past.¹⁴⁶ Without alternate or additional means of keeping fishing in check, like the more responsive LA Creel system, it seems likely that states will fall into the same pattern of failing to make necessary changes that has plagued the Council in the past.

One factor that is likely to keep states more accountable than the federal agency has been in this endeavor is the incentive of making the program permanent. Because of the long-running contention between state and federal management programs, states are likely to make significant efforts to prove they are capable of being effective regulators in the long term. It is unclear what sanctions would be imposed if the program were granted permanence and states were later found incapable of sustained management, but it seems clear that NMFS could reclaim all control of federal waters through the Gulf Council's authority under the MSA.¹⁴⁷

One of the main reasons for the difficulty federal management has faced in keeping recreational fishermen within their quota is also fundamentally removed with this program. When the federal season has been shortened to account for overfishing in the past, individual states have often extended their seasons in response,

141. *See id.*

142. *Gulf Reef Fish Survey*, FLA. FISH & WILDLIFE CONSERVATION COMMISSION, <http://myfwc.com/fishing/saltwater/recreational/gulf-reef-fish-survey/> (last visited Feb. 28, 2020).

143. *Id.*

144. *Id.*

145. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

146. *See Guindon*, 31 F. Supp. 3d at 180.

147. 16 U.S.C. § 1856(a)(3).

leading the federal season to be shortened even further the following year.¹⁴⁸ This cycle is what ultimately led to a three-day federal red snapper fishing season, contrasted with a year-round Texas state season in 2017.¹⁴⁹ Season unification under a single regulating authority would eliminate this problem, giving the states a greater chance for long-term success under the EFPs.

B. Separating the For-Hire Sector

As previously mentioned, for-hire vessels are considered part of the recreational fishing sector by the Gulf Council.¹⁵⁰ The recreational sector is divided into private anglers and federal for-hire vessels.¹⁵¹ State for-hire vessels are considered part of the private angling component and any catch by these vessels is counted against the private angling portion of the recreational quota.¹⁵² As indicated in the name, state vessels are only permitted to fish in state waters.¹⁵³ Under the EFP system, they are not subject to the same exemptions and would still be required to obtain a federal for-hire permit to fish in federal waters.¹⁵⁴ The federal for-hire component is comprised of vessels that fish in federal waters with a valid reef fish charter vessel/headboat permit.¹⁵⁵

As part of an attempt to reform the recreational sector, the Gulf Council has published proposed changes to the federal for-hire subset of this group for public comments before amending the FMP.¹⁵⁶ Some of the proposed changes include requiring for-hire boats to declare trips electronically before leaving port and to report their catch immediately after the trip has ended, before fish are offloaded from the vessel.¹⁵⁷ The proposal also includes mandating that for-hire vessels be outfitted with NOAA approved global positioning systems that can transmit location data back

148. NOAA Fisheries and the Five Gulf States Align Red Snapper Fishing Seasons, AM. FISHERIES SOC'Y (June 28, 2017), <https://fisheries.org/2017/06/noaa-fisheries-and-five-gulf-coast-states-align-red-snapper-fishing-seasons/>.

149. King, *supra* note 1.

150. FB 18-026, PERMIT REGULATIONS, *supra* note 114.

151. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

152. *Id.*

153. *Id.*

154. FB 18-026, PERMIT REGULATIONS, *supra* note 114.

155. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

156. NAT'L OCEANIC & ATMOSPHERIC INST., FB 18-071, REQUEST FOR COMMENTS: PROPOSED MODIFYING CHARTER VESSEL AND HEADBOAT REPORTING REQUIREMENTS (2018).

157. *Id.*

to NMFS.¹⁵⁸ These would be permanent fixtures required to be operational at all times, barring a special exemption.¹⁵⁹

While these proposals are a good starting point, in the future, federal for-hire vessels should also be treated as an entirely intermediate category between the commercial and recreational sectors. The quota for this new sector would be taken from the recreational sector, consistent with the current practice. However, it would be considered an independent third segment of the fishery. If the proposed new provisions are implemented, NMFS will be able to gather much more accurate data on federal for-hire vessels than it has in the past, which will allow it to better pinpoint if the shortcomings of the recreational sector are primarily caused by private anglers (including state for-hire vessels) or federal for-hire vessels. This, in turn, will help the agency be better able to identify why this sector has been unable to meet quotas in past years. The subset that is most struggling to stay within its bounds can be given more focus and allocated greater resources dedicated to compliance.

If both commercial and for-hire fishermen are able to consistently meet sustainability goals, they will require maintenance oversight, but not constant FMP amendments and enforcement resources. This would leave just a fraction of the overall fishery where the agency could target its resources to implement better monitoring measures and bring the remaining recreational portion into compliance in order to expedite the stock rebuilding plan.

Given the already high levels of tension between state and federal management, this new category would initially only include federal for-hire vessels, since states will be unlikely to relinquish more control to federal management of the fishery. However, a potential way to broaden the reach of this new segment approach is to allow states to opt-in on a state-by-state basis. If a state chooses for-hire vessels that are currently only allowed to fish in state waters, may have their licenses expanded to include access to federal waters as well, provided those vessels comply with the monitoring provisions NMFS hopes to implement. This would essentially absorb the state for-hire component into the new the segment of for-hire vessels. Vessels that currently hold state for-hire licenses would be subject to federal monitoring methods but would gain greater access to the fishery in return.

158. *Id.*

159. *Id.*

A state that chooses to adopt the program would require state-licensed for-hire vessels to participate in order to keep or renew their licenses, effectively eliminating the distinction between state and federal for-hire permits. In this case, NOAA may award the state agency a grant to help offset the costs of implementing the new monitoring technology. The amount of the grant would be determined by the percentage of a state's private angler sector that is comprised of for-hire vessels. In order to receive the grant, a state would be required to commit to the program for a minimum number of years, to be determined by the Council. Otherwise, a state would have the option to forego the grant money, implement similar monitoring requirements subject to NMFS approval, and have the flexibility to renew the program on a yearly basis, depending on its effectiveness and popularity with state-licensed for-hire fishermen. This would allow the state to re-establish a state-specific for-hire program in the event that it determines subjecting all for-hire vessels to federal control to be an ineffective management tool. Funding for the program would likely require an allocation from Congress but given the extremely long-running and highly contentious nature of the issue, it is plausible that the funds could be found. Another potential source of funding will be discussed in the following section.

The data gathered from these vessels would be sent back to both state agencies and NMFS for evaluation. Although this gives the Gulf Council and NMFS greater control by subjecting state license holders to federal managements measures, the EFP program may again give states the incentive needed to relinquish authority. The long-term adoption of the EFP system, and the potential permanent increase in state control, is dependent on states accurately assessing data and setting appropriate seasons.¹⁶⁰ The possibility of being able to set seasons for the recreational sector in both state and federal waters long-term may be enough to persuade states to adopt this measure, if it will give them a better chance of bringing the recreational sector into compliance.

In many ways, the for-hire sector is already treated differently than other recreational anglers. State for-hire vessels are not eligible to benefit from fishing in federal waters under EFPs,¹⁶¹ all for-hire vessels must have a separate permit and federal

160. See *Pilot Program*, *supra* note 128.

161. FB 18-016, REQUEST FOR COMMENTS, *supra* note 128.

vessels must have to have a specific reef fish permit,¹⁶² and the recreational fishing quota is already divided between private anglers and federal for-hire vessels.¹⁶³ Making for-hire vessels a third, distinct category will create a more focused system of control for the fishery overall by providing better data and allowing NMFS and state agencies to target resources where they will be most effective at meeting the FMP goals.

*C. Better Monitoring for the
Recreational Sector*

The need for better monitoring of the recreational sector is clear from the frequency of the sector's quota overages. Many of the proponents of state-run management programs believe states have a more accurate assessment of the stock than the Gulf Council.¹⁶⁴ Implementing better monitoring systems will provide more accurate information on the status of the fishery and help ease the tension between state and federal management.

By transitioning for-hire vessels into their own category, state and federal agencies will be able to dedicate financial and personnel resources to more effectively target monitoring efforts to the remaining portion of the recreational sector. The additional resources expected to arise from the sector division can be used to implement a larger-scale version of a system similar to the LA Creel, which provides more frequent and, by some measures, more accurate reporting than MRIP methods.¹⁶⁵ They could also be used to expand existing monitoring measures by conducting more surveys and more dockside inspections. While the opportunity to expand current practices should be embraced, state and federal agencies should also explore additional ways to monitor the fishery.

Private anglers must have a valid state-issued saltwater fishing license or registration, pursuant to individual state regulations, to fish in federal waters.¹⁶⁶ With the exception of Florida, the Gulf states all issue saltwater fishing licenses without

162. *Permits, Applications and Forms in the Southeast*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/southeast/resources-fishing/permits-applications-and-forms-southeast> (last updated Nov. 20, 2019).

163. FB 18-026, PERMIT REGULATIONS, *supra* note 114.

164. Masson, *supra* note 108.

165. *La Creel*, *supra* note 139.

166. *National Saltwater Angler Registry*, NOAA FISHERIES SERV., <https://www.st.nmfs.noaa.gov/nnri/>.

species-specific provisions.¹⁶⁷ The Florida Fish and Wildlife Conservation Commission ("FWC") currently requires additional permits to target or possess spiny lobsters, snook, and tarpon.¹⁶⁸ A simple way to collect data on the number of anglers targeting red snapper, and to generate additional funds for monitoring the stock, would be to follow Florida's model and implement a red snapper stamp that can be purchased in addition to a standard saltwater license. Like the other supplemental permits, this stamp or permit would be an optional addition to the purchase of a fishing license, requiring only those anglers who intend to target red snapper to buy one. Florida's current supplemental permit prices range from five dollars for an annual lobster stamp to just over fifty dollars for an annual tarpon tag, with an option to purchase five-year permits for lobster and snook.¹⁶⁹ The Gulf Council, with input from state agencies, would set the price for the red snapper permit. The cost itself may act as a deterrent to casual anglers who have no particular interest in targeting red snapper. The idea of purchasing an additional permit may cause them to focus their efforts on other species, thereby reducing the total number of fishermen pursuing red snapper and allowing the species to continue toward its rebuilding goal. However, given that the popularity of the fish is what brought about the need for conservation measures in the first place, many recreational fishermen would likely choose to opt-in to the program and purchase the additional permit.

The benefit of implementing this system is two-fold. First, requiring anglers to register their intent to target red snapper would create a larger-scale, multi-state database similar to the one FWC hopes to create with Gulf Reef Fish Survey.¹⁷⁰ This would be a proactive approach to a problem that has typically been managed in a retroactive manner through surveys requesting fishermen to recall and report their harvests, or through a dockside inspection program that simply cannot be implemented on a large enough

167. See *Recreational Saltwater Licenses and Permits*, FLA. FISH & WILDLIFE CONSERVATION COMMISSION, <http://myfwc.com/license/recreational/saltwater-fishing/#permits> (last visited Feb. 23, 2020); *Saltwater Recreational Licenses*, OUTDOOR ALA., <https://www.outdooralabama.com/licenses/saltwater-recreational-licenses> (last visited Feb. 23, 2020); *Recreational Fishing Licenses*, LA. WILDLIFE & FISHERIES, <http://www.wlf.louisiana.gov/recreational-fishing-licenses> (last visited Feb. 23, 2020); *License*, MISS. WILDLIFE, FISHERIES, & PARKS, <https://www.mdwfp.com/license/fishing> (last visited Feb. 23, 2020); *Official Texas Fishing Licenses and Endorsements*, TEX. PARKS & WILDLIFE, <https://www.outdooralabama.com/licenses/saltwater-recreational-licenses> (last visited Feb. 23, 2020).

168. See *Recreational Saltwater Licenses and Permits*, *supra* note 167.

169. *Id.*

170. *Gulf Reef Fish Survey*, *supra* note 142.

scale to cover all possible launch points for recreational fisherman. A database of permit purchases in all the Gulf states would show the distribution of fishermen intending to target red snapper. By determining where these licenses are primarily purchased, NMFS could geographically target dockside surveys and other existing monitoring tools to where the highest concentration of reef fish anglers appear to be licensed. This would create a much more efficient, and likely more accurate, method of assessing the stock.

Second, the system would be used to support the expansion of the other management measures. If this program is implemented concurrently with the proposed fracturing of the for-hire segment, the funds from the red snapper permits could be used to finance the grant program previously discussed to aid in the transition. Revenue from the permits could also be put toward general enforcement and monitoring provisions, allowing for an increased enforcement presence at dockside inspections, expansion of the existing survey systems, or implementation of more effective systems. In determining the cost of the permit, the Council may consider how the added revenue could benefit other programs. This would make the permit system valuable not only in its own right, but also as an important tool to support other measures in the overall monitoring plan.

Recreational fisherman may be reluctant to pay for a new permit, especially those who feel there is no longer an imminent threat to the species. However, if the Council sets the cost of the permit low enough, similar to the five-dollar annual lobster stamp, it may encounter less resistance than it would with a higher priced requirement. The Council can also encourage purchasing a stamp by enforcing penalties for fishermen who are caught fishing for or possessing red snapper without proper authorization. In Florida, a first offense for violating an FWC marine conservation measure is punishable by imprisonment of not more than sixty days or a maximum fine of \$500.¹⁷¹ Given the choice between a \$5 fee and a \$500 fine, many anglers are likely to choose the fee. Similarly, a low-level violation of fish and wildlife laws in Texas also carries the possibility of a \$500 fine, with increasing penalties for more serious offenses.¹⁷² The Council's task with implementing this measure will be to balance the cost of the new permit with the penalties to be imposed, in order to incentivize anglers to adopt the change.

171. FLA. STAT. § 379.407(1)(a) (2018).

172. *Laws, Penalties & Restitution*, TEX. PARKS & WILDLIFE, <https://tpwd.texas.gov/regulations/outdoor-annual/fishing/general-rules-regulations/laws-penalties-restitution>, (last visited Feb. 23, 2020); see TEX. PARKS & WILD. CODE § 46.015 (2017).

Another advantage of the permit system is the flexibility to adopt or dismiss the requirement as the needs of the fishery change. Since the stock is no longer considered overfished,¹⁷³ the Council may be able to set permit prices lower and impose less severe penalties than may have been necessary at a time when the population needed more extreme measures of control. Should a future stock assessment reveal a population decline, the cost of permits could be increased the following year. Conversely, when the population reaches its rebuilding goal, the program can be revoked entirely, re-opening the fishery to all private anglers with a valid state-issued saltwater fishing license.

Implementing a new monitoring system such as a species-specific permit would allow the Gulf Council to create a database to more accurately monitor red snapper fishing. The database and the revenue from the permit purchases would work alongside and in support of the existing monitoring measures to create a more comprehensive assessment of the state of the fishery. Adopting more accurate reporting measures will be an important way for NMFS to regain the trust of those fighting for state control of the fishery based on doubts about the accuracy of federal data. The Council may also find that there is some merit to the claims of a healthier stock than the current data shows and have more confidence to entrust a greater measure of control in state management. The need for improved monitoring systems will be crucial to the resolution of the dispute over the red snapper fishery.

V. CONCLUSION

To ensure the continued regrowth of the red snapper population and create a sustainable system for managing the fishery, state and federal regulators will have to find a way to reconcile their approaches to management of the resource. While they are unlikely to be able to put the controversy to rest for good, the agencies must work more cohesively in the future. The exempted fishing permits are a move toward a more unified system of joint control that, if implemented long-term, will likely have a positive effect on the overall health of the fishery.

Additional measures will be necessary to create an accurate reporting system that will allow the Gulf Council to allocate management in a way that addresses commercial fishermen's concerns about the continued overfishing of the recreational sector,

173. SEDAR, *supra* note 3.

while taking into consideration the impact of recreational fishing on the economy of fishing communities. Separating for-hire vessels from either of the existing sectors will allow the agencies to segment the current recreational sector and better focus enforcement measures where they would be most effective in helping the sector stay within its quota. Once the newly formed for-hire sector is consistently compliant with its quota, the agencies may find that they have to devote fewer enforcement resources to the management of the group and can reallocate those resources to the remaining portion of the recreational sector.

Developing more accurate monitoring systems is a crucial component to resolving the debate, given that one of the main reasons recreational anglers are vying for greater state control is distrust of federal data. By adding a species-specific permit requirement to the standard saltwater fishing license already needed to fish in either state or federal waters, state and federal agencies can work together to create a wide-spread database. This database will generate more accurate estimates of the amount of fishing and where that fishing is primarily taking place. It will not only create better information itself but will also create the opportunity to use existing methods of data collection more efficiently by allowing those methods to be geographically targeted, and by providing an additional source of funding for enforcement measures.

Both state and federal agencies agree that the current division of fishery management is not sustainable. With these additional proposed changes, the red snapper fishery will be more likely to reach its full rebuilding potential and be a successful resource for both commercial and recreational fishermen long-term.