

**TAMPA DIVISION
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

GULF FISHERMEN’S ASSOCIATION,
Plaintiff,

Case No.

v.

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

CARLOS M. GUTIERREZ, 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.

_____ /

**GULF FISHERMEN’S ASSOCIATION’S COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff, Gulf Fishermen’s Association, by and through the undersigned counsel, brings this action seeking declaratory and injunctive relief against Defendants Carlos Gutierrez, 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”). In support hereof, Plaintiff would show the Court as follows:

INTRODUCTION

1. This action for declaratory and injunctive relief arises under:
 - a. The Administrative Procedures Act, 5 U.S.C. §§ 701-706 (APA),
 - b. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (“RFA”), and
 - c. The Magnuson-Stevens Fishery Conservation and Management Act, as amended in 1996 by the Sustainable Fisheries Act, 16 U.S.C. § 1801 *et seq.* (“Magnuson-Stevens Act”).

2. Plaintiff Gulf Fishermen's Association ("GFA") brings this action to challenge the Final Rule requiring Vessel Monitoring System ("VMS"), found in NMFS Amendment 18A to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico ("Amendment 18A"), promulgated at 50 CFR § 622.9, which will become final on December 7, 2006. In particular, GFA challenges the authority of Secretary Gutierrez to issue the Final Rule without complying with the mandatory requirements under 5 U.S.C. § 604(a). In addition, GFA challenges the Defendant's substantive decisions made pertaining to the approval of the Final Rule in a manner that is inconsistent with the requirement that "Conservation and management measures shall...take into account the importance of the fishery resources to the fishing communities 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).

3. Pursuant the Magnuson-Stevens Act the Secretary of Commerce is vested with the power to make final rules and amendments to the Gulf of Mexico Fishery Management Plan. Final rules promulgated to implement Fishery Management Plans "shall be consistent with...national standards for fishery conservation and management" and "take into account the importance of the fishery resources to the fishing communities 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). The Secretary, through Amendment 18A, 50 C.F.R 622.9, has chosen to "require a NMFS-approved vessel monitoring system on board vessels with Federal commercial permits for Gulf reef fish..." *See* 71 Fed. Reg. 45428 (Aug. 9, 2006). In doing so the Secretary has failed to provide for the sustained participation of affected fishing communities or to minimize adverse impacts of the rule on such communities.

4. Final rules implementing or amending a Fishery Management Plan must also be promulgated in accordance with the requirements of the APA and the RFA. Pursuant to the RFA, the agency promulgating the final rule must include therein a Final Regulatory Flexibility Analysis. “Each final regulatory flexibility analysis shall contain...a description of the projected reporting, recordkeeping and other compliance requirements of the rule...and the type of professional skills necessary for preparation of the report or record; and...a description of the steps the agency has taken to minimize the significant economic impact on small entities...including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule...” 5 U.S.C. § 604(a). As the agency promulgating this final rule NMFS has failed to meet its minimum obligations under the RFA.

5. NMFS has determined that all vessels with Federal commercial permits for Gulf reef fish must be equipped with a VMS, to be paid for at great expense to the vessel owner’s, which will likely cause many vessel owners to go out of business. The costly VMS requirement is an attempt by the agency at “at-sea enforcement” of commercial fishing activities in special “closed areas” within the Gulf of Mexico fishery. The VMS requirement of Amendment 18A was arbitrarily and capriciously adopted and it fails to recognize that there are a number of situations that would allow a vessel with a Federal commercial permit for Gulf reef fish to be inside of a “closed area” and to legally carry on commercial fishing activities therein. The VMS does not enhance enforcement within the “closed areas” as it purports to.

6. Given the severity of the negative impacts of the Defendant’s actions on the commercial fishing industry and on fishing communities, GFA respectfully requests that this District 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).

APPLICABLE STATUTES, JURISDICTION, AND VENUE

7. This action arises under the APA, the Magnuson-Stevens Act, and the Regulatory Flexibility Act.

8. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act, which provides that “[t]he District Courts of the United States shall have the exclusive jurisdiction over any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861 (d). The Magnuson-Stevens Act further provides that regulations promulgated thereunder shall be subject to judicial review “if a petition for such review is filed within thirty (30) days on which the regulations are promulgated or action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855 (f)(1). The VMS requirements that are found within Amendment 18A and at 50 C.F.R. 622.9 and are challenged herein become “effective December 7, 2006.” *See* 71 Fed. Reg. 45428 (Aug. 9, 2006).

9. This Court also has jurisdiction over this action pursuant to the Regulatory Flexibility Act, which provides “For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of section[]...604...” 5 U.S.C. 611(a)(1). The Regulatory Flexibility Act, further provides “A small entity may seek such review during the period beginning on the date of final agency action and ending one year later...” 5 U.S.C. 611(a)(3)(A).

10. This Court also has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1346 (United States as Defendant); 28 U.S.C. § 2201 (Injunctive Relief); 28 U.S.C. § 2202 (Declaratory Relief); 5 U.S.C. §§ 701 – 706 (APA); and 5 U.S.C. § 611 (RFA).

11. An actual and justiciable controversy exists between the GFA and the Defendants.

Accordingly, the relief requested herein is proper under 28 U.S.C. § 2202 and 5 U.S.C. §§ 705 and 706.

12. Venue of this Court is proper under 28 U.S.C. § 1391(e)(2) and (3).

13. In the event that the GFA prevails on these claims it will be entitled to and will seek an award of attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

14. Defendants' actions are causing immediate, severe and irreparable harm to the GFA. Accordingly, resolution of the merits of this matter should be expedited in every way possible pursuant to 16 U.S.C. § 1855(f)(4).

15. Service of process is pursuant to Fed. R. Civ. P. 4(i)(1) and (2).

PARTIES

16. GFA is a Florida Non Profit corporation with its headquarters in St. Petersburg, Florida. GFA is a commercial fishing advocacy group representing the interest of commercial fishermen whose livelihoods depend largely upon the fishery resources of the Gulf of Mexico. GFA operates out of Florida. GFA members individually meet the definition for a "small business" under the RFA. The GFA itself meets the definition a "small organization" under the RFA. The vast majority of GFA's members live near the Gulf of Mexico and fish in its waters. Many of its members possess Gulf reef fish permits and derive some, if not all, of their income from the harvest and sale of Gulf reef fish. GFA members have played an active role in the management of Gulf of Mexico fisheries since the GFA was founded. Many of the GFA's members are directly affected by the VMS requirement within Amendment 18A. The VMS requirements will cause many individual GFA members in possession of a Gulf reef fish permit to expend great personal financial resources purchasing, installing and maintaining the mandatory VMS's by

December 7, 2006 or they will be subject to the monetary fines and permit sanctions provided for under the Magnuson-Stevens Act, potentially jeopardizing the basis for their livelihoods. As an affected and interested party, GFA brings this action on behalf of itself and its adversely affected members. Unless the Court grants the requested relief on an expedited basis, GFA and its adversely affected members will continue to be impaired by Defendant's actions in passing an arbitrary and capricious final rule and without complying with its legal obligations under the Magnuson-Stevens Act and the RFA. GFA and its members have no other adequate remedy at law.

17. Defendant Secretary Gutierrez, in his official capacity as the Secretary of Commerce of the United States, is the federal official responsible for the operations of NOAA and NMFS. Secretary Gutierrez is sued in his official capacity as the chief officer of the department charged with overseeing the proper administration and implementation of the APA, the Magnuson-Stevens Act, and the FRA.

18. Defendant NOAA is the agency of the United States Department of Commerce with supervisory responsibility for NMFS. The Secretary of Commerce has delegated responsibility to ensure compliance with the Magnuson-Stevens Act, the APA, and the FRA to NOAA which has in turn sub-delegated that responsibility to NMFS.

19. Defendant NMFS is the federal agency with primary responsibility for administering the Magnuson-Stevens Act and performing FRA compliance regarding its Magnuson-Stevens Act actions. NMFS has final management authority over the Gulf reef fish in the Gulf of Mexico. NMFS is the federal agency that approved Amendment 18A and its VMS requirement, which is the subject of this Complaint.

STATUTORY AND REGULATORY BACKGROUND

20. The Magnuson-Stevens Act is intended to protect and restore the nation's fish stocks which have been depleted due to overfishing and habitat loss. 16 U.S.C. § 1801(a)-(b).

21. In enacting the Sustainable Fisheries Act of 1996 to amend the Magnuson-Stevens Act, Congress found that:

“Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) inadequacy of fishery resource conservation and management practices and controls...”

16 U.S.C. § 1801(a)(2).

22. To manage the nation's fish stocks and to prevent overfishing, the Magnuson-Stevens Act created eight fishery management councils, each responsible for producing fishery management plans to regulate fishing within its region. 16 U.S.C. § 1852. These fishery management plans must balance the needs of fishery users against conservation principles by reference to ten national standards. 16 U.S.C. § 1851(a). The Gulf of Mexico Fishery Council manages fish stocks in the Gulf of Mexico.

23. 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 plan to ensure that they are consistent with the national standards and other applicable laws. 16 U.S.C. §§ 1852(h)(1), 1854(a)(1)-(2). If a fishery management plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. § 1854(a)(3).

24. The Magnuson-Stevens Act establishes national standards for creating fishery management plans. National Standard number eight (8) of the Magnuson-Stevens Act requires that “conservation and management measures shall take into account the importance of the

fishery resources to the fishing communities 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).

25. The APA provides that: “(a) persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial relief thereof.” 5 U.S.C. § 702. In an APA suit, the reviewing court shall “hold unlawful and set aside agency actions, findings, and conclusions found to be (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (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).

26. The Regulatory Flexibility Act requires agencies to take steps to collect information and input from small entities on regulations and to determine whether a rule is expected to have a significant economic impact on a substantial number of small entities. The FRA further requires that the agency publish with its final rule a Final Regulatory Flexibility Analysis (“FRFA”).

27. The FRFA must comply with the provisions of 5 U.S.C. § 604. At a minimum each FRFA “shall contain –

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”

5 U.S.C. § 604(a)

28. The requirements of 5 U.S.C. § 604(a) above are meant to allow affected small entities to quickly and easily identify each of the above requirements and make a determination that the RFA has been complied with.

29. “A small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of section[...] 604...” of the FRA. 5 U.S.C. § 611(a)(1).

30. “A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.” 5 U.S.C. § 611(a)(3)(A).

31. “Each court having jurisdiction to review such rule for compliance with section 553 [of the APA], or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with section[...]...604...of the FRA. 5 U.S.C. § 611(a)(2).

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

32. Gulf reef fish are commercially harvested within the Exclusive Economic Zone (“EEZ”) by those commercial fishers holding valid federal reef fish permits issued pursuant to the terms of the Magnuson-Stevens Act. Gulf reef fish include gray triggerfish, hogfish, 4 species of jacks, 14 species of snappers, 5 species of tilefish, and 17 species of grouper. *See* 50 C.F.R Part 622, Table 3. Gulf reef fish are managed under the Gulf of Mexico Fishery Management Plan for Reef Fish Resources, which was developed pursuant to the Magnuson-Stevens Act.

33. For purposes of the Magnuson-Stevens Act, and all fishery management plans developed thereunder, the EEZ is a zone within a 200 mile radius of the United States coastline where federal fishery regulations apply, the inner boundary of which “is a line conterminous with the seaward boundary of each of the coastal states.” 16 U.S.C. § 1802(11).

34. Within the EEZ there are “closed areas” where the federal government has determined that no Gulf reef fish fishing activities or harvest may take place. These areas include the Madison/Swanson Marine Reserve, the Steamboat Lumps Marine Reserve, the Tortugas North Ecological Reserve, and the Tortugas South Ecological Reserve.

35. “Closed areas” may be traversed by any vessel at any time. A vessel may also stop within a “closed area” at any time and for any reason other than to conduct fishing activities. Further, all fishing activities are not closed in “closed areas” year round. The abovementioned “closed areas” are closed to all fishing from November 1 to April 30. Surface trolling for species other than reef fish is allowed from May 1 to October 31. However, the commercial harvest of species defined within the Magnuson-Stevens Act as highly migratory species is lawful year-round within the Madison/Swanson Marine Reserve, the Steamboat Lumps Marine Reserve “closed areas.”

36. Enforcement of “closed area” fishery restrictions require at-sea enforcement, which “is difficult due to the distance from shore and the limited number of patrol vessels, resulting in a need to improve enforceability of area fishing restrictions through remote sensing methods.” *See* Amendment 18A, at 6.

37. NMFS has determined that “A vessel monitoring system [] is needed to improve enforcement of area restrictions.” *See* Amendment 18A, at 6.

38. On August 9, 2006 the Gulf Council, through Amendment 18A, amended the method by which enforcement and monitoring of “closed areas” will take place. Effective December 7, 2006, a VMS will be required on each vessel having a valid Gulf reef fish permit.

39. The VMS must be turned on seven (7) days per week and twenty-four (24) hours per day during which time the VMS sends a signal to the agency indicating only the location of the vessel at the time that the signal is transmitted. The government will track the locations of each vessel having a valid Gulf reef fish permit in an attempt to enforce its regulations regardless of whether there is any indication that the vessel has violated fishing regulations at any time in the past, or will violate fishing regulations at any time in the future. A procedure is provided for allowing a vessel owner to shut down a VMS whereby the agency gives permission for a thirty (30) day shut down. The vessel is not allowed to leave the dock during the time that the VMS is turned off.

40. The VMS is intended to “allow[] a more effective means to monitor vessels for intrusion into restricted areas...” *See* Amendment 18A at 3. However, intrusion into the restricted or closed areas by vessels having a valid Gulf reef fish permit is not unlawful and the VMS requirement will not provide the government with any indication as to whether a vessel that has entered a closed area is conducting any type of fishing activities or whether that vessel is

lawfully fishing for a highly migratory species within the “closed area.” At-sea enforcement will still be required to determine whether any illegal fishing activities are taking place. The VMS will do nothing more than track to location of the vessel.

41. The cost of installing and maintaining each VMS is estimated by the government to range from \$2,032.00 to \$3,651.00. This cost is to be borne by individual vessel owners, which the government recognizes to be substantial, particularly relative to the profits of small-time vessel operations.

42. The government estimates that commercial reef fish vessels in the Gulf of Mexico have an annual net income range from \$4,479.00 for low-volume vertical line [commercial] vessels to \$28,466.00 for high-volume vertical line [commercial] vessels” and for-hire vessels have “annual operating profits rang[ing] from \$36,758.00 for charter vessels to \$338,209.00 for headboats.” 71 Fed. Reg. 45431-32 (Aug. 9. 2006). “Currently, there are 1,145 commercial and 1,574 for-hire active vessel permits for the Gulf reef fish fishery. *See*, 71 Fed. Reg. 45431 (Aug. 9. 2006); and Amendment 18A, at 81-82.

43. On the basis of the numerical and monetary determinations of the preceding paragraph, the agency concluded that the VMS requirement within Amendment 18A would have a substantial effect on the profitability of commercial vessels and a significant economic impact on a substantial number of small entities. *See*, Amendment 18A, section 82.

44. In adopting Amendment 18A, and in order for it to properly become a final rule, the agency must comply with the provisions of the RFA, and in particular, section 604 thereof. *See* paragraph’s 25-27, above.

45. To comply with the RFA, Amendment 18A must contain all of the elements listed within section 604(a)(1)-(5). Included among those elements are “a description of the projected

reporting, recordkeeping and other compliance requirements of the rule...and the type of professional skills necessary for preparation of the report or record; and a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.” 5 U.S.C. § 604(a)(4) and (5). No indication as to the type of skills necessary for preparing of reports and records is given in the final rule, no description of the steps taken by the agency to minimize the economic impact on small entities has been included in the final rule, and no legal reasons have been included in the final rule that indicate why the VMS alternative was chosen by the agency.

46. All fishery management plans must be consistent with the national standards for fishery conservation and management. 16 U.S.C. § 1851(a). National Standard number eight (8) requires that “conservation and management measures shall take into account the importance of the fishery resources to the fishing communities 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). Amendment 18A has not taken into consideration the importance of the fishery resources on fishing communities, it does not provide for the sustained participation of these communities, and it has made no attempt to minimize the adverse economic impacts on these communities.

47. Based upon the factual circumstances surrounding the passage of Amendment 18A, the Defendants are precluded from requiring vessels to be equipped with VMS’s in the absence of compliance with the above referenced federal statutes.

FIRST CLAIM FOR RELIEF
Claim for Declaratory Relief

(The VMS Requirement of Amendment 18A Violates the Magnuson-Stevens Act National Standard Number Eight)

48. GFA incorporates by reference the allegations set forth in paragraphs 1 through 47 above, as though fully set forth herein.

49. The Magnuson-Stevens Act requires that all fishery management plans must be consistent with the national standards for fishery conservation and management. 16 U.S.C. § 1851(a).

50. National Standard number eight (8) requires that “conservation and management measures shall take into account the importance of the fishery resources to the fishing communities 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).

51. Amendment 18A does not take into account the importance of the fishery resources to fishing communities in order to provide for the sustained participation of those communities, and in no way minimizes the adverse economic impacts on such communities.

52. Defendants’ violations of the Magnuson-Stevens Act have caused the GFA and its individual members irreparable injury for which there is no other adequate remedy at law.

53. The GFA is entitled to declaratory judgment that Defendants have violated the Magnuson-Stevens Act in adopting Amendment 18A as a final rule of the Gulf of Mexico Fishery Management Plan without complying with the mandatory considerations and accounting requirements of National Standard number eight (8).

SECOND CLAIM FOR RELIEF
Claim for Declaratory Judgment

(The VMS Requirement of Amendment 18A is Arbitrary, Capricious and an Abuse of Agency Discretion)

54. GFA incorporates by reference the allegations set forth in paragraphs 1 through 47 above, as though fully set forth herein.

55. The VMS requirement within Amendment 18A is being enacted for the stated purpose of “improve[ing] enforceability of area restrictions in order to...enhance the ability of enforcement agencies to detect and prevent the use of fishing gear in [closed areas of the Gulf of Mexico]...” *See* Amendment 18A at 6. Amendment 18A also states that the purpose of requiring the VMS is to “allow[] a more effective means to monitor vessels for intrusion into restricted areas...” *See* Amendment 18A at 3.

56. However, because intrusion into restricted areas is not unlawful, and vessels having a VMS will still be legally allowed to traverse the “closed areas” within the Gulf of Mexico, and monitored vessels will be allowed to carry on any other lawful activities, including commercial fishing for highly migratory species, within the “closed areas,” the stated purposes of the VMS requirement within Amendment 18A will in no way be achieved.

57. The VMS requirement of Amendment 18A is arbitrary, capricious, contrary to law, and an abuse of agency discretion in violation of the APA, 5 U.S.C. § 706(2).

58. Such agency action is actionable pursuant to the APA.

59. Defendants’ violations of the APA have caused the GFA and its individual members irreparable injury for which there is no other adequate remedy at law.

60. The GFA is entitled to declaratory judgment that the VMS requirement of Amendment 18A is arbitrary, capricious, contrary to law, and an abuse of agency discretion in violation of the APA.

THIRD CLAIM FOR RELIEF
Claim for Declaratory Judgment

(The VMS Requirement of Amendment 18A Violates the RFA)

61. GFA incorporates by reference the allegations set forth in paragraphs 1 through 47 above, as though fully set forth herein.

62. The GFA and its members are “small entities” as that term is employed in the RFA’s judicial review provisions, 5 U.S.C. § 611(a)(1).

63. As concluded by NMFS, Amendment 18A, and particularly its VMS requirements, will have a significant economic impact on a substantial number of small entities; therefore the secretary and his designees are required to abide by the procedures within the RFA set forth at 5 U.S.C. §§ 604(a)(4)-(5).

64. The Secretary and his designees’ final regulatory flexibility analysis contained within Amendment 18A does not comply with the RFA because such analysis fails to adequately address the specific considerations required within sections 604(a)(4) and (5) thereof, to the extent that such analysis addresses these requirements at all.

65. Such failure is actionable pursuant to the RFA and the APA.

66. Defendants’ violations of the RFA have caused the GFA and its individual members irreparable injury for which there is no other adequate remedy at law.

67. The GFA is entitled to declaratory judgment that Defendants have violated the RFA by adopting Amendment 18A as a final rule of the Gulf of Mexico Fishery Management Plan without complying with the mandatory considerations of 5 U.S.C. §§ 604(a)(4) and (5).

FOURTH CLAIM FOR RELIEF
Claim for Declaratory Judgment

(The VMS Requirement of Amendment 18A is an Unconstitutional Violation of Privacy)

68. GFA incorporates by reference the allegations set forth in paragraphs 1 through 47 above, as though fully set forth herein.

69. GFA members and all other commercial fishers who possess a valid Gulf reef fish permit have a constitutional right to privacy pursuant to Fourth Amendment to the Constitution.

70. The 24 hour electronic monitoring of vessels with no indication that they will be used in violation of governmental fishing regulations violates the constitutional right to privacy guaranteed under the Fourth Amendment.

71. Defendants' violations of GFA members' constitutional right to privacy have caused the GFA and its individual members irreparable injury for which there is no other adequate remedy at law.

72. The GFA is entitled to declaratory judgment that the VMS requirement of Amendment 18A is a violation of the Fourth Amendment to the Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Gulf Fishermen's Association and its members respectfully request that this honorable Court enter the following relief:

1. A declaratory judgment that the VMS requirement of Amendment 18A violates the Magnuson-Stevens Act, National Standard number eight (8) by failing to take into account the importance of the fishery resources to fishing communities in order to provide for the sustained participation of such communities, and to minimize adverse economic impacts on such communities;

2. A declaratory judgment that Defendants violated the APA in that the VMS requirement of Amendment 18A is arbitrary, capricious, contrary to law, and an abuse of agency discretion;

3. A declaratory judgment that the VMS requirement of Amendment 18A violates the RFA by failing to adequately address the specific considerations required within 5 U.S.C. §§ 604(a)(4) and (5);
4. A declaratory judgment that the VMS requirement of Amendment 18A is a violation of the Fourth Amendment to the Constitution in that the 24 hour per day electronic monitoring of the location of vessels with no indication that they will be used in violation of governmental fishing regulations is a violation of the vessel owner and/or operator's right to privacy;
5. An order awarding Plaintiff Gulf Fishermen's Association its attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
6. An order granting such other and further relief as the Court deems equitable, just, and proper under the circumstances.

DATED: October 23, 2006

Respectfully submitted,

By: s/ Gary M. Mastry, II
Gary M. Mastry, II, Esquire
Mike Mastry, Attorney & Counselor, P.A.
2101 5th Avenue North
St. Petersburg, FL 33713
Phone (727) 896-5191
Fax (727) 323-3252
Florida Bar Number 0720879

Attorneys for Gulf Fishermen's Association

Trial Counsel: Mike Mastry