

WITEK: THE FORGOTTEN TOOL (from page 8)

Not too many years ago, in the Gulf of Mexico's recreational red snapper fishery, anglers chronically overfished their ACL, but the Gulf of Mexico Fishery Management Council repeatedly failed to account for the management uncertainty that led to such overharvest. Eventually, things became so intolerable for the commercial fishing sector, which was being hurt by the recreational overages, that some fishermen sued.

The result was the 2014 court decision in *Guindon v. Pritzker*, which saw the United States District Court for the District of Columbia find that regulations recommended by the Gulf Council and adopted by NMFS "were arbitrary and capricious and not in accordance with the [Magnuson-Stevens Fishery Conservation and Management Act]. Under the MSA, NMFS has a statutory duty to: prohibit the retention of fish after quotas are reached in the Gulf of Mexico red snapper fishery; use the best scientific information available when making management decisions; ***require whatever accountability measures are necessary to constrain catch to the quota***; avoid decisions that directly conflict with the 'fishery management plan's] allocation of catch; and, where sectors are managed separately, avoid penalizing one sector for overages that occur in another. [emphasis added]"

The District Court didn't specify what sort of accountability measures were needed to address recreational overfishing, but the chastened Gulf Council ultimately decided on an annual catch target that reduced the recreational ACL by 20 percent to account for management uncertainty.

Unfortunately, that court decision only applied to recreational red snapper in the Gulf of Mexico, and does not govern the actions of other regional fishery management councils nor the management of other fisheries. Thus, in December 2019, when the Mid-Atlantic Council addressed chronic recreational overharvest in the black sea bass fishery, the reasoning in *Guindon v. Pritzker* was completely ignored.

Although the Council's Summer Flounder, Scup and Black Sea Bass Monitoring Committee acknowledged that it was "Hard to constrain [recreational] catch under high availability [of black sea bass]," the same situation that the Gulf Council faced with red snapper in the *Guindon v. Pritzker* scenario, the Monitoring Committee recommended that the recreational harvest limit for black sea bass be "Set equal to the ACL, no deduction for management uncertainty," even though such recommendation was likely to result in 2020 recreational black sea bass landings that exceeded the recreational harvest limit by 26 percent, exceeded the recreational ACL by 23 percent, and could have caused total black sea bass landings to exceed the ABC by 12 percent.

When the Mid-Atlantic Council decided to go along with such recommendation—a decision that was ultimately also adopted by NMFS—it not only ignored existing management uncertainty, but it also ignored the Guidelines' advice on how such uncertainty should be addressed, as well as other language in the Guidelines stating that "ACL cannot exceed the ABC."

Still, with respect to the Mid-Atlantic Council's failure to recognize management uncertainty, the worst was yet to come.

Most people will acknowledge that the onset of COVID-19 made 2020 a very bad year. It was a particularly bad year for the

people trying to manage recreational fisheries as, due to COVID-19, both fisheries-dependent data, such as MRIP catch and landings estimates, and fisheries-independent data, including information about stock abundance and recent recruitment, is largely unavailable.

Both scientific uncertainty and management uncertainty abounded, with management uncertainty levels being particularly high.

Yet the Mid-Atlantic Council decided to ignore management uncertainty once again.

In the case of four recreationally-important species, summer flounder, scup, black sea bass, and bluefish, the Mid-Atlantic Council's relevant monitoring committees acknowledged that, "The Monitoring Committee (MC) discussed the impact of Covid-19 on recreational data collection and the ability to generate catch estimates for 2020. As discussed in the staff memos, due to a lapse in angler intercept sampling due to Covid-19 restrictions, 2020 catch estimates from the Marine Recreational Information Program (MRIP) will not be available until the end of 2020."

The monitoring committees went on to discuss the issue in further detail, making it very clear that managers were lacking most of the data needed to calculate recreational catch and landings, and so to craft the regulations needed to prevent overfishing.

If there was ever an example of management uncertainty on steroids, that called out for the use of an annual catch target to keep recreational landings under control, this was it.

But instead of considering management uncertainty, the Mid-Atlantic Council merely decided to leave things unchanged, and carry 2020 regulations over into 2021.

That might work out for summer flounder, as an increase in recreational landings was scheduled for next year, and for scup, as commercial landings are typically well below the recreational quota. It might even work out for black sea bass, despite the fears that the ABC might be exceeded, as COVID-19 resulted in lower than expected commercial landings, which may very well have offset any recreational overage.

But in the case of bluefish, it's hard to believe that it was OK.

The bluefish stock is overfished, and there are good reasons to believe that overfishing may have occurred in 2020.

Reading between the lines, it almost seemed that although the Bluefish Monitoring Committee recommended status quo recreational rules, it was calling for Council action when it wrote, "To predict recreational landings, the MC typically uses the most recent 3-year average of landings. The 2017-2019 average landings (20.30 M lbs.) with the same 28.56% reduction that was projected to be achieved under the 2020 management measures yields a 2021 landings projection of 14.50 M lbs. This landings methodology indicates ***a potential 73.86% overage of the 2021 [recreational harvest limit] of 8.34 M lbs.*** While the MC still recommends status quo recreational measures for 2021, these analyses indicate a potential range of ***2021 landings projection estimates that should be reviewed by the Council and Board...*** [emphasis added]"

(to page 21)