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DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE OCEAN INSTITUTE
250 Lawrence Hill Road
Cold Spring Harbor, NY 11724

CARL SAFINA
Post Office Box 2383
Amagansett, NY 11930

Plaintiffs

v.

CARLOS M. GUTIERREZ, in his official capacity as Secretary of the United States Department of Commerce
Department of Commerce, Room 5851
14th Street and Constitution Avenue, NW
Washington, DC 20230

NATIONAL MARINE FISHERIES SERVICE,
Department of Commerce, Room 14555
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

No. 06-1869 HHK

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The plaintiffs Blue Ocean Institute and Carl Safina hereby challenge the defendants' failure to adopt a fishery management plan that prevents overfishing of the western Atlantic bluefin tuna ("bluefin") and minimizes the unintentional catch ("bycatch") of bluefin that is depleting its already overfished population. In particular, the plaintiffs challenge defendants' arbitrary and capricious rejection of a recent petition that sought protection for spawning members of the bluefin population.

2. The bluefin population has been in steep decline for more than twenty-five years. Defendants (hereinafter "the Fisheries Service") officially declared bluefin tuna to be an overfished species in 1997. The latest estimates of the bluefin population show that it is now at its lowest point ever, and that it is hovering on the brink of collapse.

3. Despite the precarious status of this fish, and in clear violation of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), the Fisheries Service has refused to protect western Atlantic bluefin on their spawning grounds in the Gulf of Mexico. In particular, in a final rule governing the management of bluefin and other "highly migratory species" of fish dated October 2, 2006, the Fisheries Service ignored the best available science and rejected a petition filed by the Blue Ocean Institute and other conservation groups and decided not to order any reduction in fishing effort by longline fishermen in the Gulf of Mexico that is killing as "bycatch" depleted bluefin in their known spawning area. This decision by the Fisheries Service rejected specific practicable fishery management measures supported by the best available science that would help prevent continued overfishing of the bluefin.

APPLICABLE STATUTES, JURISDICTION, AND VENUE

4. This action arises under the MSA, 16 U.S.C. §§ 1801-1883; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

5. This Court has jurisdiction over this action pursuant to the MSA. That statute provides that "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under" the MSA. 16 U.S.C. § 1861(d). The MSA also provides that regulations promulgated under that statute 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). The Fisheries Service published the final rule implementing the Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) on October 2, 2006 in the Federal Register. See 71 Fed. Reg. 58058. Plaintiffs are filing this Complaint within thirty (30) days after the publication of that final rule.

6. This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331, 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."

7. Venue is proper 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 or omissions giving rise to the claim occurred here.

8. This Court may issue a declaratory judgment in this case pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and may grant relief pursuant to the MSA, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. § 706.

DESCRIPTION OF THE PARTIES

9. Plaintiff Blue Ocean Institute (the Institute) is a non-profit conservation organization headquartered in Cold Spring Harbor, New York dedicated to developing conservation solutions for ocean resources. To further this goal, the Blue Ocean Institute promotes public awareness, education, and citizen involvement in the conservation of marine wildlife and resources and supports related programs. Working through science, literature, and art, the Institute broadens the number of people who are aware of the importance of ocean

wildlife. The work of the Institute includes the development of innovative solutions to minimize bycatch of sea turtles and birds by longline fishing gear. Institute staff members share their expertise at symposia and conferences, publish reports and scientific papers, and speak for ocean life through popular media such as television, documentaries, and magazines. The Institute conducts research and writes about western Atlantic bluefin tuna. The President of the Institute, Carl Safina, has published several books that address ocean conservation; these include *Song for the Blue Ocean.* Published in 1998, *Song for the Blue Ocean* included a detailed description of the plight of the bluefin. The interests and work of the Institute in ocean conservation are directly and adversely affected by the failure of the Fisheries Service to prevent overfishing of the western Atlantic bluefin tuna. By allowing continued overfishing and bycatch of bluefin, the Fisheries Service is reducing the already depleted population of that fish to even more dangerously low levels and contributing to the possible collapse of that fish population that has recently been shown to harbor unique genetic diversity. The interests of the Institute in protecting western Atlantic bluefin tuna, and in observing, writing about, and educating the public concerning western Atlantic bluefin tuna, have been adversely affected by the failures of the Fisheries Service to prevent overfishing and to minimize bycatch of that fish. Moreover, unless the relief sought in this complaint is granted, those interests will continue to be adversely affected and irreparably injured by the Fisheries Service's unlawful failure to perform its non-discretionary duties under the MSA, NEPA, and the APA.

10. Plaintiff Carl Safina is a writer and scientist who currently serves as President of the Blue Ocean Institute. Dr. Safina has been actively involved in efforts to protect and conserve western Atlantic bluefin tuna for more than a decade. He has served as a member of the Mid-Atlantic Fishery Management Council and has attended numerous government meetings

convened to address the regulation of the bluefin, including meetings held both in the United States and abroad in connection with the deliberations of the International Commission for the Conservation of Atlantic Tunas. He regularly communicates with the Fisheries Service concerning the need to protect the bluefin. He has fished for and observed bluefin in United States ocean waters, beginning in the late 1960's. He is the author of *Song for the Blue Ocean*, a book published in 1998 that devotes itself in part to describing the depleted condition of the bluefin and the need to take action to conserve the bluefin population. Dr. Safina intends to continue to work on protecting the bluefin population, and to observe and write about the bluefin. Dr. Safina's interests in protecting western Atlantic bluefin are directly and adversely affected by the failure of the Fisheries Service to prevent overfishing of the western Atlantic bluefin tuna stock. By allowing continued overfishing and bycatch of bluefin, the Fisheries Service is reducing the already depleted population of that fish to even more dangerously low levels and contributing to the possible collapse of that fish population that has recently been shown to harbor unique genetic diversity. Dr. Safina is concerned that the Fisheries Service' actions and failures to act as described in this Complaint are resulting in lowered bluefin populations in the Gulf of Mexico and along the east coast of the United States. As a result, Dr. Safina's continuing interests in observing, studying, and fishing for western Atlantic bluefin tuna have been adversely affected by the failures of the Fisheries Service to prevent overfishing and to minimize bycatch of bluefin. Among other things, the Fisheries Service's failure to halt overfishing of bluefin has caused bluefin to be effectively unavailable for recreational fishing of the type Dr. Safina engages in. Moreover, unless the relief sought in this complaint is granted, those interests will continue to be adversely affected and irreparably injured by the Fisheries

Service's unlawful failure to perform its non-discretionary duties under the MSA, NEPA, and the APA.

11. Defendant Carlos M. Gutierrez is Secretary of the United States Department of Commerce. He is sued in his official capacity as the chief officer of the Department charged with overseeing the proper administration and implementation of the MSA, including those MSA provisions that require an end to overfishing and that mandate the minimization of bycatch.

12. Defendant National Marine Fisheries Service ("NMFS") is an agency of the United States Department of Commerce that has been delegated the responsibility to issue regulations implementing fishery management plans ("FMPs") for highly migratory fish stocks such as the western Atlantic bluefin tuna. NMFS is the United States government agency with primary responsibility to ensure that the MSA's requirements are followed and enforced, including the requirements to end overfishing, to rebuild overfished populations of fish, and to minimize bycatch.

LEGAL AND FACTUAL BACKGROUND

Legal Framework for Fisheries Management of Atlantic bluefin tuna

13. The MSA establishes a system for conserving and managing fish populations in the exclusive economic zone of the United States, which generally extends from the boundaries of state waters to 200 miles offshore. The MSA requires the Fisheries Service to conserve and manage fish populations pursuant to a number of "National Standards" and certain other requirements.

14. Bluefin tuna are classified as a "Highly Migratory Species" ("HMS") under the MSA. For HMS such as bluefin tuna, the MSA charges the Fisheries Service with direct responsibility for preparing an FMP for purposes of conservation and management. See 16

U.S.C. §§ 1802(20), 1854(g)(1), 1852(a)(3). All FMPs and regulations implementing FMPs, including the FMP for HMS, are subject to final review and approval of the Fisheries Service to ensure that they comply with the requirements of the MSA, as well as with other applicable laws and requirements. 16 U.S.C. § 1854(a), (b).

15. In enacting the MSA, 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) the inadequacy of fishery resource conservation and management practices and controls....
>
> Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

16 U.S.C. § 1801(a)(2), (5).

16. National Standard One of the MSA 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. § 185l(a)(1).

17. National Standard Two of the MSA requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2).

18. The MSA requires that the Fisheries Service identify overfished fish populations and manage those populations by attaining the optimum yield that will rebuild them to a healthy population level. 16 U.S.C. § 1802(28)(C) (optimum yield for an overfished fishery provides for rebuilding the population); 16 U.S.C. § 1853(a)(10) (FMPs 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 and rebuild overfished fisheries as soon as possible).

19. National Standard Nine of the MSA 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).

20. The MSA also requires that FMPs must

> establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority --
> (A) minimize bycatch; and
> (B) minimize the mortality of bycatch which cannot be avoided[.]

16 U.S.C. § 1853(a)(11).

21. Because some 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 ("ICCAT"). ICCAT 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.

22. The Atlantic Tunas Convention Act ("ATCA") is the federal statute that – along with the MSA – provides authority to the Fisheries Service to manage bluefin tuna in conformance with quotas established by ICCAT. See 16 U.S.C. § 971.

23. In pertinent part, ATCA provides that the defendant Secretary of Commerce shall promulgate regulations that are "necessary and appropriate" to carry out the recommendations of ICCAT that establish the western Atlantic bluefin quota for the United States fishing fleet. See 16 U.S.C. § 971d(c)(1)(A). In addition, ATCA requires that such regulations "shall, to the extent practicable, be consistent with fishery management plans [FMPs] prepared and implemented

under" the MSA. 16 U.S.C. § 971d(c)(1)(C). ATCA 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 ICCAT. 16 U.S.C. § 971d(c)(3).

24. NEPA requires the Fisheries Service to analyze the environmental impacts of a reasonable range of alternative measures for ending overfishing and rebuilding an overfished stock of fish, as well as for avoiding or minimizing bycatch, when it prepares an FMP. 42 U.S.C. § 4332(2)(C). Thus, NEPA requires the Fisheries Service to analyze the environmental impacts of the HMS FMP and consider alternatives to the proposed action with respect to bluefin, including alternatives that might mitigate the impacts of the FMP on bluefin, while developing the scientific information and analysis necessary to analyze those impacts and alternatives.

25. The APA requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law," and to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Overfishing and Depletion of the Bluefin tuna

26. Western Atlantic bluefin tuna are one of the most important predators in the oceans. They are large (up to ten feet in length and 1,500 pounds), fast (able to reach swimming speeds of 40 mph), and capable of regulating their body temperature to allow themselves to hunt in both warm and cold waters. They spawn in the Gulf of Mexico annually, primarily between the months of March and June, and then spend much of their early years foraging off the east coast of the United States and Canada. The bluefin in the Gulf of Mexico have been shown to have fidelity to the Gulf for up to three years and harbor unique molecular genotypes indicative of a separate bluefin population.

27. 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 fetch as much as $30,000, or $40,000, or more. As a result, there is intense fishing pressure to catch these fish -- and their total populations have been falling steadily for the past 20 years.

28. In recognition of the depleted state of the bluefin, the Fisheries Service officially identified them as "overfished" under the MSA on September 30, 1997.

29. 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 (ICCAT). Membership of ICCAT includes the United States, Japan, Spain, Canada, and a host of other countries that fish for tuna in the Atlantic Ocean. Based upon advice from its scientific advisory committee, ICCAT has tried to manage the fishing for these tuna in a fashion that ensures it will survive and support a sustainable fishery. Thus, for several decades, ICCAT and its scientists have made an effort to track the population of both western Atlantic bluefin tuna and eastern Atlantic bluefin tuna, and ICCAT has allocated quotas to each member country that allow each country to catch a certain amount of these fish.

30. ICCAT makes certain management recommendations for specific fish species, including bluefin tuna. Pursuant to the Atlantic Tunas Convention Act ("ATCA"), the United States is tasked to maintain consistency with these ICCAT recommendations. See 16 U.S.C. § 971d(c)(1)(A). In 1999, ICCAT recommended that no fishing be allowed to target bluefin tuna in their Gulf of Mexico spawning area during their spawning season. Thus, the Fisheries Service has prohibited directed fishing for bluefin in the Gulf of Mexico. See 50 C.F.R. § 285.31(a)(30).

31. On the national level, the Fisheries Service is required by the relevant federal statutes (MSA and ATCA) to conform with the quotas set by ICCAT, to prevent overfishing of bluefin tuna and to avoid or minimize bycatch mortality of bluefin. Accordingly, both in its negotiations at ICCAT and in its regulations authorizing fishing in federal waters, the Fisheries Service must take care to protect against quotas that allow an excessive amount of fishing. In connection with these efforts, the MSA further requires the Fisheries Service to rely upon the best available science that describes the status of the population and its chances of survival on a sustainable basis. In April of 1999, the Fisheries Service issued a fishery management plan ("FMP") for bluefin in an effort to end overfishing and rebuild the bluefin population. That FMP adopted the bluefin rebuilding plan recommended by ICCAT.

32. Neither the ICCAT international management effort nor the domestic actions by the Fisheries Service have halted the steady decline in the population of the western Atlantic bluefin. In 2004, ICCAT reported that the spawning stock biomass of western Atlantic bluefin had decreased by at least 80% since 1970. The most recent assessment published by ICCAT shows both that the bluefin population is at its lowest level ever, and that fishing pressure is at its highest point ever.

33. Indicative of the steep bluefin population decline is that United States fishers have been unable to catch the quota allocated to them by ICCAT for the past four years. During the most recent fishing season U.S. bluefin fishers caught less than 15% of their ICCAT quota.

34. New scientific data published in the journal Nature in the spring of 2005 confirmed that spawning-age western Atlantic bluefin tuna were present in United States waters of the Gulf of Mexico during the months of January through June, and that they were spawning during the period between March and June. The Nature paper conclusively established that

longline fishing vessels kill these bluefin as "bycatch" while those vessels are fishing for yellowfin tuna in the bluefin spawning area. This Nature article pointed out that longline fishers targeting yellowfin tuna were killing numerous spawning bluefin in the Gulf of Mexico because incidentally caught bluefin were physiologically stressed due to elevated ocean temperatures in the Gulf during spawning season and therefore died at very high rates shortly after being caught. The Nature article further identified the particular area of the Gulf occupied by the bluefin and stated that prohibiting yellowtail tuna longline fishing in the bluefin spawning area would eliminate this often fatal bycatch of spawning bluefin.

35. On the basis of these data and the article in Nature, the Blue Ocean Institute and several other conservation groups submitted a petition on June 8, 2005, to defendant Gutierrez. The June 2005 petition emphasized that longline fishing in the Gulf of Mexico bluefin spawning area kills significant numbers of bluefin, depletes the bluefin population, and cripples the potential of the bluefin to rebuild to a healthy level. Accordingly, the June 2005 petition requested defendant Gutierrez to take immediate action to stop all longline fishing in the Gulf of Mexico bluefin spawning areas during spawning season. This June 2005 petition also requested defendant Gutierrez to initiate a rulemaking designed to permanently prohibit all fishing activity that can catch bluefin tuna (either intentionally, or incidentally as "bycatch") in their spawning areas in the Gulf of Mexico during their spawning season.

36. In response to the petition, the Fisheries Service declined to take immediate action to prevent illegal bycatch of spawning bluefin in the Gulf, and promised to address the problem and further consider the petition for closure in connection with its Draft Fishery Management Plan for Highly Migratory Species ("HMS FMP"). The HMS FMP looked at a number of actions relating to the management not of only bluefin tuna, but also other so-called "highly

migratory species." In an environmental impact statement ("EIS") prepared by the Fisheries Service in connection with the HMS FMP during 2005 and 2006, the Fisheries Service acknowledged that bluefin tuna are overfished and subject to continued overfishing, but declined to establish a fishing closure of the bluefin spawning area in the Gulf of Mexico.

37. In comments on this EIS, the plaintiffs advised the Fisheries Service that there was no sound basis for its conclusion. Among other things, the plaintiffs provided evidence of several relevant factors that the Fisheries Service had failed to consider. These relevant factors included: (a) the Fisheries Service had disregarded evidence of the disproportionately high biological importance of protecting spawning bluefin; (b) the Fisheries Service had ignored evidence that bluefin only mature between the ages of 10 and 12 years (several years later than the time the Fisheries Service had assumed) and therefore require protection for a longer period of time than Fisheries Service was allowing; (c) the Fisheries Service had rejected evidence that western Atlantic bluefin tuna spawn exclusively in the Gulf of Mexico; and (d) the Fisheries Service had overlooked evidence that bluefin caught in their spawning area in the Gulf of Mexico during spawning season are likely to experience a high rate of mortality due to their unique physiology and the fact that they are highly stressed by spawning in the warm waters of the Gulf.

38. The plaintiffs also noted in their comments that the Fisheries Service had failed to adequately analyze the effects of closing longlining in the bluefin spawning area in the Gulf of Mexico by, among other things, failing to develop a realistic model that addressed the potential redistribution of fishing effort and by failing to realistically weight the value of bycatch. In addition, the plaintiffs advised the Fisheries Service that it had wrongly failed to address their proposal for a cap on bycatch in the longline fishery in the Gulf.

39. A recent paper by Fisheries Service scientists supports the view that bluefin begin to breed between the ages of 10 to 12 years. This paper is consistent with the April 2005 Nature article and with the comments of the plaintiffs on the EIS, and contrasts with the Fisheries Service's policy of regulating bluefin on the assumption that bluefin begin to breed at 8 years.

40. The Fisheries Service did not decide to take steps to protect bluefin in response to the plaintiffs' comments. Instead, the Fisheries Service published the final rule implementing the HMS FMP rule on October 2, 2006 that refused to institute any closure of longline fishing in the bluefin spawning area in the Gulf of Mexico during spawning season, or otherwise to take any action to halt the collapse of the western Atlantic bluefin population.

41. As a result of the decision by the Fisheries Service to violate the MSA, deny the plaintiffs' petition, and refuse to institute a fishing closure in the bluefin spawning area of the Gulf of Mexico during bluefin spawning season, additional bluefin were killed as bycatch by longline fishers fishing in that area in 2006. More bluefin can be expected to die in that spawning area in 2007, and in subsequent years, until the Fisheries Service reduces the fishing pressure in that area during bluefin spawning season. These bluefin mortalities contribute to continued overfishing and harm the capacity of the western Atlantic bluefin tuna to survive and to rebuild as a healthy and sustainable fish population.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: THE HMS FMP FAILS TO PREVENT OVERFISHING OF BLUEFIN TUNA

42. The plaintiffs reallege and incorporate by reference paragraphs 1- 41 of this Complaint in this First Claim for Relief.

43. National Standard 1 of the MSA 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).

44. The MSA requires the Fisheries Service to promulgate and implement a fishery management plan that prevents overfishing and rebuilds overfished fish populations within not more than 21 months after they identify those populations as being overfished. 16 U.S.C. § 1854(e).

45. The Fisheries Service identified bluefin tuna as overfished on September 30, 1997, and issued a fishery management plan addressing overfishing and rebuilding for bluefin in April of 1999. Notwithstanding these actions, the overfished bluefin population has steadily declined. In fact, the Fisheries Service acknowledged that western Atlantic bluefin tuna remain overfished and are subject to continued overfishing when they published the EIS accompanying the final rule implementing the HMS FMP on October 2, 2006.

46. In their final rule implementing the HMS FMP on October 2, 2006, the Fisheries Service refused to take action to minimize bluefin bycatch or avoid the killing of spawning bluefin as bycatch in their spawning grounds located in the Gulf of Mexico.

47. The Fisheries Service's October 2, 2006 final rule implementing the HMS FMP fails to prevent overfishing and promote rebuilding of the bluefin tuna population, notwithstanding the deadlines and requirements contained in the MSA.

48. These actions and failures to act by the Fisheries Service violate the MSA.

49. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

50. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

SECOND CLAIM FOR RELIEF:
THE HMS FMP FAILS TO RELY UPON THE BEST SCIENTIFIC INFORMATION AVAILABLE

51. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 - 41 of this Complaint in this Second Claim for Relief.

52. National Standard 2 of the MSA requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2).

53. The best scientific information available demonstrates that: (i) the population of bluefin tuna is at its lowest level ever; (ii) the Gulf of Mexico is a discrete spawning ground for western Atlantic bluefin tuna; (iii) the average age at which bluefin tuna become sexually mature is between 10 and 12 years; (iv) spawning bluefin are being killed as bycatch in their spawning grounds in the Gulf of Mexico and bluefin subject to bycatch in the Gulf spawning grounds suffer a high rate of mortality; (v) any redistribution of fishing effort resulting from closing the Gulf of Mexico bluefin spawning area to longline fishing during bluefin spawning season would not occur in the manner assumed by the Fisheries Service; and (vi) closing the Gulf of Mexico bluefin spawning area to longline fishing during bluefin spawning season would reduce mortality of bluefin and help to prevent overfishing of bluefin.

54. In their final rule implementing the HMS FMP on October 2, 2006, the Fisheries Service disregarded the best scientific information available and refused to close the Gulf of Mexico bluefin spawning area to fishing during bluefin spawning season.

55. The Fisheries Service's October 2, 2006 final rule implementing the HMS FMP therefore is not based upon the best scientific information available.

56. These actions and failures to act by the Fisheries Service violate the MSA.

57. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

58. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

THIRD CLAIM FOR RELIEF:
THE HMS FMP FAILS TO AVOID OR MINIMIZE
BYCATCH OF BLUEFIN TUNA

59. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 - 41 of this Complaint in this Third Claim for Relief.

60. National Standard Nine of the MSA 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).

61. The MSA also requires that FMPs must "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery" and include practicable measures to minimize bycatch and bycatch mortality. 16 U.S.C. § 1853(a)(11).

62. In their final rule implementing the HMS FMP on October 2, 2006, the Fisheries Service refused to take the actions necessary to minimize or avoid bycatch of bluefin tuna in the bluefin spawning area of the Gulf of Mexico, and failed to establish a standardized reporting methodology for that bycatch. In that final rule, the Fisheries Service refused to consider establishing a cap on bycatch of bluefin, despite the fact that such an approach would be a

practicable method for reducing bluefin bycatch, and despite the fact that numerous spawning bluefin are being killed as bycatch in the Gulf of Mexico.

63. The Fisheries Service's October 2, 2006 final rule implementing the HMS FMP therefore does not comply with the requirements of National Standard Nine and the bycatch reporting requirements of the MSA.

64. These actions and failures to act by the Fisheries Service violate the MSA.

65. These actions and failures to act by the Fisheries Service are arbitrary, capricious, and contrary to law in violation of the APA. These actions and failures also constitute actions that have been both unlawfully withheld and unreasonably delayed in violation of the APA.

66. These violations of the MSA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

FOURTH CLAIM FOR RELIEF:
THE HMS FMP FAILS TO COMPLY WITH
THE NATIONAL ENVIRONMENTAL POLICY ACT

67. The plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 – 41 of this Complaint in this Fourth Claim for Relief.

68. Section 102(2)(C) of NEPA requires the Fisheries Service to prepare a detailed environmental impact statement ("EIS") whenever they engage in a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS must carefully assess the environmental impacts of the action. The final rule issued on October 2, 2006 by Fisheries Service to implement the HMS FMP is a major federal action that requires an EIS.

69. Section 102(2)(E) of NEPA requires the Fisheries Service to consider alternatives in the course of preparing an EIS. 42 U.S.C. § 4332(2)(E).

70. NEPA regulations of the Council on Environmental Quality require the Fisheries Service to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14.

71. The Fisheries Service's own internal regulation implementing NEPA requires it to evaluate reasonable alternatives to proposed actions. See NOAA Administrative Order 216-6.

72. The EIS prepared by the Fisheries Service in connection with the HMS FMP and the final rule implementing that FMP fails to carefully consider the impacts of allowing numerous bluefin to be killed in the Gulf of Mexico and does not consider available alternatives to allowing longlining to continue in the bluefin spawning area of the Gulf during bluefin spawning season. In addition, the EIS does not adequately analyze the effects of closing longlining in the Gulf spawning area for bluefin.

73. In particular, the EIS for the HMS FMP does not properly consider that the Gulf of Mexico is a discrete spawning ground for western Atlantic bluefin tuna, and that the average age at which bluefin tuna become sexually mature is between 10 and 12 years. In addition, the EIS completely fails to consider the use of a bycatch cap that would limit the number of bluefin killed incidentally in the yellowfin longline fishery that takes place in the bluefin spawning area of the Gulf of Mexico. The EIS for the HMS FMP also ignores recent models that examine the possible redistribution of fishing effort resulting from a closure of that yellowfin longline fishery.

74. The failure by the Fisheries Service to adequately analyze the adverse effects upon bluefin of the Fisheries Service policy that allows longline fishing to continue in bluefin spawning areas in the Gulf of Mexico, and its additional failure to consider available alternatives to that policy, violates NEPA and constitutes an arbitrary and capricious action that violates the APA.

75. These violations of NEPA and the APA by the Fisheries Service threaten the plaintiffs with irreparable injury for which they have no adequate remedy at law.

PRAYERS FOR RELIEF

WHEREFORE, the plaintiffs respectfully request this Court to enter the following relief:

1. Declare that the Fisheries Service has violated the MSA and the APA by failing to halt overfishing of bluefin tuna in the Gulf of Mexico and failing to minimize bycatch of bluefin in the Gulf.

2. Declare that the Fisheries Service has violated the MSA and the APA by failing to establish a plan to rebuild the overfished population of bluefin tuna in the Gulf of Mexico.

3. Declare that the Fisheries Service's approval of the October 2, 2006 final rule implementing the HMS FMP with respect to bluefin tuna is arbitrary, capricious, and contrary to law, in violation of the APA.

4. Declare that the Fisheries Service has violated NEPA by preparing an EIS for the HMS FMP that (a) fails to adequately analyze the adverse effects upon bluefin of the Fisheries Service policy that allows longline fishing in bluefin spawning areas in the Gulf of Mexico during bluefin spawning season and (b) fails to consider mitigation measures and alternatives to that policy.

5. Order the Fisheries Service to take immediate action to stop all fishing-induced mortality of bluefin in their Gulf of Mexico spawning areas during their spawning season.

6. Further order the Fisheries Service to initiate a rulemaking designed to permanently prohibit all fishing activity that can catch bluefin tuna (either intentionally, or

incidentally as "bycatch") in their spawning areas in the Gulf of Mexico during their spawning season.

7. Order the Fisheries Service to prepare a supplemental environmental impact statement for the HMS FMP that adequately analyzes the adverse effects upon bluefin of longline fishing in bluefin spawning areas in the Gulf of Mexico during bluefin spawning season and that considers alternatives to the Fisheries Service policy that allows such fishing.

8. Provide plaintiffs all their reasonable costs, fees, and attorney fees.

9. Provide such other and further relief as the Court deems just and proper.

DATED this 1st day of November, 2006.

Respectfully submitted,

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