

Florida Court Limits Rule to Red Grouper

Coastal Conservation Assn. v. Gutierrez, 2005 WL 2850325 (M.D. Fla. 2005)

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Introduction

The Coastal Conservation Association (CCA) and the Fishing Rights Alliance (FRA), groups representing the recreational fishing industry, challenged an interim rule published by the Secretary of the U.S. Department of Commerce (Secretary) in conjunction with the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS, also known as NOAA Fisheries). In consolidated civil actions the plaintiffs sought declaratory relief, alleging that the defendants' interim rule was arbitrary and capricious.¹ The industry groups alleged that there was no finding that red grouper was overfished, that the interim rule was overbroad because there was no determination that sixteen of the seventeen grouper species were overfished, that the interim rule was not based on the best scientific evidence available, and that the agencies' environmental assessment was inadequate.

Interim Rule

Pursuant to the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council² develops fishery management plans. NMFS oversees the Council and makes the appropriate recommendations to the Secretary, who then promulgates the regulations to implement the approved plan. Once the plan has been approved and implemented it has the force and effect of law. If the Council fails to act in a timely fashion,

The stated purpose of the interim rule was to “reduce the likelihood that overfishing for red grouper will occur in 2005.”

the Secretary is required to prepare a plan, amendment, or proposed regulation. The Secretary can promulgate short-term interim rules to address emergency situations.

The Gulf of Mexico Fishery Management Plan for Reef Fish Resources was implemented in November 1984. In October 2000 NMFS determined that red grouper stock was overfished and undergoing overfishing.³ This determination was based on stock assessment findings of red grouper stock as of 1997. Under the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council had one year to submit a plan to end overfishing. The Gulf Council missed the deadline so the Secretary submitted a proposed Secretarial Amendment 1 to the Reef Fish Fishery Management Plan. Secretarial Amendment 1 imposed bag limits for recreational anglers, set a total allowable catch, and established a ten-year rebuilding plan for red grouper.

A subsequent assessment in 2002 found that even though red grouper stock was improving and could no longer be considered overfished, the “red grouper was not yet at the biomass level capable of producing maximum sustainable yield on a continuing basis.”⁴ On



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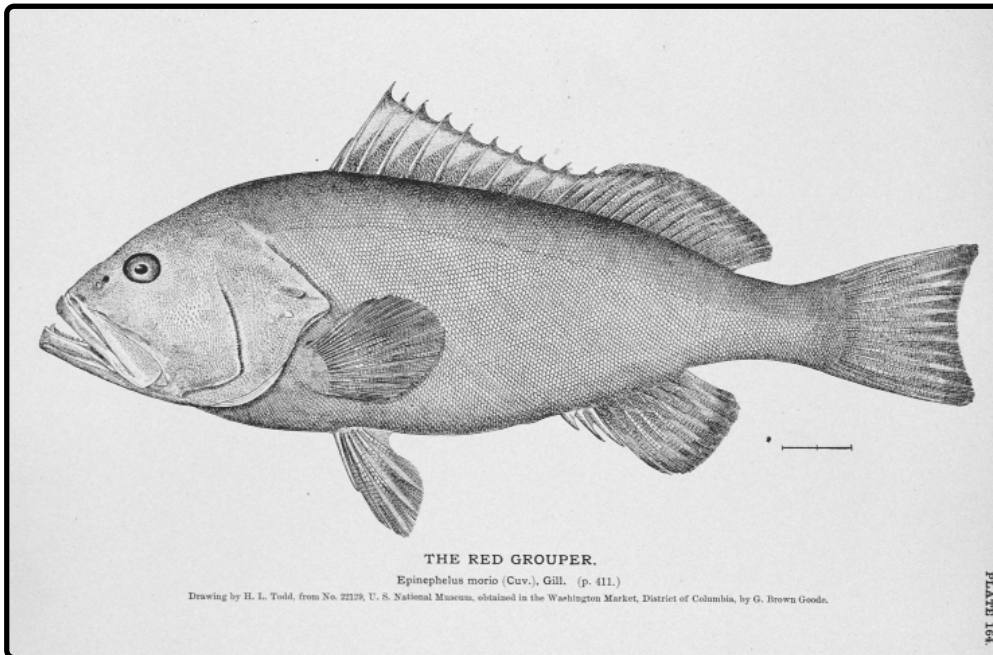
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June 15, 2004, NMFS published its final rule to implement Secretarial Amendment 1.

In March of 2005, the Gulf Council found that red grouper landings “were likely to exceed recreational tar-

2002 stock assessment found that red grouper was no longer overfished, the Federal Register noted that the “Gulf Council had concluded that a reduction in recreational red grouper landings [was] needed to end overfishing in 2005.”⁹ It further stated that NMFS and the Assistant Administrator for Fisheries had determined that the temporary rule was necessary to reduce overfishing of red grouper in the Gulf of Mexico. The findings were sufficient for the Secretary to conclude that red grouper was being overfished and an interim rule should be promulgated.



Photograph courtesy of NOAA's Historic National Marine Fisheries Service Collection

get level” as they had in the previous two years.⁵ The Council passed a motion granting NMFS the authority to make an interim rule “to bring the recreational red grouper fishing within the target levels in Secretarial Amendment 1 for the year 2005.”⁶ The stated purpose of the interim rule was to “reduce the likelihood that overfishing for red grouper will occur in 2005.”⁷ NMFS published its interim rule in the Federal Register on July 25, 2005.⁸ The interim rule reduced the red grouper bag limit from two fish per person per day to one fish per person per day, and reduced the aggregate grouper bag limit from five fish per person to three fish per person and closed recreational fishing for all grouper species in the Gulf of Mexico (Exclusive Economic Zone) for November and December 2005.

Finding of Red Grouper Overfishing

The plaintiffs first challenged the enactment of the interim rule, alleging that the defendants had made no finding of overfishing. The court looked to the Administrative Record that summarized the background of the interim rule and held in favor of NMFS. The court found that the Federal Register publication of the interim rule adequately established that the Secretary made the required finding of overfishing. Even though the

impact of the red grouper rebuilding plan on other species.”¹⁰ The industry groups sought a declaratory judgment that the defendants violated the Magnuson-Stevens Act and the Administrative Procedure Act (APA) because the interim rule was too broad; it limited fishing within *all* grouper species when the interim rule was only intended to reduce overfishing of *one* species. The Administrative Record only addressed the overfishing of red grouper, and the court noted that the “limitation and closure as to other grouper species [went] beyond the request made by the Gulf Council to promulgate an interim measure to bring the catch levels of red grouper into line with the Secretarial Amendment 1 requirements.”¹¹ The court found that red grouper had consistently been treated as a distinct stock of fish, and without findings of overfishing as to other grouper species the extension of the interim rule could not be upheld.

Best Scientific Evidence

The plaintiffs claimed that the interim rule was invalid because the defendants did not use the best scientific evidence available. The Magnuson-Stevens Act requires conservation and management measures to be based upon the best scientific information available although

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“such information may not be exact or totally complete.”¹² After reviewing the Administrative Record, especially Secretarial Amendment 1, the court held in favor of the defendants because “characterizing a fishery as overfished is a matter of experience and expertise as well as scientific evidence.”¹³ The court gave deference to the agency’s methods because they were in the best position to decide what methods to use and there was no clear error.

Environmental Assessment

Lastly, the plaintiffs claimed the defendants violated the National Environmental Policy Act (NEPA) “by not adequately addressing the environmental circumstances regarding overfishing of red grouper.”¹⁴ Again, there is a link between NEPA and APA. The plaintiffs asserted that “[b]ecause the environmental assessment was inadequate...the interim rule [was] arbitrary, capricious, contrary to law, and an abuse of agency discretion.”¹⁵ In this situation the court is to make sure that the agency has taken a “hard look” at the environmental consequences of its action.¹⁶ Under NEPA an agency must prepare an environmental assessment to determine whether or not an environmental impact statement is necessary. Here, NMFS considered many studies and reviewed comments and opinions from members of the recreational fishing industry before it prepared its environmental assessment and issued a finding of no significant impact. The court held that these measures were sufficient evidence that NMFS took a “hard look” at the environmental consequences of its decision.

Conclusion

The District Court upheld the interim rule regarding red grouper. The methods used to determine that red grouper is overfished were the best methods available, and NMFS had sufficient information to determine that the interim rule would not significantly affect the environment.

However, the reduction of the aggregate grouper bag limit and closure for recreational fishing for all grouper species in the Gulf of Mexico for November and December 2005 were found to be invalid and struck down by the court. Therefore, the interim rule is specific to red grouper and fishermen still have the flexibility to fish for other grouper and reef fish species. ♡

ENDNOTES

1. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) adopt-

ed the “arbitrary and capricious” standard set out in the Administrative Procedure Act (APA). This standard gives deference to agency decisions by reviewing for clear error. A regulation will be found to be arbitrary and capricious “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 a difference in view or the product of agency expertise.” *Coastal Conservation Assn. v. Gutierrez*, 2005 WL 2850325 at *4 (M.D. Fla. 2005).

2. The Gulf of Mexico Fishery Management Council manages federal fishery resources off the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida.
3. The Magnuson-Stevens Act defines the terms “overfishing” and “overfished” to mean “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. § 1802(29). Maximum sustainable yield is the “largest long term average catch or yield that can be taken from a stock complex under prevailing ecological and environmental conditions.” 50 C.F.R. § 600.310(c)(1).
4. *Coastal Conservation Assn.* at *3.
5. *Id.* at *4 (quoting Administrative Record).
6. *Id.*
7. *Id.*
8. Fisheries of the Caribbean, Gulf, and South Atlantic, 70 Fed. Reg. 42485, 42511-42512 (July 25, 2005) (to be codified at 50 C.F.R. pt. 622).
9. *Coastal Conservation Assn.* at *6.
10. *Id.* at *3.
11. *Id.* at *7.
12. *Midwater Trawlers Coop. v. Dept. of Commerce*, 393 F.3d 1003 (9th Cir. 2004).
13. *Coastal Conservation Assn.* at *8.
14. *Id.* at *9.
15. *Id.*
16. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996).

