



This Final Rule violates the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act, because it increases fishing opportunities for the imperiled Atlantic bluefin tuna without full and proper analysis and mitigation of the effects of the action.

2. Atlantic bluefin tuna populations are overfished and rebuilding policies in place since 1998 in the western Atlantic have not been successful to date. The western Atlantic bluefin tuna have been severely depleted since the early 1970s, and in the past decade the eastern Atlantic bluefin tuna has been subjected to the largest catches since the fishery began. In June 2011 the Fisheries Services listed both stocks of Atlantic bluefin tuna as “species of concern” under the Endangered Species Act (“ESA”) due to their imperiled status and multiple threats and will revisit the status of bluefin tuna under the ESA in 2013. Endangered and Threatened Wildlife and Plants; Endangered Species Act Listing Determination for Atlantic Bluefin Tuna, 76 Fed. Reg. 31,556 (June 1, 2011).

3. The Final Rule loosens controls on fishing for bluefin tuna. Specifically, it increases retention limits and lengthens the fishing season. Because bluefin tuna migrate, lengthening the fishing season also expands the geographic range of fishing. Similar to regulatory changes completed in 2003, which also increased retention limits and lengthened the fishing season, the Final Rule creates fishing opportunities in states that have not historically participated in the fishery and exposes bluefin tuna to commercial fishing for an additional two months a year.

4. The Final Rule for the 2011 Atlantic bluefin tuna regulations is unlawful for several reasons. In violation of the Magnuson-Stevens Act, the Final Rule: 1) increases fishing opportunities for an overfished species for which overfishing is occurring; 2) fails to minimize

bycatch; 3) fails to base management measures on the best scientific information available, particularly with respect to the impacts of high rates of illegal fishing overseas. In addition, in violation of NEPA Defendants failed to analyze a reasonable range of alternatives and associated impacts, including cumulative impacts, for the Final Rule and failed to provide a reasonable response to public comments on the Draft EA for the proposed rule. Each of these actions and omissions fails to comply with the statutory requirements of the Magnuson-Stevens Act and NEPA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation of the Administrative Procedure Act.

5. Western Atlantic bluefin tuna have been at low population levels for decades despite conservation efforts. Recent science has shown that the current limits on bluefin tuna fishing set by international treaty are inadequate to prevent further decline. The Final Rule's increase in fishing jeopardizes the recovery of western Atlantic bluefin tuna.

**APPLICABLE STATUTES, JURISDICTION AND VENUE**

6. This Action arises under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884; the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

7. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act, which provides that the “district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861(d). The Magnuson-Stevens Act also provides that actions taken by the Secretary of Commerce under regulations implementing a fishery management plan shall be subject to judicial review “if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable.” 16 U.S.C. §

1855(f). Defendants published the Final Rule implementing the 2011 Atlantic bluefin tuna regulations on November 30, 2011, in the Federal Register. 76 Fed. Reg. 74,003. Plaintiff is filing this Complaint within thirty (30) days of publication of the Final Rule.

8. This Court further has jurisdiction over this action pursuant to the Administrative Procedure Act, which provides that final agency action is subject to judicial review. 5 U.S.C. §§ 701-706. Defendants' issuance of its Final Rule implementing the 2011 Atlantic bluefin tuna regulations and its associated EA is an "agency action" subject to judicial review under the Administrative Procedure Act.

9. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), which grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States" and 28 U.S.C. § 1361, which grants the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

10. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and may also grant relief pursuant to the Magnuson-Stevens Act, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the Administrative Procedure Act. 5 U.S.C. § 706.

11. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(e), because the Fisheries Service defendants are located in this district and a substantial part of the events and omissions which give rise to this action occurred here.

## PARTIES

12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a nonprofit corporation that works through science, law and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 42,000 members, including over 7,000 members in Atlantic and Gulf of Mexico coastal states. These members include those who have viewed, photographed, and otherwise appreciated Atlantic bluefin tuna, who live near the bluefin tuna's habitats and ecosystems, and who intend to visit and enjoy Atlantic bluefin tuna, their habitats and their ecosystems in the future.

13. The conservation and sound management of Atlantic bluefin tuna is a central focus of the Center's ocean program. The Center has devoted considerable resources to studying and communicating the threats to bluefin tuna and organizing scientific, legal and media efforts to mitigate these threats. These efforts include petitioning the National Marine Fisheries Service in May 2010 to list the Atlantic bluefin tuna under the Endangered Species Act and launching a grassroots campaign to reduce consumer demand for bluefin tuna sushi. The Center has been involved in the development of the 2011 Atlantic bluefin tuna regulations, submitting two comments to the 2009 proposed rule, dated December 11, 2009 and March 31, 2010, submitting comments dated April 28, 2011, on the Fisheries Service's proposed rule implementing Atlantic bluefin tuna quotas and Atlantic tuna fisheries management measures (76 Fed. Reg. 13,583), and attending and commenting at the September 2011 Highly Migratory Species Advisory Panel meeting.

14. The Center and its members use and enjoy the oceans for numerous activities, including fishing, birding, boating, swimming, research and study. The Center's members and staff value a healthy marine environment and derive scientific, recreational, conservation,

educational and aesthetic benefit from the existence, observation and study of Atlantic bluefin tuna. They are concerned about and directly affected by environmental injury caused by unsustainable fishing practices in the U.S. Atlantic bluefin tuna fishery, including implementation of the 2011 Atlantic bluefin tuna regulations. The regulations make it more likely that overfishing and bycatch of bluefin will occur, which will further reduce the already depleted bluefin tuna population, thus harming the Center and its members' aesthetic interests. These interests in Atlantic bluefin tuna and its environment are being harmed by the Fisheries Service's failure to adequately protect bluefin tuna through management of the fishery.

15. The above-described aesthetic, conservation, recreational, scientific, educational, and other interests of the Center staff and members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by the Defendants' promulgation of regulations unlawful under the Magnuson-Stevens Act. In addition, these regulations have impacts inadequately analyzed under NEPA, injuring the Center staff and members' procedural interests. These injuries are actual and concrete and would be redressed by the relief sought herein. Plaintiff has no adequate remedy at law.

16. The Defendants in this action are:

a. JOHN E. BRYSON. Mr. Bryson is sued in his official capacity as Secretary of Commerce. He is ultimately responsible for overseeing the proper administration and implementation of the Magnuson-Stevens Act in connection with federal fisheries management actions, including provisions related to the duty to end and prevent overfishing and achieve optimum yield. He is also responsible for his agency's compliance with NEPA.

b. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION. The National Oceanic and Atmospheric Administration ("NOAA") is an agency of the United

States Department of Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary of the Department of Commerce has delegated responsibility to ensure compliance with the Magnuson-Stevens Act to NOAA, which in turn has sub-delegated that responsibility to the National Marine Fisheries Service.

c. NATIONAL MARINE FISHERIES SERVICE. The National Marine Fisheries Service (“Fisheries Service”) is an agency of the United States Department of Commerce that has been delegated the primary responsibility to ensure that the requirements of the Magnuson-Stevens Act and other applicable laws are followed and enforced, including the requirements to prevent and end overfishing, to rebuild overfished populations of fish, and to achieve optimum yield.

### **LEGAL BACKGROUND**

#### **Magnuson-Stevens Fishery Conservation and Management Act**

17. The Magnuson-Stevens Act is designed to conserve and manage fish populations in the United States territorial waters and in the exclusive economic zone, which extends from the boundaries of state waters (3 miles from shore) to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. § 1801(b)(1).

18. Bluefin tuna are classified as a highly migratory species under the Magnuson-Stevens Act. For highly migratory species such as bluefin tuna, the Fisheries Service has direct responsibility for preparing a fishery management plan and implementing regulations for the purposes of conservation and management of the Atlantic bluefin tuna fishery. See 16 U.S.C. §§ 1802(21), 1854(g)(1), 1852(a)(3).

19. The Magnuson-Stevens Act requires that fishery management plans, fishery management plan amendments, and any regulations promulgated to implement such fishery

management plans, must be consistent with the “National Standards” for fishery conservation and management, and certain other requirements. 16 U.S.C. § 1851(a).

20. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery . . . .” 16 U.S.C. § 1851(a)(1).

21. While the Fisheries Service has a degree of discretion to balance among seemingly competing interests such as economic impact and allocation, the agency must always place first priority on the conservation objectives embodied in National Standard One.

22. The Magnuson-Stevens Act requires the Fisheries Service to identify fish populations that are overfished – or approaching an overfished condition – and to manage those populations by attaining the optimum yield that will rebuild them to a healthy population level. 16 U.S.C. § 1802(33)(C) (optimum yield for an overfished fishery provides for rebuilding the population); 16 U.S.C. § 1853(a)(10) (fishery management plans must “specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished” and “contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery”); 16 U.S.C. § 1854(e) (requirements to identify overfished fisheries, to end overfishing immediately, and to rebuild overfished fisheries as soon as possible).

23. The Magnuson-Stevens Act and its implementing regulations highlight the importance of protecting marine ecosystems. “Optimum yield” is defined as 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,” and “is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor.” 16 U.S.C. § 1802(33).



24. National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

25. National Standard Nine of the Magnuson-Stevens Act requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

### **Atlantic Tunas Convention Act**

26. Because Atlantic bluefin spend part of their lives in international waters, they are subject to regulation by the International Commission for the Conservation of Atlantic Tunas (“International Commission”). The International Commission establishes bluefin quotas for each member country; thus United States fishermen are limited to catching the amount of western Atlantic bluefin allocated to this country's quota.

27. The Fisheries Service manages Atlantic bluefin tuna under the dual authority of the Magnuson-Stevens Act and the Atlantic Tunas Convention Act, 16 U.S.C. §§ 971-971k. Under the Atlantic Tunas Convention Act, the Fisheries Service, by delegation from the Secretary, is authorized to promulgate regulations to implement the International Commission’s recommendations. 16 U.S.C. § 971d(c).

28. The Atlantic Tunas Convention Act provides authority for the Fisheries Service to regulate the fishery by establishing closed seasons; limiting the size of the fish and the quantity of catch; limiting or prohibiting the incidental catch of a regulated species; and take other actions to sustainably manage the fishery. 16 U.S.C. § 971d(c)(3). Regulations promulgated must, to the extent practicable, be consistent with fishery management plans prepared and implemented under the Magnuson-Stevens Act. 16 U.S.C. § 971d(c)(1)(C).

29. The Atlantic Tunas Convention Act also provides also provides that no such regulations “may have the effect of increasing or decreasing any allocation or quota of fish or fishing mortality level” set by the International Commission. 16 U.S.C. § 971d(c)(3). This ensures that the Fisheries Service does not unilaterally adjust the U.S. allotment under the treaty at the expense (or to the benefit) of other states.

### **National Environmental Policy Act**

30. Congress enacted the National Environmental Policy Act (“NEPA”) to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies, including the Fisheries Service, to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5. An agency’s evaluation of environmental consequences must be based on scientific information that is both “[a]ccurate” and of “high quality.” 40 C.F.R. § 1500.1(b). In addition, federal agencies must notify the public of proposed projects and allow the public the chance to comment on the environmental impacts of their actions. *See id.* § 1506.6.

31. The cornerstone of NEPA is the environmental impact statement (“EIS”). An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. It must provide a “full and fair discussion of significant environmental impacts and . . . inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

32. The Council on Environmental Quality’s NEPA regulations describe numerous factors indicating that an action significantly affects the environment, including, but not limited

to, the degree to which the action sets precedent for future actions, affects ecologically critical areas, has unknown effects, impacts endangered or threatened species, or involves a high level of controversy. 40 C.F.R. § 1508.27. An action may have significant effects on the environment that trigger the completion of an EIS regardless of whether those impacts are negative or beneficial impacts. *Id.*

33. After an agency has completed an initial EIS, it must prepare a supplemental EIS when the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

34. NEPA regulations make clear that an agency must prepare an EIS “if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by . . . breaking [an action] down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

35. In an EIS, the federal agency must identify the direct, indirect, and cumulative impacts of the proposed action, and consider alternative actions and their impacts. See 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.16. Agencies must consider “[c]onnected actions,” “[c]umulative actions,” and “[s]imilar actions” together in one environmental impact statement. 40 C.F.R. § 1508.25(a)(1)-(3). Actions are “connected actions” if they: a. “[a]utomatically trigger other actions which may require environmental impact statements,” b. “[c]annot or will not proceed unless other actions are taken previously or simultaneously;” or c. “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* § 1508.25(a)(1)(i)-(iii).

36. An agency may determine, after preparing an environmental assessment (“EA”) and finding of no significant impact (“FONSI”), that preparation of an EIS is unnecessary. However, an agency may rely on an EA/FONSI only if its proposed action will not have significant environmental effects. 40 C.F.R. § 1508.13. Moreover, the agency may not rely upon the analysis performed in a prior EIS regarding the agency action if “the agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts.” 40 C.F.R. § 1502.9(c).

#### **Administrative Procedure Act**

37. The Administrative Procedure Act requires courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.” 5 U.S.C. § 706(2).

### **FACTUAL ALLEGATIONS**

#### **Decline of Atlantic Bluefin Tuna**

38. The Atlantic bluefin tuna (*Thunnus thynnus*) is a vital component of the Atlantic Ocean. Growing up to 1500 pounds, living for over 30 years, and traversing the ocean in a matter of weeks, these predators keep Atlantic Ocean ecosystems healthy and once supported vibrant fishing communities.

39. Atlantic bluefin tuna is managed as two separate stocks or management units separated by the 45° longitude meridian. The western Atlantic stock, ten times smaller than the eastern Atlantic/Mediterranean stock, returns to the Gulf of Mexico to spawn after migrating up the U.S. east coast and into Canada to feed. The larger eastern Atlantic population spawns in the Mediterranean and migrates across the Atlantic Ocean as early as age one.

40. The best available science shows that western and eastern populations have been reduced to 17% and 33%, respectively, of the 1950 adult biomass levels (the earliest point at which there is catch data; while western Atlantic tuna fisheries began in the middle of the twentieth century, fishing in the Mediterranean occurred for several hundred years prior). Depletion to the population level that produces maximum sustainable yield occurred in the 1960s and the late 1990s for western and eastern populations, respectively.

41. Bluefin tuna are regulated at both the national and international level. At the international level, they are subject to the jurisdiction of the International Commission for the Conservation of Atlantic Tunas (“International Commission”). Membership of the International Commission includes the United States, Japan, Spain, Italy, France, Canada, and other countries that fish for tuna in the Atlantic Ocean. Based upon advice from its scientific advisory committee, the International Commission has tried to manage the fishing for these tuna in a fashion that ensures it will survive and support a sustainable fishery. Thus the International Commission allocates quotas to each member country that allow each country to catch a certain amount of Atlantic bluefin tuna.

42. The International Commission’s objective is to maintain populations of Atlantic bluefin tuna at levels that will permit maximum sustainable yield, i.e. populations capable of reproducing at a rate that maximizes current catches without reducing the potential for future harvest. According to an independent review in 2008 of the International Commission’s performance against its objectives, the International Commission is widely regarded as an international disgrace with respect to management of bluefin tuna fisheries, particularly in the eastern Atlantic and Mediterranean Sea. The International Commission’s objectives were not met for either the western or eastern Atlantic bluefin tuna stocks. Decision by consensus gives

individual countries inordinate power to block agreement on regulations that are detrimental to their domestic interests. In addition, the International Commission is ineffective at controlling the international catch of Atlantic bluefin tuna, in large part because of the lack of members' political will to properly regulate the fishery.

43. With respect to U.S. regulations, the Fisheries Service is tasked with implementing regulations to manage fishing within the limits specified by the International Commission pursuant to the Atlantic Tunas Convention Act. 16 U.S.C. § 971d(c). The Fisheries Service also must prevent overfishing of bluefin tuna, base its management on the best available science and avoid or minimize bycatch mortality of bluefin tuna under the Magnuson-Stevens Act. 16 U.S.C. § 1851(a)(1), (2), and (9).

44. Neither the International Commission's management efforts nor the domestic actions by the Fisheries Service have halted overfishing of bluefin tuna. In the past decade the eastern Atlantic bluefin tuna has been subjected to the largest catches since the fishery began.

45. Bluefin tuna are extraordinarily valuable fish to catch. The demand for raw bluefin tuna – particularly in high-end sashimi markets in Japan – is so great that individual bluefin have been known to sell for hundreds of thousands of dollars, although more typical prices are tens of thousands of dollars. As a result, there is intense fishing pressure on bluefin tuna. Illegal and underreported catches are a severe problem in the Mediterranean Sea.

46. In 2008, scientists had to adjust reported catches using import records, which showed much more bluefin tuna harvested and traded than was reported. A recent analysis of market data of eastern Atlantic and Mediterranean bluefin tuna showed that harvests in 2010 were likely more than double the allowable catch levels, or more than 32,000 metric tons (mt).

47. At this level of catch, the Fisheries Service has projected an 8.5 percent probability of quasi-extinction (fewer than 500 adults) of the eastern Atlantic bluefin tuna by 2030. *See* Endangered and Threatened Wildlife and Plants; Endangered Species Act Listing Determination for Atlantic Bluefin Tuna, 76 Fed. Reg. 31,556 (June 1, 2011).

48. Eastern Atlantic bluefin tuna cross the ocean and make up a large portion of U.S. catches. The unusually large catches of eastern Atlantic bluefin tuna in the Mediterranean means fewer are available to the U.S. fishery. Thus, the U.S. fishing effort is directed more heavily towards western Atlantic bluefin tuna.

49. This may be one reason why the 20 year rebuilding plan for the western Atlantic stock put in place in 1998 has failed thus far. The adult bluefin tuna biomass in 2007 was seven percent lower than the adult biomass in 1998, the beginning of the rebuilding plan, and in 2009 was still about three percent lower than at the start of the rebuilding plan.

50. Results published this month in the journal PLoS ONE from a scientific model that estimates the effects of mixing on Atlantic bluefin tuna populations shows that the western Atlantic bluefin tuna will not recover with the current rebuilding quotas in place of 1,750 and 12,900 mt in the western and eastern Atlantic, respectively. If future catches are double the rebuilding quotas (as indicated by market data), the model predicted that rebuilding of both populations will be compromised. This model was presented at the International Commission's scientific meetings in 2008 and 2009, and comments to the proposed rule specifically asked that the new information be taken into account during finalization of the 2011 Atlantic bluefin tuna regulations.

51. The Fisheries Service unreasonably overlooked both the evidence of illegal fishing that undermines the effectiveness of the International Commission's recommended

quotas and the model incorporating effects of mixing between the stocks that shows that current quotas will not rebuild the western Atlantic bluefin tuna fishery. Rather, the Final Rule asserts that catching the International Commission's recommended quota is expected to result in western Atlantic bluefin tuna population growth. In part on that basis, the Fisheries Service issued a finding of no significant impact.

### **Domestic Efforts to Expand the Fishery**

52. Coincident with the increase in fishing in the eastern Atlantic and Mediterranean in the past decade, the U.S. landings of bluefin tuna precipitously declined, particularly from 2002 through 2008. From a high of over 1,800 mt of bluefin tuna landed in 2002, landings declined steadily until 2006, to a low of about 500 mt. Since then, landings have marginally increased, only once surpassing 1000 mt, in 2009.

53. With depleted bluefin tuna populations and therefore declining revenue, industry has pressured the Fisheries Service to increase the economic potential of the bluefin tuna fishery. As a result, the Fisheries Service has incrementally expanded the Atlantic bluefin tuna General category fishery from approximately five months a year while bluefin tuna were still off northern New England (pre-2004) to ten months a year, allowing fishermen to target bluefin tuna as far south as Florida.

54. The 2011 Atlantic bluefin tuna regulations: (1) increase the daily retention limit and lengthen the fishing season for fishing vessels in the General category and (2) double the incidental retention limit (i.e. bycatch of undersized bluefin tuna) for the Harpoon category. Because bluefin tuna are migratory, by extending the General category fishing season the Fisheries Service shifts bluefin tuna landings both temporally (January through March) and



geographically (southward off the mid- and South Atlantic states of North Carolina, South Carolina, Georgia, and the Florida East Coast).

55. Under the Fishery Management Plan and implementing regulations in effect prior to 2004, the General category fishing season began June 1 and ended on December 31. The fishing season closed in mid to late summer due to catching the quota of bluefin tuna. During these years, when bluefin tuna were more abundant and available to U.S. fishermen, the General category fishing season lasted fewer than six months.

56. Since those days of plenty, the Fisheries Service has implemented three management measures to loosen controls on fishing and expand the fishery in an effort to increase revenue despite declining catches.

57. First, in December 2003, to increase fishing opportunities and optimum yield for the fishery, the Fisheries Service extended the General category end date from December 31 to January 31. Atlantic Highly Migratory Species; Bluefin Tuna Season and Size Limit Adjustments, 68 Fed. Reg. 74,504 (Dec. 24, 2003).

58. Second, in 2006, the Fisheries Service modified the General category quotas to allow for a formalized winter fishery via the Consolidated Highly Migratory Species Fisheries Management Plan. Atlantic Highly Migratory Species; Recreational Atlantic Blue and White Marlin Landings Limit; Amendments to the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks and the Fishery Management Plan for Atlantic Billfish; Final Rule, 71 Fed. Reg. 58, 058 (Oct. 2, 2006). In other words, while the December 2003 rule extended the season, the 2006 rule provided additional quota for the extended season. *See* 50 C.F.R. § 635.27(a)(8), (9) and (10) (providing authority for inseason quota transfers and annual adjustments that do not require rulemaking).

59. Third, the Fisheries Service promulgated the 2011 Atlantic bluefin tuna regulations extend the General category season to March 31 and increasing retention limits.

60. Based on the similarity of this action to the 2003 rule, it is reasonable to anticipate that after the 2011 Atlantic bluefin tuna regulations extend the General category season to March 31, the Fisheries Service may adjust January quotas inseason or by an annual adjustment so that fishing may continue through March 31, not only a few weeks as the Fisheries Service claims in the Final Rule.

61. This paves the way for formalizing February and March quotas, similar to the 2006 rulemaking, through the upcoming revision Fisheries Management Plan amendment alluded to in the Final Rule. *See* 76 Fed. Reg. at 74,006 (“NMFS is undertaking a comprehensive review of [bluefin tuna] management to determine whether existing management measures need to be adjusted more broadly to meet the multiple goals for the [bluefin tuna] fishery.”)

#### **No Need for Current Action**

62. The Fisheries Service asserts that the Final Rule is needed because U.S. bluefin tuna landings have fallen below the quotas recommended by the International Commission in recent years. In fact, the Fisheries Service is currently wrestling with the opposite problem – in 2009 the landings exceeded the base quota and for 2011, the Fisheries Service anticipated that the available quota would not cover all bluefin tuna catch, including the bycatch of bluefin tuna in fisheries targeting swordfish and other tunas.

63. As concerns have mounted about the status of bluefin tuna populations, the International Commission reduced the western Atlantic bluefin tuna quota in 2006, 2008 and 2010. Although U.S. fishermen were unable to catch the U.S. quota from 2004 through 2008 and

in 2010, quota reductions and modest increases in landings mean that landings are now constrained by the quotas.

64. Based on the current scientific evidence showing rebuilding the western Atlantic bluefin tuna population is unlikely under current quotas and the current trend of declining quotas, it is unreasonable for the Fisheries Service to issue a Final Rule to enable “more thorough utilization” of available U.S. bluefin tuna quota and expand fishing opportunities.

### **Environmental Impacts**

65. NEPA requires that the Fisheries Service analyze cumulative impacts on the environment, which result from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions. The Fisheries Service failed to analyze cumulative impacts of the temporal and geographic expansion of the fishery from 2003 through the 2011 Atlantic bluefin tuna regulations.

66. By expanding the Atlantic bluefin tuna fishery, the Fisheries Service has eliminated a time-area closure existing from January 1 through March 31 and in areas south of New England.

67. The majority of fish available to the fishery during this period are primarily adolescents, interspersed with mature western Atlantic bluefin tuna on their way to the Gulf of Mexico to breed. These bluefin tuna therefore have a high reproductive value and warrant heightened protection because the fish are within a year or two of spawning or are in the middle of their migration to the spawning ground. Increasing mortality on these bluefin tuna would hinder rebuilding of the western Atlantic bluefin tuna.

68. In response to a comment to the proposed rule that raised this concern, the Fisheries Service modified the proposed rule, which would have left the season open until May

31 instead of March 31, in an effort to mitigate the potential impacts of additional fishing efforts during months previously unfished. There is no explanation of why the two month expansion of the fishery, until March 31, will not jeopardize rebuilding of western Atlantic bluefin tuna or how the Fisheries Service arrived at the conclusion that a two month, but not a four month extension would mitigate impacts to the population.

69. The Fisheries Service’s analysis of environmental impacts consists largely of the response “[f]ishing patterns and behavior are not expected to change significantly as a result of this action,” thus environmental impacts will be minimal.

70. Given the Fisheries Service’s authority to make inseason quota transfers and annual adjustments, however, it is reasonably foreseeable that the Fisheries Service will increase the January subquota in order to extend the fishery through March 31 rather than just a few weeks, as analyzed in the EA. *See* 50 C.F.R. § 635.27(a)(8), (9) and (10).

71. In addition, the purpose of the action is to increase fishing opportunities and fishing mortality on Atlantic bluefin tuna, thereby utilizing U.S. quota. This suggests that the Fisheries Service does expect fishing patterns and behavior to change.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF**

#### **Violation of the Magnuson-Stevens Act – Failure to Prevent Overfishing of Bluefin Tuna (16 U.S.C. §§ 1851(a)(1), 1854(e))**

72. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

73. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a

continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1).

74. The Magnuson-Stevens Act defines “optimum yield” as 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,” and “is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor.” 16 U.S.C. § 1802(33)(A)-(B).

75. The Magnuson-Stevens Act requires that the Fisheries Service’s regulations prevent overfishing and rebuild overfished fish populations. 16 U.S.C. § 1854(e).

76. The Fisheries Service has identified bluefin tuna as overfished and acknowledged that overfishing is occurring. Notwithstanding this designation, the overfished western Atlantic bluefin population has declined since the Fisheries Service implemented a rebuilding plan in 1999. Current science predicts that it will not rebuild under current fishing quotas.

77. The 2011 Atlantic bluefin tuna regulations fails to prevent overfishing and promote rebuilding of the bluefin tuna population, in spite of the requirements contained in the Magnuson-Stevens Act. Instead, the Final Rule increases opportunities to harvest Atlantic bluefin tuna, leading to more overfishing.

78. By issuing the Final Rule, Defendants violated the Magnuson-Stevens Act and the Administrative Procedure Act.

79. These actions and failures to act by the Fisheries Service are arbitrary and capricious, violate the Magnuson-Stevens Act and the Administrative Procedure Act, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy at law.

**SECOND CLAIM FOR RELIEF**  
**Violation of the Magnuson-Stevens Act – Failure to Base Management Measures on Best Available Science**  
**(16 U.S.C. § 1851(a)(2))**

80. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

81. National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

82. The best scientific information available demonstrates that: (i) Atlantic bluefin tuna populations are at critically low levels and at risk of collapse, (ii) illegal and unreported fishing continues to undermine international management measures, (iii) at current quotas, the western Atlantic bluefin tuna will not recover, (iv) unreported bluefin tuna harvests, as estimated from market data, threaten the eastern Atlantic bluefin tuna with extinction, and (v) increasing fishing effort temporally and geographically will increase mortality on reproductively important bluefin tuna, further hindering rebuilding of western Atlantic bluefin tuna.

83. The Fisheries Service disregarded the best scientific information available and decided to increase fishing opportunities for Atlantic bluefin tuna based on the assumption that harvesting all the bluefin tuna allowed by the U.S.’s allocated quota will allow for continued stock growth.

84. By issuing the Final Rule, Defendants violated the Magnuson-Stevens Act and the Administrative Procedure Act.

85. These actions and failures to act by the Fisheries Service are arbitrary and capricious, violate the Magnuson-Stevens Act and the Administrative Procedure Act, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy at law.

**THIRD CLAIM FOR RELIEF**  
**Violation of the Magnuson-Stevens Act – Failure to Avoid or Minimize Bycatch of Bluefin Tuna**  
**(16 U.S.C. § 1851(a)(9))**

86. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

87. National Standard Nine of the Magnuson-Stevens Act requires that conservation and management measures must, to the extent practicable, avoid or minimize bycatch and bycatch mortality. 16 U.S.C. § 1851(a)(9).

88. In the Final Rule, the Fisheries Service refused to take the actions necessary to minimize or avoid bycatch of bluefin tuna and other fish species, but instead selected alternatives with the potential to increase bycatch. The Fisheries Service increased the General category maximum daily retention limit and lengthened the fishing season despite the fact that increases in fishing effort may increase bycatch mortality of other fish species. The Fisheries Service also decided to increase the Harpoon category incidental retention limit despite a potential increase in bycatch mortality of small medium bluefin tuna and bluefin tuna in excess of the incidental limit.

89. The Final Rule therefore does not comply with the requirements of National Standard Nine.

90. By issuing the Final Rule, Defendants violated the Magnuson-Stevens Act and the Administrative Procedure Act.

91. These actions and failures to act by the Fisheries Service are arbitrary and capricious, violate the Magnuson-Stevens Act and the Administrative Procedure Act, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy at law.

**FOURTH CLAIM FOR RELIEF**  
**Violation of National Environmental Policy Act**  
**(42 U.S.C. § 4332(2)(C))**

92. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

93. NEPA requires that an agency rigorously explore and objectively evaluate a reasonable range of alternatives and their associated environmental impacts on the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14. NEPA also requires that an agency consider the cumulative impacts associated with the action. 40 C.F.R. § 1508.7.

94. The Administrative Procedure Act requires that courts “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that are “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

95. The Defendants violated NEPA, its implementing regulations, and the Administrative Procedure Act by failing to consider an adequate range of alternatives for meeting Magnuson-Stevens Act National Standard One requirements, by failing to consider the impacts, including cumulative impacts of its actions on the potential for western Atlantic bluefin tuna populations to rebuild, and by and failing to provide a reasonable response to public comments regarding these issues.

96. These actions and failures to act by Defendants are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and are causing irreparable injury to the Plaintiff, for which it has no adequate remedy at law.



**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Declare that Defendants have violated the Magnuson-Stevens Act and the Administrative Procedure Act;
- B. Declare that Defendants have violated NEPA and the Administrative Procedure Act;
- C. Vacate and remand the Final Rule to the Fisheries Service for compliance with applicable laws;
- D. Maintain jurisdiction over this action until Defendants are in compliance with the Magnuson-Stevens Act, NEPA, the Administrative Procedure Act, and every order of this Court;
- E. Award Plaintiff its costs of litigation, including reasonable attorney and expert witness fees.
- F. Grant Plaintiff such further and additional relief as the Court may deem just and proper.

DATED this 30th day of December, 2011.

Respectfully submitted,



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