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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

UNITED BOATMEN, RECREATIONAL  
FISHING ALLIANCE, CAPTAIN VICTOR  
M. BUNTING, JR., JJC BOATS, INC., RUDEE  
OPERATIONS, LLC, CAPTAIN MICHAEL  
ABBATICCHIO, OCEAN POWER, INC.,  
CAPTAIN H.D. PARSONS, II, SPRING LAKE  
FREEZER COMPANY, CAPTAIN JOHN  
SPORTFISHING LLC, OLD INLET BAIT  
AND TACKLE, RJ FISHING CORP.,

Plaintiffs,

v.

GARY LOCKE, in his official  
capacity as Secretary of the United States  
Department of Commerce, THE NATIONAL  
OCEANIC AND ATMOSPHERIC  
ADMINISTRATION and THE NATIONAL  
MARINE FISHERIES SERVICE,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**EXPEDITED CONSIDERATION  
SOUGHT PURSUANT TO 16 U.S.C.  
§1855 (f)(4)**

**INTRODUCTION**

1. Plaintiffs Recreational Fishing Alliance (the "Alliance"), United Boatmen,

Captain Victor M. Bunting, Jr., JJC Boats, Inc., Rudee Operations, LLC., Captain Michael Abbaticchio, Ocean Power, Inc., Captain H.D. Parsons II, Spring Lake Freezer Company, Captain John Sportfishing, LLC, Old Inlet Bait and Tackle, and RJ Fishing Corp., by and through their undersigned counsel, bring this action seeking declaratory and injunctive relief against Defendants Gary Locke, in his official capacity as Secretary of the United States Department of Commerce, the National Oceanic and Atmospheric Administration (“NOAA”) and the National Marine Fisheries Service (“NMFS”).

2. On October 5, 2009, NMFS implemented, through an emergency rule, a closure of the recreational Black Sea Bass (“BSB”) fishery in the federal waters of the Exclusive Economic Zone (“EEZ”) from North of Cape Hatteras, North Carolina to Maine (The EEZ runs from 3 to 200 miles offshore.). This closure was unprecedented for a fish whose stocks are considered rebuilt, not overfished, and not subject to overfishing. The closure was largely based upon the misapplication and misuse of a fatally flawed angler survey which NMFS itself has acknowledged is not to be used for this type of decision. The result of this closure is social and economic devastation to the marine recreational fishing community.

3. During the fall months Black Sea Bass are primarily found in federal waters, in excess of 3 miles from shore. During the winter months, BSB are found exclusively in federal waters. BSB spend their winters in offshore waters in and around underwater canyons off the east coast of the United States. Although Plaintiffs may fish for BSB in State waters, as will be explained herein, there is little or no availability because of their offshore migration. Thus, their BSB business is severely curtailed in the

fall months and virtually eliminated during the winter months.

4. Plaintiffs challenge the emergency rule promulgated by the Defendants which has closed the recreational BSB fishery in the federal waters. This emergency rule was published in the Federal Register on October 5, 2009 74 Fed. Reg. 51092-51093 (attached as Exhibit "A") (referred to herein as the "Rule"). Plaintiffs challenge this emergency rule in that it violates numerous provisions of the Magnuson-Stevens Fishery Conservation and Management Act, as amended, ("Magnuson-Stevens Act") 16 U.S.C. § 1801 et seq.; violates the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Act ("RFA"); violates the Administrative Procedure Act, 5 U.S.C. § 701 et. seq.; violates National Standard guidelines issued by NMFS, the subagency delegated with authority to promulgate fisheries regulations pursuant to the Magnuson Stevens Act by closing a recreational fishery by relying upon the fatally flawed Marine Recreational Fisheries Statistics Survey ("MRFSS"), while ignoring countervailing information; fails to consider less severe alternatives; fails to abide by the statutorily mandated process for implementing an emergency rule; fails to conduct the requisite socio-economic study of the social and economic impact of such a closure; fails to implement statutorily mandated improvements to the recreational statistical system; fails to perform, develop, and consider the appropriate requisite impact assessments, and otherwise fails to abide by procedural and substantive requirements; and violative of the National Environmental Policy Act ("NEPA") 42 U.S.C. § 4321 et seq. As a result of Defendants' actions, and failure to comply with the law, the Plaintiffs have suffered, and will continue to suffer, immediate, substantial and irreparable harm, for which there is no

adequate remedy at law, and for which they seek expedited relief pursuant to 16 U.S.C. § 1855 (f) (4).

### **JURISDICTION AND VENUE**

5. This action for declaratory and injunctive relief arises under:
- (i) The Magnuson-Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. § 1801 *et seq.* (“Magnuson-Stevens Act”);
  - (ii) The Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706 (“APA”);
  - (iii) The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (“RFA”);
  - (iv) The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”).

6. The Magnuson-Stevens Act places exclusive jurisdiction in the Federal District Court by providing that: “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of [the Magnuson-Stevens Act.]” 16 U.S.C. § 1861(d).

7. The Magnuson-Stevens Act also provides that regulations promulgated under the statute “shall be subject to judicial review to the extent authorized by, and in

accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or action is published in the Federal Register, as applicable...” 16 U.S.C. § 1855(f)(1).

8. The Magnuson-Stevens Act also provides for expedited consideration and judicial review pursuant to 16 U.S.C. § 1855 (f)(4).

9. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. § 1346 (United States as a Defendant); 28 U.S.C. § 2201 (Declaratory Relief); 28 U.S.C. § 1337 (Interstate Commerce); 28 U.S.C. § 2202 (Injunctive Relief); and 5 U.S.C. §§ 701-706 (Administrative Procedures Act).

10. An actual, justiciable controversy exists by and between the Plaintiffs and Defendants. Accordingly, the relief requested herein is proper under 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. §§ 705 and 706.

11. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(e)(2) and (3).

12. If the Plaintiffs prevail on these claims, they will seek, and be entitled to, an award of attorneys’ fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

13. This case is ripe for judicial determination. While Defendants have described the Rule challenged herein as “temporary rule emergency action”, the “temporary” rule significantly changes the final rule establishing the 2009 recreational management measures for recreational black sea bass fishing in Federal waters which were 12.5-inch minimum size limit, 25-fish possession limit, and an open season of

January 1 through December 31. The Magnuson-Stevens Act provides that: “Any emergency regulation or interim measure which changes any existing fishery management plan or amendment shall be treated as an amendment to such plan for the period in which such regulation is in effect...” 16 U.S.C. §1855(c)(3). Therefore, while Defendants may describe the Rule challenged herein as “temporary”, it is really a final rule and ripe for purposes of judicial review.

14. Defendants’ actions have caused, are causing and will continue to cause immediate, severe and irreparable harm to Plaintiffs. Accordingly, Plaintiffs respectfully request expedited consideration and resolution of the merits of this matter pursuant to the provisions of 16 U.S.C. § 1855(f)(4).

15. Service of process is pursuant to Fed. R. Civ. 4(i).

16. If in the event this case cannot be resolved prior to expiration of the 180-day closure of the recreational black sea bass fishery, Plaintiffs’ case would not be moot; an actual case and controversy would continue to exist under U.S. Constitution, Article III § 2 because Defendants’ actions truly are “capable of repetition, yet evading review”. *Roe v. Wade*, 410 U.S. 113, quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

17. Given the severe immediate and irreparable harm which will be caused by the contested action, Plaintiffs respectfully request that the Court assign this matter for hearing at the earliest possible date and expedite the matter in every possible way, pursuant to 16 U.S.C. § 1855(f)(4).

## **PARTIES**

18. Plaintiff Recreational Fishing Alliance (“Alliance”), is a New Jersey corporation with its principal place of business in Smithville, New Jersey. The Alliance is a membership based, not-for-profit entity, with members in many states, including several thousand in New Jersey. The Alliance’s membership includes individual recreational saltwater anglers, sport fishing boat and marine product manufacturers, party and charter boat owners and operators, fishing tackle manufacturers, wholesale and retail bait and tackle suppliers, marinas and other businesses that depend on the recreational BSB fishery. The RFA has actively participated in the black sea bass regulatory process through participation in Administrative Hearings, submission of public comments and written submissions. Many of RFA’s members participate in the recreational BSB fishery and have been, and will be in the future, adversely affected by the challenged emergency closure. Individual angler members engage in the BSB fishery for food and recreational opportunities. Many business members depend on the recreational BSB fishery for their economic well being. The contested closure has had, and will continue to have, a significant and deleterious impact on their socio-economic well being. As an affected and interested party, RFA brings this action on behalf of itself and its adversely affected members.

19. Plaintiff United Boatmen is a non-profit trade association formed under the Laws of the State of New Jersey, with its principal office located in Brielle, New Jersey. United Boatmen members are primarily party boat and charter boat owners and operators from the states New Jersey and New York. Party and charter boats are

professionally owned and operated vessels, licensed by the U.S. Coast Guard, which carry passengers for hire to engage in recreational fishing. Party boats (also referred to as “head boats”) are open to the public which pays individually as they board. Charter boats tend to be retained by a group of persons in advance who pay to have exclusive use of such boats for a fishing trip. The party and charter boat industry in New Jersey consists of full and part time small businesses located throughout the coastal districts of New Jersey. Many United Boatmen members derive a significant portion of their yearly revenue taking paying customers out to fish for BSB. The United Boatmen has been actively involved in the management process for various Atlantic Ocean fisheries for nearly thirty-five years by way of participation in the BSB regulatory process, public comment, written submissions, and by providing landings and business data, serving on regulatory bodies, and participation on the Black Sea Bass Advisory Committee. United Boatmen's members and their customers are directly affected by the challenged Rule. As an affected and interested party, United Boatmen brings this suit on behalf of itself and its adversely affected members.

20. JJC Boats, Inc., a New Jersey Corporation, and its principal, Captain Jim Cicchitti, of Cape May, New Jersey, operate the Starlight Fleet out of Wildwood Crest, New Jersey. The Starlight fleet consists of three party and charter fishing boats between 70 and 100 foot in length. The business has been in operation for over three decades. These fishing boats target BSB almost exclusively in the winter. Between the months of October through the end of March, almost 100% of their business is derived from the BSB fishery. Captain Cicchitti received only four days notice of the closure. The closure

will result in a loss of up to 40% gross annual revenues of the vessel “Atlantic Star”, and a loss of work for 10-12 persons. The closure has been, and will continue to be, devastating to the business, Captain Cicchitti and his family, and employees and their families. Besides the loss of a livelihood, all business spending has been frozen. For the first time since running his business, the government has literally taken his livelihood away.

21. Plaintiff, Victor M. Bunting, Jr., is a fishing boat captain and owner of a multi-passenger for-hire “party” fishing boat located in Ocean City, Maryland. Captain Bunting and his crew operate from May through the month of November, taking people bottom fishing on four, eight and twelve hour fishing trips. Sea bass is a primary target in bottom fishing. Captain Bunting received four days notice of the contested closure. Advertising dollars were wasted in an economy which already had marine businesses reeling. The Maryland summer flounder season had already been closed pursuant to regulation when this unexpected closure was imposed. Captain Bunting has had to end his season and lay off employees early. The negative economic impact to him is severe.

22. Frederick “Skip” M. Feller resides at 4478 Ashwood Land, Virginia Beach, Virginia. He is the majority member of Rudee Operations, LLC, which owns a number of party fishing vessels fishing out of Virginia Beach, Virginia. He has been in business for 33 years. Of its fleet of six boats, three primarily engage in fishing trips. The main species they target in the spring, fall and winter is BSB. They fish for BSB at least nine months out of the year. Fall and winter customers patronize the business almost exclusively for sea bass. In the course of the year, 40% of Captain Feller’s

business is derived from the BSB fishery. Captain Feller and company employees received approximately 4 days notice of the closure of the BSB fishery. As a result of the closure, the business is serving very few customers and they have had to cancel many charters. If the BSB season is not reopened, it will have a devastating impact to Captain Feller's winter and spring business.

23. Michael Abbaticchio runs a party boat business with the vessel "JUDITH M". Captain Abbaticchio runs his business from Bahia Marina, Ocean City, Maryland. He has been operating there for 31 years. Captain Abbaticchio is considered a wreck fishing<sup>1</sup> specialist who fishes for sea bass as the primary target species for the months April through November. Without the BSB fishery, Captain Abbaticchio loses his customer base. Captain Abbaticchio received four day notice of the closure. He has suffered significant losses of his customer base, and will continue to do so for the remainder of the season. One mate is already filing for unemployment. The majority of his customers come to fish with him to catch and land BSB.

24. Ocean Power Inc. is a company located at 305 Route 35 North, Point Pleasant Beach, New Jersey. It is in the business of marine diesel engine and generator repairs and sales. It has been in operation since 1980. Ocean Power Inc. relies on fishing boats for its income. It sells engines and generators, and repairs engines and generators, for party, charter, commercial and pleasure fishing boats. Of the boats on whose engines Ocean Power Inc. performs, repairs and/or sales, a significant portion depend on the BSB

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<sup>1</sup> Black sea bass congregate near structures on the bottom, including sunken wrecks and rock piles. Fishing on these underwater structures is often called "wreck fishing", or, in general, "bottom fishing".

fishery, particularly during the fall and winter months. As a result of the contested closure, Ocean Power Inc. has experienced a reduction in business. As the closure continues, particularly during the winter, its business will decrease further and further to the point it will almost have to shut its doors.

25. H. D. Parsons, II, is a principal in the party and charter boat, tackle and restaurant business. His business has been in operation since 1937. The business moved to Lewes, Delaware in 1938. Captain Parsons' business has been involved in the BSB fishery since 1938. The black sea bass fishery is the mainstay of that fishing business. He describes it as the common man's access to fresh fish. BSB accounts for more than 70% of the businesses fish related income. During the winter months, Captain Parsons' business derives almost 100% of its income from the BSB fishery. He, too, received four day notice of the closure which has, and will, result in the loss of full time employment for 6 persons and 10 part time persons and severe economic and social hardship.

26. Spring Lake Freezer Company is a New Jersey Corporation. Its primary business is selling bait to bait and tackle shops, marinas, and party and charter boats on a wholesale level. Approximately thirty percent of its business during the fall and winter is derived from the BSB fishery. The emergency closure is having, and will continue to have, significant negative economic impact on Spring Lake Freezer Company.

27. Captain John Sportfishing LLC, d/b/a Voyager ("Voyager"), is a party boat operation out of Point Pleasant Beach, New Jersey. Its principal is Captain Jeffrey Gutman. The Voyager engages in fishing for BSB during the winter and spring. It depends almost exclusively on sea bass for the months of November thru March.

Approximately 30% of its business is derived from the winter BSB fishery. This closure has substantially reduced the amount of fishing trips that can be taken by the Voyager, layoff of Captains and deckhands, and other substantial economic and social harm.

28. Old Inlet Bait and Tackle is located in Rehoboth Beach, Delaware. It is a full service, year round bait and tackle dealership which includes rod and reel repair. It is located within the Delaware Seashore State Park. The business was established in April, 1962. Revenues derived from the BSB fishery are an important component of this business in the fall. Business had already been off for the first three quarters of 2009 for this and the other Plaintiffs named herein. This closure has added additional reductions in business.

29. RJ Fishing Corp., and Captain Robert Andresen, run the fishing vessel "Captree Princess" out of Bayshore, New York. The "Captree Princess" primarily engages in party boat fishing, but also engages in charters. The "Captree Princess" sails from Captree State Park. It runs trips requiring reservations offshore during the winter. The primary target species in BSB. As is the case with the other fishing boats and related businesses named as Plaintiffs herein, the 2009 season was characterized by fewer passengers and the unusually poor weather of late May and entire month of June 2009. The owners, crew and their families were relying upon a good fall and winter. With only four days notice, the BSB fishery was closed. It had an immediate and severe impact on the business of the "Captree Princess" which will be able to sail only one third of its scheduled trips. The closure of the BSB fishery will have a devastating economic and social impact on the "Captree Princess", its owners, crew and family, and will also

impact other businesses such as bait dealers, fuel distributors, local food purveyors, tackle shops, etc.

30. Each of the above Plaintiffs can attest that the month of June, 2009, was poor for business because of record setting rain falls. The poor economy also contributed to poor participation in fishing in general, and the BSB fishery in particular. Despite this fact, NMFS, in reliance upon its fatally flawed MRFSS data system, concluded that participation during this time period had not decreased significantly. In addition, because of increases in the minimum size, far fewer BSB were landed by anglers this year. This fact notwithstanding, MRFSS concluded that there were robust landings of BSB.

31. Defendant Secretary Gary Locke is the Secretary of Commerce of the United States (“Secretary”). Secretary Locke is sued in his official capacity as the chief officer of the federal administrative department charged with overseeing the administration and implementation of the Magnuson-Stevens Act. The Secretary is vested with the overall responsibility for the review and approval of fishery management plans prepared by regional fishery management councils (16 U.S.C. § 1854(a)), and the issuance of regulations to implement such plans. 16 U.S.C. § 1854(b).

32. Defendant National Oceanographic and Atmospheric Administration (“NOAA”) is the over arching federal agency having delegated authority from the Commerce Department over all matters concerning U.S. oceans and the natural resources situated therein, and is sued in such capacity.

33. Defendant National Marine Fisheries Service (“NMFS” or “NOAA Fisheries”), is the federal sub-agency with delegated authority over the management,

conservation and exploitation of living marine resources found in federal U.S. waters (those waters from 3 miles to 200 miles offshore, known as the Exclusive Economic Zone or “EEZ”), and is sued in such capacity.

### **MANAGEMENT OF THE BLACK SEA BASS FISHERY**

34. In order to manage the nation’s fish stocks and prevent overfishing, the Magnuson-Stevens Act created eight fishery management councils, each responsible for generating fishery management plans to regulate fishing within its region. 16 U.S.C. § 1852. The term “fishery” is defined in the Magnuson-Stevens Act as “(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.” 16 U.S.C. §1802 (13). The geographic management unit for black sea bass is the Western Atlantic Ocean and the United States/Canadian border.

35. Fishery management plans (“FMP”) developed by the councils must balance the needs of fishery users against conservation principles by reference to ten National Standards. 16 U.S.C. § 1851(a). The regional councils submit their fishery management plans to the Secretary of Commerce, who acts through NMFS. NMFS solicits public comment and reviews the fishery management plans to ensure they are consistent with the national standards (id. at §1853(a)(1)(C)) and other applicable laws such as the Regulatory Flexibility Act and NEPA. If a fishery management plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. § 1854(a)(3).

36. The BSB fishery management plan was developed by the Mid-Atlantic Fishery Management Council (“Council”), in cooperation with the Atlantic States Marine Fisheries Commission (“Commission”).

37. Fishery management plans must comply with the statutory requirements

and prevent overfishing while obtaining the optimum fishing yield (National Standard 1-16 U.S.C. § 1851(a)(1)). The Magnuson-Stevens Act specifically 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).

38. The Magnuson-Stevens Act mandates that optimum yield must provide the greatest overall benefit to the nation, particularly with respect to food production and recreational opportunities, but cannot exceed Maximum Sustainable Yield (“MSY”), maximum sustainable yield is the largest long-term average catch that can be taken from a stock or stock complex, taking into consideration ecological and environmental conditions, and must provide for rebuilding of overfished stocks to levels consistent with producing MSY. 16 U.S.C. § 1802(33).

39. National Standard two requires that conservation and management measures be based upon the best scientific information available. 16 U.S.C. § 1851(a)(2).

40. National Standard eight provides that “[c]onservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of the fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8).

41. The term “fishing community” is defined under the Magnuson-Stevens Act as “a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators and crew...that are based in such community.”

Plaintiffs include party and charter boat business owners and operators, wholesale and retail bait dealers, and other fishery dependent businesses that are representative of integral parts of fishing communities typical throughout the Mid-Atlantic region.

42. Management of the BSB fishery is primarily governed by two federal laws: The Magnuson-Stevens Act and the Atlantic Coastal Fisheries Cooperative Management Act (“ACFCMA”). The entity charged in carrying out the provisions of the ACFCMA is the Atlantic States Marine Fisheries Commission (“Commission”) As part of the cooperative management process for BSB (and other species), the Mid-Atlantic Fishery Management Council (“Council”) rules generally apply from 3 miles to 200 miles offshore, while the Commission’s jurisdiction generally encompasses coastal bays and rivers, and ocean waters to 3 miles offshore. The Commission accomplishes its component of the Black Sea Bass Plan management through the summer flounder and scup management board (the “Board”). The Board’s action is final, and pursuant to the terms of the ACFCMA, is binding upon member states. The Council’s recommendations must be reviewed by NMFS, which determines whether the recommendations comply with FMP objectives and the National Standards.

43. A Fisheries Management Plan for black sea bass was first made part of the summer flounder, scup and BSB FMP in 1996. Since that time, various amendments to the FMP have been adopted by the Council and NMFS, and concurrently adopted by the Commission, to address various issues which have arisen.

44. The annual harvest limit for recreational black sea bass fishing is set concurrently by the Council and the Commission. It is set as a total allowable catch (TAC) which includes landings and discards, and total allowable landings (TAL). A TAL refers to the number of fish actually landed and retained. The harvest limit is effective from January 1 to December 31 of each year. It is based upon a

recommendation of the Black Sea Bass Monitoring Committee (“Monitoring Committee”), which is created by the FMP, and now the Science and Statistical Committee (SSC). These committees review scientific information and recommend a TAC and TAL and other management measures meant to achieve a level of catch which will not result in overfishing.

45. Black sea bass stocks are considered to be rebuilt. When the stock was characterized as overfished, management measures were implemented so that it could be “rebuilt” to a level designated in the FMP within a certain time period. This was accomplished. Black sea bass were determined to have exceeded their rebuilding goal according to their 2008 stock assessment. Management measures as well as conservation practices and sacrifices by fishermen have resulted in the determination that black sea bass are no longer overfished and rebuilt. Total stock biomass has increased significantly over the last several years.

46. In 2008, the Council, NMFS and the Board approved a TAC of 2.71 million pounds, and TAL of 2.30 for the 2009 fishing season. Consistent with the plan, the TAL was allocated 51% to the recreational fishery, and 49% to the commercial fishery. NMFS approved the Council’s TAL and it became a final rule. The Board’s approval, which is not subject to NMFS approval, established a commensurate rule within the waters of its jurisdiction (i.e., up to three miles offshore).

47. In 2009, the Scientific and Statistical Committee (SSC) recommended that the TAC and TAL for 2010 remain the same as 2009’s (i.e. a TAC of 2.71 million pounds). The Council staff and Monitoring Committee recommended a TAC of 5.83 million pounds and a TAL of 4.80 million pounds.

48. Based upon the above, at a joint meeting of the Black Sea Bass Board of the ASMFC and the Mid-Atlantic Council, a TAC of 2.71 million pounds and TAL of

2.30 million pounds was approved.

49. In or around August, 2009, preliminary data from a much criticized angler survey produced by NMFS, suggested that recreational landings for BSB (and several other recreationally landed species) had exceeded the recreational TAL for 2009. Based upon the above, the Commission's Board arranged a meeting to consider a motion to close the fishery in State waters under the Commission's jurisdiction.

50. The Board was presented with recreational harvest projections from the MRFSS that indicated the harvest target could be exceeded by 86% to 165%. The Board decided to take no action regarding potential overage in the 2009 recreational black sea bass fishery. Public participation was permitted. The Board rejected a motion to close the recreational BSB fishery by a vote of 7 against and 4 in support. One of the votes in support of the closure was NMFS.

51. On October 5, 2009, NMFS published an emergency rule closing the black sea bass fishery in the EEZ. No comment was sought from the public. The Council was not afforded the opportunity to consider this action.

52. It is the action of NMFS in implementing this closure that forms the basis of this suit.

### **THE RECREATIONAL BLACK SEA BASS FISHERY**

53. Marine recreational fishing in New Jersey contributes approximately \$1.3 billion dollars per year to the state's economy. New York's numbers are only slightly less.

54. Although there are few recent studies, a party charter boat study by Rutgers University, found that in 1997 nearly 900,000 fishing trips were made with over

400 New Jersey party and charter boats. The number of party and charter boats, and the number of anglers who fish from them, has declined since that time because of increasingly more onerous regulations, and, of late, a severe recession.

55. A significant percentage of those anglers and fishing trips is dedicated to fishing for BSB. The recreational fishery for BSB tends to be prosecuted between April and February. The black sea bass fishery is responsible for a significant percentage of annual revenues for party and charter boats, marinas, bait and tackle wholesale and retail distributors and boat sales, particularly during the spring, fall and winter months.

56. Even according to NMFS' information, NMFS assumed that recreational anglers would take 106,574 trips directed at BSB. Despite the black sea bass fishery prosecuted from January through March each year, MRFSS does not record participation during this time.

57. Plaintiffs in this case rely upon the revenues derived from fishing for black sea bass, and the anglers who fish for these species, rely upon the ability to land them for food and pleasure. The closure eliminates these possibilities altogether.

58. In imposing the closure, NMFS failed to give adequate consideration to the social and economic impacts that would befall the recreational industry. It has also relied upon preliminary data from a survey (i.e., MRFSS) which has been deemed to be unreliable and not designed to be used in the way it is being used, including for such a closure. NMFS failed to give adequate consideration to the social and economic consequences of the proposed regulation, failed to abide by the laws and requirements needed to sustain the closure, and relied upon faulty data and a survey system that was not designed to be used for this purpose and which is acknowledged to be faulty.

59. This closure has undermined, and will continue to undermine, an important recreational activity and business which have been woven into the cultural

fabric of Mid-Atlantic and New England coastal states for over three centuries.

### MRFSS

60. The MRFSS was originally designed as a tool to analyze and predict trends in recreational fishing activities occurring over longer periods of time and geographic regions. It was not intended to be used as a state by state quota monitoring mechanism, yet it is. Indeed, the former Assistant Administrator of NMFS, Doctor William Hogarth, and other NMFS officials have publicly stated on various occasions that fishery managers should not use MRFSS in the manner in which it is used. Despite the survey's limitations, and known deficiencies, managers have routinely used the MRFSS data to determine specific catches during discrete time periods.

61. NMFS has explained the survey's limitations in response to a proposal to impose recreational paybacks in a related fishery for perceived over harvest by recreational anglers:

“The MRFSS is an excellent fishery management tool for the purpose for which it was designed, that is, giving an overall projection of recreational catch from the recreational fishery from Maine to Texas. However, the survey was not intended to be used as a basis for calculating an overage in the recreational fishery that would then be deducted from the quota established for the subsequent year. The survey variability becomes problematic, and this problem is further exacerbated if the fishery is managed on a regional quota basis as is a possibility in the scup fishery. In addition, the survey variability could affect residents of different states unevenly with respect to quota overages. These problems make the provision inconsistent with national standard 4. Likewise, because the survey is based on contacts with recreational fishermen, it reflects a sampling variability in addition to variations in the stock. The effects of this sampling variability render its use to calculate overages inconsistent with national standard 6. In failing to account for these variations, the use of the survey affects the overall ability of the entire scup quota management process to achieve on a continuing basis, the optimum yield from this fishery. This raises concern regarding its consistency with

national standard 1. Finally, it would take a significant expenditure of funds to reduce the survey variability, especially as the geographic area for which estimates are made is reduced, to render it consistent with national standard 2. This conflicts with national standard 7.”

62. The National Research Council, as part of the National Academy of Sciences, performed an analysis of MRFSS in 2000 at the request of NMFS after complaints from fishermen and congress had reached a fever pitch. That analysis indicated, *inter alia*, that MRFSS cannot be used for in-season fishery management adjustments. The report was highly critical of MRFSS. Despite the acknowledged flaws in MRFSS, and its in appropriate use to justify in-season adjustments or closures, NMFS closed the BSB fishery largely on the basis of one wave (covering the months of May and June, 2009) of preliminary MRFSS data.

63. The public, particularly representatives from the RFA and United Boatmen, has presented public comments setting forth the reasons that the MRFSS data regarding recreational participation and landings is bogus and presents false conclusions regarding high black sea bass catches and robust angler participation for the year 2009. That information has been ignored.

64. The contested emergency closure results from a misapplication and misuse of MRFSS in the management system. This misapplication and misuse has been acknowledged by defendants and independent scientists. This fact notwithstanding, defendant NMFS has used this fatally flawed statistical system to justify this emergency closure.

65.

#### **STATUTORY AND REGULATORY BACKGROUND**

66. The Magnuson-Stevens Act establishes a highly public and lengthy process to regulate fishing activities. Until the contested closure, that was the case with

BSB.

67. The national standard guidelines promulgated by NMFS to assist in development of fishery management plans and amendments to fishery management plans state that “[t]he national standards are statutory principles that must be followed in any [fishery management plan].” 50 C.F.R. § 600.305.

68. The APA provides that notice of a proposed rule making shall be published by agencies such as Defendants in the Federal Register (5 U.S.C. § 553(b)) and that interested persons shall have an opportunity to participate in the rule making through submission of written data, views or arguments (5 U.S.C. § 553(c)). The required publication of a substantive rule is not less than 30 days before its effective date pursuant to 5 U.S.C. § 553(d). Defendants claim they had “good cause” to waive prior notice and the opportunity for public comment pursuant to the exception provided by 5 U.S.C. § 553(b)(B) and to waive the 30-day comment period under 5 U.S.C. § 553(d)(3) thereby making the Rule challenged herein effective immediately upon publication on October 5, 2009. Defendants’ action was unlawful and should be set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

69. Defendants publicly acknowledged the inaccuracy and unreliability of MRFSS data on several occasions over the last decade and have stated on the record that MRFSS data is inappropriate for making in-season adjustments as Defendants have done with the Rule. Following the 2006 report by the National Research Council entitled “Review of Recreational Survey Methods”, Congress amended the Magnuson-Stevens Act in 2006 requiring Defendants to make significant improvements in recreational fishing data collection programs including MRFSS. 16 U.S.C. § 1881(g). Congress

mandated that Defendants establish and implement a regionally based registry program for recreational fishermen in each of the 8 fishery management regions. Defendants have failed to meet this Congressional mandate in the Mid-Atlantic region. Congress also required Defendants to establish and implement a program, incorporating recommendations of the National Research Council, to improve the quality and accuracy of information generated by MRFSS by January 1, 2009. 16 U.S.C. 1881(g)(3). Defendants failed to meet this deadline set by Congress, continue to be out of compliance with the law, and base the Rule challenged herein on the very MRFSS data condemned by Congress and the National Research Council.

70. Section 305(c) of the Magnuson-Stevens Act provides that: “If the Secretary finds that an emergency or overfishing exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing...” 16 U.S.C. 1855(c). While “overfishing” is a defined term under the law, “emergency” is not. However, Congress provided evidence of what it considers an “emergency” in Section 1855(c)(3)(C) which states: “Any emergency regulation or interim measure promulgated under this subsection that responds to a public health emergency or an oil spill may remain in effect until the circumstances that created the emergency no longer exist, provided, that the public has had an opportunity to comment after the regulation is published...” 16 U.S.C. 1855(c)(3)(C). There is no emergency in the recreational black sea bass fishery. The black sea bass stock is not “overfished” and “overfishing is not occurring” according to Defendants’ own Northeast Fisheries Science Center. With greatly improved recruitment and declining fishing mortality rates since 2000, spawning stock biomass has steadily increased over the last several years, also according to Defendants’ own science. Projections through 2011 suggest that an increase in fishing

mortality will not result in a decrease in biomass that would trigger rebuilding requirements under the Magnuson-Stevens Act.

71. Before management measures are imposed on a fishery, in addition to the National Standards, NMFS must consider the economic impacts in accordance with the Regulatory Flexibility Act. The Regulatory Flexibility Act requires a description of the need for the action, the management objectives, and a description of the expected economic impacts. It also requires an analysis of each alternative, the expected effects, and a description of the reasons why an action is being taken.

72. The small business Regulatory Enforcement and Fairness Act of 1996 amended the Regulatory Flexibility Act and made compliance with sections of the Regulatory Enforcement and Fairness Act subject to judicial review. The Regulatory Flexibility Act requires agencies to assess impacts of their proposed regulations on small entities and encourages federal agencies to utilize innovative administrative procedures when dealing with those small entities. The Regulatory Flexibility Act requires agencies to perform an Initial Regulatory Flexibility Analysis (“IRFA”) if an action is believed to have a significant impact on a substantial number of small entities. It is to do so during the proposed rule stage and, after considering public comment, a final Regulatory Flexibility Analysis (“FRFA”) is to be prepared.

73. In accordance with Executive Order 12866 (EO12866), the Department of Commerce and NOAA require the preparation of a Regulatory Impact Review (RIR) for regulatory actions that either implement a new fishery management plan or significantly amend an existing plan. The RIR is to focus on the net economic benefit from the entire fishery rather than the individual businesses or fishermen. It is intended to provide a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The agency must also provide a review of the problems and

policy objectives prompting the proposed rule, and evaluate the major alternatives that could be used to solve the problem.

74. An RIR was prepared in support of this closure. It is woefully inadequate, filled with speculation and conjecture, and devoid of any acknowledgment of concrete factors which belie the conclusions of the preliminary MRFSS data. Thus, for example, the RIR largely or wholly ignores the bait and tackle and offshore winter party and charter boat component of the recreational fishery; it fails to acknowledge the “novel legal or policy issues arising out of legal mandates”, such as relying on MRFSS as the best information available when concluding this is not “significant regulatory action”; incorrectly speculates that the closure will not change overall participation levels or angler satisfaction.

75. Before NMFS undertakes a major action significantly affecting the quality of the human environment, NEPA requires that the agency write a detailed statement evaluating “the environment impact of the proposed idea.” 42 U.S.C. § 4332(2)(C)(i). The agency may prepare an environmental assessment (“EA”) to determine whether an action constitutes a major federal action significantly affecting the quality of the human environment and thus necessitates a preparation of an Environmental Impact Statement (“EIS”), unless the agency has already decided to prepare an EIS. *See* 40 C.F.R. § 1508.9.

76. Council on Environmental Quality (“CEQ”) and NOAA guidelines in turn require that, to make the determination of whether an EIS is needed, the EA must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,” 40 C.F.R. § 1508.9(a)(1), and evaluate the direct, indirect, and cumulative impacts of the proposed action. *See* 40 C.F.R. §§ 1508.8 and 1508.9; NOAA Administrative Order 216-6 at

5.03B (June 3, 1999). As the CEQ and NEPA regulations make clear, an EA or EIS is the vehicle for analysis of federal agency actions upon the environment and the consideration of reasonable alternatives that would avoid or minimize the adverse impacts of those actions. 40 C.F.R. § 1502.1. The primary purpose of an EA or EIS “is to serve as an action forcing device to ensure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the federal government.” 40 C.F.R. §§ 1502.1. Accordingly, an EA or EIS “is more than a disclosure document” and is to be used by the federal officials in conjunction with other relevant materials to plan actions and make decisions.” *Id.*

77. Had NMFS followed the normal NEPA process, it would have concluded that the public had heightened concerns about the proposed rule. Moreover, when the Commission’s BSB Board considered the motion for an emergency closure, recreational representatives made clear there was great concern by the public for any such action. NMFS sat on the Board and was aware of that concern.

78. The APA further provides that: “(a) persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. In an APA suit, the reviewing court shall “hold unlawful and set aside agency actions, findings, and conclusions to be found (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law. . . .” 5 U.S.C. § 706(2).

## CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

#### (Claim for Declaratory and Injunctive Relief – Violation of APA 5 U.S.C. § 553)

79. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

80. The APA provides that notice of a proposed rule making shall be published by agencies such as Defendants in the Federal Register (5 U.S.C. § 553(b)) and that interested persons shall have an opportunity to participate in the rule making through submission of written data, views or arguments (5 U.S.C. § 553(c)). The required publication of a substantive rule is not less than 30 days before its effective date pursuant to 5 U.S.C. § 553(d).

81. Defendants purposely chose an insular approach designed to block further investigation and public scrutiny by claiming they had “good cause” to waive prior notice and the opportunity for public comment thereby making the Rule challenged herein effective immediately upon its October 5, 2009 publication date.

82. Defendants did not have “good cause” to exclude interested parties from this rule making process. The Rule is based upon MRFSS data from January 2009 through June 2009. Defendants had ample time in the months of July, August and September to publish the Rule and provide for a 30-day public comment period.

83. Defendants were fully aware that the Rule would be met by public outrage and therefore bypassed the notice stage of rule making and failed to engage in a public

dialogue concerning the merits of the Rule.

84. Defendants' action should be declared unlawful and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

85. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the Rule would apply has expired.

### **SECOND CLAIM FOR RELIEF**

#### **(Claim for Declaratory and Injunctive Relief – Violation of Magnuson-Stevens Act 16 U.S.C. 1881(g))**

86. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

87. Congress has directly spoken to the precise question at issue in this case: Does MRFSS in its current form produce the best scientific information available to manage U.S. recreational fisheries such as the black sea bass fishery? In 2006, Congress answered this question in the negative by way of adding Section 401(g) to the Magnuson-Stevens Act. 16 U.S.C. 1881(g).

88. The statute is unambiguous. The Magnuson-Stevens Act directs Defendants to make significant improvements in recreational fishing data collection programs including MRFSS. 16 U.S.C. 1881(g). Congress mandated that Defendants establish and implement a regionally based registry program for recreational fishermen in each of the 8 fishery management regions. 16 U.S.C. 1881(g)(1). Defendants have failed to meet this Congressional mandate in the Mid-Atlantic region.

89. The Magnuson-Stevens Act also required Defendants to establish and implement a program, incorporating recommendations of the National Research Council, to improve the quality and accuracy of information generated by MRFSS by January 1,

2009. 16 U.S.C. 1881(g)(3). Defendants failed to meet this deadline set by Congress, continue to be out of compliance with this section of the law, and base the Rule challenged herein on MRFSS data condemned by Congress and the National Research Council.

90. Defendants should be adjudged and declared to be in violation of the Magnuson-Stevens Act 16 U.S.C. § 1881(g).

91. Defendants' action should be declared unlawful and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

92. Defendant should be enjoined from making any further in-season adjustments to recreational fisheries management measures until the Court determines Defendants have met their mandates under Magnuson-Stevens Act 16 U.S.C. § 1881(g).

93. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the Rule would apply has expired.

### **THIRD CLAIM FOR RELIEF**

#### **(Claim for Declaratory and Injunctive Relief – Violation of Magnuson-Stevens Act 16 U.S.C. 1855(c))**

94. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

95. Section 305(c) of the Magnuson-Stevens Act provides that: "If the Secretary finds that an emergency or overfishing exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing..." 16 U.S.C.

1855(c). While “overfishing” is a defined term under the law<sup>2</sup>, “emergency” is not.

96. Congress provided evidence of what it considers an “emergency” in Section 305(c)(3)(C) which states: “Any emergency regulation or interim measure promulgated under this subsection that responds to a public health emergency or an oil spill may remain in effect until the circumstances that created the emergency no longer exist, provided, that the public has had an opportunity to comment after the regulation is published...” 16 U.S.C. § 1855(c)(3)(C). Clearly, Congress provided Defendants with emergency rulemaking authority under the Magnuson-Stevens Act to address real emergencies – e.g., the imminent collapse of a fishery, unexpected “overfishing”, or an environmental disaster such as a major oil spill.

97. There is no emergency in the recreational black sea bass fishery. The black sea bass stock is not “overfished” and “overfishing is not occurring” according to Defendants’ own Northeast Fisheries Science Center. With greatly improved recruitment and declining fishing mortality rates since 2000, spawning stock biomass has steadily increased over the last several years, also according to Defendants’ own science. Projections through 2011 suggest that an increase in fishing mortality will not result in a decrease in biomass that would trigger rebuilding requirements under the Magnuson-Stevens Act.

98. While the Secretary’s discretion under the Magnuson-Stevens Act is admittedly broad, it is not without limits.

99. Defendants’ exercise of emergency rule making authority under the Magnuson-Stevens Act (16 U.S.C. § 1855(c)) should be adjudged and declared unlawful and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in

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<sup>2</sup> The term “overfishing” means a rate or level of fishing that jeopardizes the capacity of a fishery to produce maximum sustainable yield on a continuing basis.

accordance with law pursuant to 5 U.S.C. § 706(2)(A).

100. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the Rule would apply has expired.

#### **FOURTH CLAIM FOR RELIEF**

##### **(Claim for Declaratory and Injunctive Relief – Violation of Magnuson-Stevens Act 16 U.S.C. § 1851(a)(1))**

101. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

102. Defendants have failed to comply with National Standard 1 of the Magnuson-Stevens Act in that the Rule fails to achieve, on a continuing basis, the optimum yield for the black sea bass fishery. 16 U.S.C. § 1851(a)(1). "Optimum yield" means "the amount of fish which will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems" 16 U.S.C. 1802(33).

103. In particular, the Rule fails to provide the greatest overall benefit to the nation, particularly with respect to food production and recreational opportunities.

104. Individual recreational fishermen fish for black sea bass because the recreational opportunities enhance their quality of life and black sea bass make excellent table fare. Unlike some other recreational fisheries where catch and release is popular among a significant number of participants, black sea bass are targeted because their tender, flavorful, white meat makes them a valued source of protein.

105. The proposed regulations significantly impede food production and recreational opportunities while alternative measures could have allowed for continued management of the black sea bass stock while also allowing for recreational anglers to continue enjoying the fishery and for the economic survival of fishery dependent

businesses. NMFS' decision to adopt the emergency closure violates National Standard 1 of the Magnuson-Stevens Act and is arbitrary, capricious, contrary to law, and an abuse of an agency discretion in violation of both the Magnuson-Stevens Act and the APA, 5 U.S.C. § 706(2).

106. Defendants' violations of the Magnuson-Stevens Act and the APA have caused the Plaintiffs irreparable injury for which there is no other adequate remedy at law.

107. Defendants' action should be adjudged and declared in violation of National Standard 1 and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

108. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the emergency rule would apply has expired.

#### **FIFTH CLAIM FOR RELIEF**

#### **(Claim for Declaratory and Injunctive Relief – Violation of Magnuson-Stevens Act 16 U.S.C. § 1851(a)(2))**

109. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

110. The Defendants have failed to comply with National Standard 2 of the Magnuson Stevens Act by failing to use the best scientific information available when implementing this emergency closure. 16 U.S.C. § 1851(a)(2).

111. Defendants have publicly acknowledged the problems with the accuracy and reliability of MRFSS data generated by random telephone surveys and dockside interviews of recreational fishermen which are fraught with human error.

112. The 2006 report by the National Research Council entitled "Review of Recreational Survey Methods" provides ample evidence that MRFSS data is not the best

scientific information available.

113. Congress recognized that MRFSS in its current form does produce the best scientific information available and amended the Magnuson-Stevens Act in 2006 requiring Defendants to make significant improvements in recreational fishing data collection programs. 16 U.S.C. § 1881(g).

114. Defendants have failed to meet the Congressional mandates in the Magnuson-Stevens Act to improve recreational fishing data collection programs.

115. The Defendants have also ignored evidence submitted to them which has further demonstrated the inappropriate use made by the Defendants of MRFSS, and the need to enhance the recreational catch and landings data. This arbitrary and capricious disregard of that substantive information has resulted in severe restrictions on the black sea bass recreational fishery.

116. Defendants have knowingly selected a flawed recreational data collection methodology to support the Rule challenged herein.

117. Defendants have failed to base the contested measures upon the best scientific information available and have, and will in the future, cause the Plaintiffs irreparable injury for which there is no other adequate remedy at law.

118. Defendants' action should be adjudged and declared in violation of National Standard 2 and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

119. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the emergency rule would apply has expired.

#### **SIXTH CLAIM FOR RELIEF**

#### **(Claim for Declaratory and Injunctive Relief – Violation of Magnuson-Stevens Act 16 U.S.C. § 1851(a)(8))**

120. Plaintiffs hereby repeat and reallege each and every allegation as if set

forth herein at length.

121. Contrary to National Standard 8, the Defendants have failed to take into account the importance of fisheries resources to fishing communities in order to (a) provide for the sustained participation of such communities, and (b) to the extent practicable minimize adverse economic impact on such communities. 16 U.S.C. § 1851(a)(8).

122. Plaintiffs include party and charter boat business owners and operators, wholesale and retail bait dealers, and other fishery dependent businesses that are representative of integral parts of fishing communities typical throughout the Mid-Atlantic region.

123. Defendants' obligations under the Magnuson-Stevens Act to conserve fishery resources do not override National Standard 8 which requires a balance of conservation interests against the economic interests of fishermen.

124. Defendants are bound to comply with the mandates of National Standard 8 of the Magnuson-Stevens Act.

125. Defendants failed to give any meaningful consideration to the economic impact the Rule would have on the fishing communities of the Mid-Atlantic.

126. The economic analysis Defendants described in the Regulatory Impact Review (RIR) is wholly inadequate. Defendants' limited inquiry into economic impact was largely based on fundamentally flawed MRFSS data. Defendants inquiry into economic impact of the Rule on party and charter boat business owners and operators is cursory at best and their analysis completely ignored the impact the Rule is having on black sea bass fishery dependent businesses in fishing communities such as bait and tackle retailers, bait wholesalers, and other service providers.

127. Defendants' violations of the Magnuson-Stevens Act have caused the

Plaintiffs irreparable injury for which it has no other adequate remedy at law.

128. Defendants' action should be adjudged and declared in violation of National Standard 8 and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

129. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the emergency rule would apply has expired.

### **SEVENTH CLAIM FOR RELIEF**

#### **(Claim for Declaratory Relief – Violation of RFA 5 U.S.C. §§ 603 - 604 )**

130. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

131. Defendants purposely chose an insular approach designed to block further investigation and public scrutiny by claiming they had "good cause" to waive prior notice and the opportunity for public comment thereby making the Rule challenged herein effective immediately upon its October 5, 2009 publication date.

132. Defendants did not have "good cause" to exclude interested parties from this rule making process.

133. Defendants decision to bypass the notice stage of rule making and failure to engage in a public dialogue concerning the merits of the Rule as required by APA § 553 was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law therefore, Defendant was in fact required by RFA § 603 to prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the Rule on small entities pursuant to 5 U.S.C. § 603 and a final regulatory

flexibility analysis pursuant to 5 U.S.C § 604.

134. The Defendants have failed to comply with the mandates of RFA in that they have failed to adequately assess the impacts of the Rule on small business entities such as those represented by the Plaintiffs.

135. Defendants failed to fully evaluate the direct, indirect, and cumulative impacts of the Rule. Defendants' inquiry into economic impact of the Rule on party and charter boat business owners and operators is cursory at best and their analysis completely ignored the impact the Rule is having on black sea bass fishery dependent businesses in fishing communities such as bait and tackle retailers, bait wholesalers, and other service providers.

136. Defendants did not engage in a good-faith effort to inform the public about potential adverse effects of the Rule.

137. Defendants completely ignored the impact that the Rule would have on small business entities such as those represented by the Plaintiffs in the context of the economic recession our Nation has been in and the plight small businesses have been suffering as a result of recent economic conditions.

138. Defendants completely ignored that recreational fishing opportunities for other species are limited in the Mid-Atlantic during the 180-day closure period under the Rule as a result of other regulatory measures in place and seasonal fish migrations.

139. Defendants limited their inquiry in order to reach their conclusion that the Rule is not a "significant regulatory action".

140. Defendants failed to consider alternatives to the Rule, e.g., a larger minimum size limit or smaller bag limit rather than a complete shutdown of the recreational black sea bass fishery, which would accomplish the stated objectives of applicable statutes and which would minimize any significant economic impact of the

Rule on small entities such as those represented by the Plaintiffs.

141. Defendants should be adjudged and declared to be in violation of RFA §§ 603 – 604.

142. Defendants' action should be declared unlawful and set aside for being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).

143. Defendant's actions are likely to recur and should, therefore, be addressed even if the time period in which the emergency rule would apply has expired.

#### **EIGHTH CLAIM FOR RELIEF**

**(Claim for Declaratory Relief – Violation of NEPA 42 U.S.C. § 4321 *et seq* )**

144. Plaintiffs hereby repeat and reallege each and every allegation as if set forth herein at length.

145. The Defendants have failed to comply with the mandates of NEPA, and the guidelines issued by the Council on environmental quality and NOAA, by failing, to provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or finding of no significant impact; evaluating the direct, indirect and cumulative impacts of the proposed action; by failing to adequately analyze and consider reasonable alternatives that would avoid or minimize the adverse impacts of the contested actions; and by failing to insure that the policies and goals defined in the Act are infused into the contested actions.

146. Defendants' violation of NEPA have caused the Plaintiffs irreparable injury for which there is no other adequate remedy at law.

147. Plaintiffs are entitled to a declaratory judgment that the Defendants have violated NEPA.

### **PRAYER FOR RELIEF**

148. Wherefore, the Plaintiffs respectfully request that the court enter judgment for the following relief:

1. A declaratory judgment holding the contested emergency closure unlawful.
2. A judgment setting aside the emergency rule as being violative of the APA and Magnuson-Stevens Act.
3. A judgement declaring, and setting aside, the emergency closure as being violative of the Regulatory Flexibility Act, NEPA, and Executive Order 12866.
4. An order awarding Plaintiffs' its attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;
5. An order enjoining the Defendants from enforcing the contested rules.
6. Enjoining Defendant from making any further in-season adjustments to recreational fishery measures until the court determines Defendants have met their mandates under the Mangnuson-Stevens Act.
7. For such other relief as the court deems equitable, just and proper under the circumstances.

Dated: Point Pleasant Beach, New Jersey  
November 4, 2009

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