UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

OCEAN CONSERVANCY and ENVIRONMENTAL DEFENSE FUND, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as Secretary of the United States Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	No. 1:17-cv-01408 **Hon. Amy Berman Jackson**

MOTION FOR SUMMARY JUDGMENT

Federal Defendants, Wilbur L. Ross, in his official capacity as Secretary of the United States Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"), and National Marine Fisheries Service ("NMFS"), pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and Local Civil Rule 7.1(h)(2), hereby move for summary judgment on all of the Plaintiffs' claims in the above-captioned matter. Federal Defendants are entitled to judgment as a matter of law because Plaintiffs' claims are moot and thus the Court lacks subject matter jurisdiction over them. Even if the Court were to find it has jurisdiction, the only appropriate course at this juncture is to remand to the agency for further action consistent with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").

COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 21)

INTRODUCTION

On June 19, 2017, NMFS, on behalf of the Secretary of Commerce, issued a temporary rule re-opening the private angling component of the recreational red snapper fishery in the exclusive economic zone ("EEZ") for the 2017 season on select weekend and holiday dates through Labor Day, September 4, 2017. 82 Fed. Reg. 27,777 (June 19, 2017). The 2017 Federal recreational season for the private angling component was previously opened for only three days and closed at 12:01 a.m. on June 4, 2017. 82 Fed. Reg. 21,140 (May 5, 2017). NMFS reopened the recreational fishing season for this limited period in response to an agreement among the Gulf of Mexico states to modify their various individual seasons and adopt a singular uniform season Gulf-wide through September 4. 82 Fed. Reg. at 27,779. The temporary rule promotes improved Federal-State cooperation to benefit the long-term recovery of the red snapper stock while maximizing the economic benefits from recreational fishing in the Gulf region. Id.

Plaintiffs challenge the temporary rule, among other reasons, because it is allegedly inconsistent with the red snapper fishery rebuilding plan and the applicable fishery rebuilding targets. See 72 Fed. Reg. 59,989 (Oct. 23, 2007) (Proposed Rule); 73 Fed. Reg. 5117 (Jan. 29, 2008) (Final Rule, hereinafter, "Reef Fish Amendment 27"). Plaintiffs allege various violations of the MSA, National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). However, the temporary rule has expired under its own terms, and the Federal recreational season is closed. Plaintiffs' claims are moot, and the Court should enter judgment in favor of Defendants on jurisdictional grounds. Alternatively, if the Court concludes that

Plaintiffs' claims are not moot, the only appropriate course is for the Court to remand this matter to NMFS for further proceedings consistent with the agency's duties.

BACKGROUND

I. Legal Framework

A. The Magnuson-Stevens Act

The MSA provides for sovereign rights and exclusive fishery management authority for the United States within the EEZ, 16 U.S.C. § 1811(a), as established by Presidential Proclamation No. 5030, dated March 10, 1983. 16 U.S.C. § 1802(11).[1] Congress enacted the MSA to address, among other things, its finding that the Nation's coastal "fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities" and "to promote domestic commercial and recreational fishing under sound conservation and management principles . . . ." 16 U.S.C. §§ 1801(a)(2), (b)(3). Under the MSA, the Secretary of Commerce ("Secretary") has "broad authority to manage and conserve coastal fisheries." Kramer v. Mosbacher, 878 F.2d 134, 135 (4th Cir. 1989). The Secretary has delegated this authority to NMFS.

To assist the Secretary, the MSA established eight regional fishery management councils with specified geographic areas of authority over fisheries.[2] 16 U.S.C. § 1852(a). The councils' charter is to "exercise sound judgment in the stewardship of fishery resources through the

[1] For purposes of applying the MSA, the inner boundary of the EEZ is a line coterminous with the seaward boundary of each of the coastal States. 16 U.S.C. § 1802(11).

[2] The Secretary appoints as fishery management council members individuals who "by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned." 16 U.S.C. § 1852(b)(2)(A).

preparation, monitoring, and revision" of fishery management plans ("FMPs"). 16 U.S.C. § 1801(b)(5); see also 16 U.S.C. § 1852(h)(1)(A) (directing councils to develop fishery management plans for any fishery that requires management and conservation). In addition to developing FMPs or amendments, a council also prepares proposed regulations which it deems necessary or appropriate for implementing an FMP or amendment. Id. § 1853(c). The Gulf Council prepared the FMP for Gulf of Mexico reef fish, which includes the red snapper at issue in this case. See generally, Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Mgmt. Council, 364 F.3d 269, 271 (5th Cir. 2004); 16 U.S.C. § 1852(a)(1)(E) (describing composition of the Gulf Council).

An FMP contains measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A).[3] Where, as here with red snapper, the Secretary has determined that a fish species is overfished, the MSA requires the development of an FMP or FMP amendment to end overfishing and to rebuild the affected stocks. 16 U.S.C. § 1854(e).[4] An FMP must also

[3] Both "overfished" and "overfishing" are defined in the MSA as "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(34). To avoid confusion, NMFS has defined these two terms separately to clarify that "overfished" relates to "biomass" of a "stock or stock complex", and "overfishing" pertains to a rate or level of removal of fish from a stock or stock complex. 50 C.F.R. § 600.310(e)(2)(i)(E).

[4] The MSA provides that the rebuilding period for an overfished species should not exceed 10 years, except in cases where the biology of the stock, other environmental conditions, or management measures under an international agreement dictate otherwise. Id. § 1854(e)(4)(A)(ii). Moreover, a rebuilding period must be as short as possible, taking into account specified considerations. Id. § 1854(e)(4)(A)(i).

"establish a mechanism for specifying annual catch limits in the plan . . . , implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." 16 U.S.C. § 1853(a)(15).[5]

Once a council transmits a proposed FMP or amendment to the Secretary, the Secretary publishes a notice of availability in the Federal Register announcing a 60-day comment period. 16 U.S.C. § 1854(a)(1)(B). The Secretary "take[s] into account the information, views, and comments received from interested persons" and within 30 days after the end of the comment period, must approve, disapprove, or partially approve the FMP or amendment. 16 U.S.C. §§ 1854(a)(2)(A), 1854(a)(3). The Secretary also reviews and, if appropriate, promulgates regulations to implement an FMP or amendment recommended by a council. 16 U.S.C. § 1854(a), (b).

B. The National Environmental Policy Act

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370h, serves the dual purposes of informing agency decisionmakers of the environmental effects of proposed federal actions and of ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA, however, does not mandate particular results or impose substantive environmental obligations on federal agencies. Id. at 351-52; Marsh v. Or. Nat. Res. Council, 490 U.S. 360,

[5] An annual catch limit ("ACL") is a level of annual catch of a stock or stock complex established at or below the acceptable biological catch level, 50 C.F.R. § 600.310(f)(2)(ii). An annual catch target ("ACT") is a management target for a fishery that accounts for management uncertainty in controlling actual catch at or below the ACL. Id. at (f)(4)(i).

371 (1989). Instead, NEPA ensures that federal agencies take a "hard look" at the environmental consequences of their proposed actions before deciding to proceed. Robertson, 490 U.S. at 350-51. Inherent in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider every conceivable environmental effect. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767-68 (2004); Marsh, 490 U.S. at 373.

II. Factual Background

A. The Gulf of Mexico Reef Fish FMP

The history of federal management of the red snapper fishery is recited in detail in Guindon v. Pritzker, 31 F. Supp. 3d 169 (D.D.C. 2014) ("Guindon I"). In short, the Gulf of Mexico is home to a variety of ecologically and commercially important species, including groupers, snappers, tilefishes, jacks, wrasses, and triggerfishes. 50 C.F.R. part 622, Appendix A, Table 3. Pursuant to regulations implementing Amendment 1 to the Reef Fish FMP, NMFS established a total allowable catch ("TAC") for red snapper with 51% of the TAC allocated to the commercial sector and 49% of the TAC allocated to the recreational sector. See 55 Fed. Reg. 2078 (Jan. 22, 1990) (Final Rule implementing Amendment 1); 56 Fed. Reg. 23,044 (May 20, 1991) (Proposed rule explaining 51/49% split). NMFS also established a commercial quota that reflected the commercial allocation and allowed the Regional Administrator to close commercial red snapper fishing when the quota was caught. 56 Fed. Reg. 33,883 (July 24, 1991). With the advice of the Gulf Council, NMFS also implemented a series of other regulatory measures, including limitations on fishing equipment, data reporting requirements, quotas and bag limits, seasonal and size limitations, and a permitting system, as set out in 50 C.F.R. Part 622.

B. Red snapper rebuilding plan

In September 1997, pursuant to 16 U.S.C. § 1854(e)(1)-(2), the Secretary issued a "Report to Congress on the Status of Fish Stocks of the United States" identifying red snapper and other fish species as "overfished." Identification of these species as overfished triggered a requirement to develop a fishery management plan to end overfishing and to rebuild affected stocks of fish, 16 U.S.C. § 1854(e), and to promulgate proposed regulations deemed necessary or appropriate to implement the plan, id. § 1853(c).[6]

Based on a finding that it would take 10 years or longer to rebuild red snapper stocks to the maximum sustainable yield in the absence of fishing mortality, NMFS adopted a rebuilding target of 2032 via Amendment 22 to the Reef Fish FMP. 70 Fed. Reg. 32,266 (June 2, 2005). In response to the court's order in a case challenging the final rule implementing Amendment 22, Coastal Conservation Ass'n v. Gutierrez, 512 F. Supp. 2d 896 (S.D. Tex. 2007), NMFS implemented joint Amendment 27 to the Reef Fish FMP/Amendment 14 to the Shrimp FMP. See 73 Fed. Reg. 5117. Reef Fish Amendment 27 modified harvest rates and implemented other management measures to ensure that recreational and commercial landings of reef fish, including red snapper, and shrimp trawl bycatch remain consistent with achievement of the rebuilding target. Id.

[6] At its June 2017 meeting, the Gulf of Mexico Fishery Management Council recently approved Reef Fish FMP Amendment 44. Based on the best available science, Amendment 44 revises the minimum stock size threshold for seven reef fish stocks including red snapper. NMFS published a Notice of Availability of Amendment 44. 82 Fed. Reg. 44,582 (Sept. 25, 2017). If NMFS approves Amendment 44, NMFS expects that Gulf of Mexico red snapper would no longer be listed as overfished. However, Gulf of Mexico red snapper would still be subject to a rebuilding plan, since the stock has not been rebuilt.

C. Management of Recreational Sector

Under the regulations, NMFS is responsible for ensuring the recreational and commercial harvests do not exceed the applicable quota for each sector. 50 C.F.R. § 622.8(b) ("When a quota specified in this part is reached, or is projected to be reached, the Assistant Administrator will file a notification to that effect with the Office of the Federal Register."). Over the years, NMFS has used a variety of tools to accomplish this. Prior to 1997, NMFS managed the harvest of the recreational sector's allocation through bag and size limits. See generally 56 Fed. Reg. 33,883. From 1997 through 1999, NMFS implemented an in-season monitoring and closure process within the recreational fishery to conform landings to quotas established under rebuilding targets then in effect. Guindon I, 31 F. Supp. 3d at 179. In 2000, NMFS began setting fixed season lengths in advance, based on projections of when the quota would be reached. Id. at 180. NMFS utilizes the ability to adjust season length as a means to constrain recreational harvests to applicable quotas. See generally, 75 Fed. Reg. 23,186 (May 3, 2010).

NMFS determines the recreational season length based on the amount of the quota, the average weight of fish landed, and the estimated catch rates over time. See generally 50 C.F.R. §§ 622.38 (bag and possession limits); 622.8(a) (quotas-general); 622.8(b) (quota closures); 622.39(a)(1)(i) (amount of snapper quota). In response to repeated overages of the applicable recreational quotas, NMFS has dramatically shortened the red snapper recreational seasons over the years. See 78 Fed. Reg. 17,882 (Mar. 25, 2013). For example, following implementation of Reef Fish Amendment 27, the federal fishing season was shortened in Federal waters off of all Gulf of Mexico states from 194 days to 65 days in 2008. The recreational season became

progressively shorter in subsequent years.[7] Despite NMFS' actions to reduce season length in successive years, the recreational sector continued to exceed its quota frequently. See 78 Fed. Reg. at 17,882.

1. Recreational Fishery Monitoring

NMFS' efforts to set the recreational fishing seasons have been complicated, in part, by the lack of real-time data[8] on recreational fish harvests. See generally 65 Fed. Reg. 50,158, 50,160 (Aug. 17, 2000) ("Establishing fishery closure dates based on projections is the only practicable method of setting such dates. This is because the real-time data are not available soon enough toward the end of the fishing season to allow for the evaluation and analysis necessary to determine the appropriate closure date and implement it in time to prevent quota overages."). Prior to 2008, NMFS collected data on the recreational red snapper sector through the Marine Recreational Fishery Statistics Survey ("MRFSS"), which generated effort and catch

[7] See 75 Fed. Reg. 23,186 (2010 original season was 53 days in length); 77 Fed. Reg. 31,734, 31,736 (May 30, 2012) (2011 season was 48 days in length); 77 Fed. Reg. 39,647 (July 5, 2012) (2012 season was 46 days in length, including the original 40-day season and an additional six-day reopening due to severe tropical weather); 78 Fed. Reg. 34,586 (June 10, 2013) & 78 Fed. Reg. 57,313 (Sept. 18, 2013) (2013 recreational season was a total of 42 days in length, including the 28-day June 2013 season and the 14-day supplemental October 2013 season); 79 Fed. Reg. 27,768 (May 15, 2014) (2014 recreational season was nine days in length); 80 Fed. Reg. 24,832 (May 1, 2015) (2015 recreational season for private angling component was ten days in length); 81 Fed. Reg. 38,110 (June 13, 2016) (2016 recreational season for private anglers was nine days in length and subsequently extended for two days due to severe weather).

[8] Unlike most of the commercial fisheries in the Gulf of Mexico, which are monitored on a real-time basis through mandatory dealer reporting procedures, NMFS estimates annual landings for recreational sectors (like the recreational red snapper sector) based largely on the effort and catch data generated from statistical surveys and the Southeast Headboat Survey logbook program. See generally Coastal Conservation Ass'n v. Gutierrez, Case Nos. 2:05CV400-FTM-29DNF and 2:05CV419-FTM-29DNF, 2005 WL 2850325, at *8 & *11 n.9 (M.D. Fla. Order filed Oct. 31, 2005).

data primarily through onsite interviews with anglers and offsite telephone surveys. See generally Fishing Rights All. v. NMFS, No. 8:09-CV-916-T-30AEP, 2011 WL 3897891, at * 2, (July 15), adopted by 2011 WL 3898016 (Order filed Sept. 6, 2011). Since 2008, NMFS has begun implementing an improved recreational data collection program, the Marine Recreational Information Program ("MRIP"), pursuant to 16 U.S.C. § 1881(g). One key feature of MRIP was the establishment of a national registry of recreational fishers. NMFS published a Final Rule to create the National Saltwater Angler Registry, 73 Fed. Reg. 79,705 (Dec. 30, 2008), which has been used to design improved surveys for collecting data on recreational fishing effort. In 2013, NMFS updated MRIP protocols to include data from fishing trips at time intervals that the agency had not previously sampled, resulting in higher estimates of recreational landings and discards. Guindon v. Pritzker, 240 F. Supp. 3d 181, 189 (D.D.C. 2017).

2. Inconsistent state seasons

In addition to the lack of "real time" fishery data from recreational anglers, NMFS' efforts to set the recreational fishing seasons based on projections of when the red snapper quota will be harvested have been complicated, in part, due to actions by individual states in setting fishing seasons and bag limits that are inconsistent with federal regulations. See generally 78 Fed. Reg. 17,882. For example, private anglers fishing in state waters can harvest more fish per trip than anglers fishing in the EEZ if states allow a higher bag limit in state waters during the period when both state waters and the EEZ are open. Private anglers also can continue to fish for red snapper in state waters off states that allow red snapper harvest when the EEZ is closed. Because Gulf red snapper occur in both Federal and State waters (and travel freely between these waters), the entire Gulf red snapper stock must be managed as a whole. Thus, to comply with

the MSA, NMFS must ensure that the entire recreational harvest, whether it takes place in State or Federal waters, does not exceed the recreational quota. 50 C.F.R. § 622.8(a) ("[T]he quotas include species harvested from state waters adjoining the EEZ."). Therefore, if states establish a longer season or a larger bag limit for state waters than the Federal regulations allow in the EEZ, then the Federal season must be reduced to account for the additional expected harvest in state waters. See id.

Given the intertwined nature of the fishery across State and Federal lines, following implementation of Reef Fish Amendment 27 in 2008, the Gulf Council requested the five Gulf states to adopt consistent regulations in state waters. However, at various points, Florida, Texas, Louisiana, and Alabama implemented inconsistent red snapper fishing regulations as to recreational season length and/or bag limits. In response, NMFS published an emergency rule in early 2013 to set the federal recreational red snapper fishing season on a state-by-state basis to account for regulatory actions by the states of Texas, Louisiana, and Florida that are inconsistent with federal regulations in terms of recreational fishing season length and bag limits. 78 Fed. Reg. 17,882. NMFS determined that emergency action under the MSA, 16 U.S.C. § 1855(c), was necessary as a matter of fairness and equity, to ensure that all Gulf fishers have an opportunity to harvest red snapper and that such opportunities will not be unfairly limited by the actions of those states with inconsistent fishing seasons. 78 Fed. Reg. at 17,883.

The emergency rule was challenged by the states of Texas and Louisiana and various recreational fishing interests and was set aside in Texas v. Crabtree, 948 F. Supp. 2d 676 (S.D. Tex. 2013). On June 10, 2013, in response to that court's decision, NMFS published a

temporary rule establishing a Gulf-wide EEZ closure date of June 29, 2013 (instead of closing the EEZ on different days off individual Gulf states). 78 Fed. Reg. 34,586.

3. Implementation of revised accountability measures

In Guindon I, a group of commercial fishing interests challenged a series of NMFS actions that established commercial and recreational quotas and set the lengths of the recreational red snapper fishing seasons for 2013. See 78 Fed. Reg. 57,313. Plaintiffs alleged that, in light of past overages, the recreational fishers were highly likely to catch red snapper at levels that exceed their allotted quota and that these anticipated overharvests would indirectly harm commercial fishing interests by delaying the process of stock rebuilding and effectuating a *de facto* reallocation of red snapper quota to the recreational sector. The Guindon I Court granted judgment in favor of Plaintiffs on March 26, 2014. Because the recreational sector has repeatedly overrun its allotted quotas, the Court held that NMFS failed to comply with its statutory duties under the MSA. The Court reasoned that, although NMFS had repeatedly shortened the length of the recreational season, this approach was not constraining recreational harvests to the recreational quota, and there was no evidence that overfishing would be avoided without implementing further accountability measures. Id. at 193.

In 2014, in response to the Court's order in Guindon I, NMFS published an emergency rule to establish an in-season accountability measure for the recreational harvest of red snapper in the Gulf of Mexico. 79 Fed. Reg. 27,768. The emergency rule set an ACT of 4.312 million pounds ("mp") to project the season length and reduced the Federal recreational fishing season to nine days. Id. This ACT accounted for the management uncertainty in monitoring recreational harvest by setting a target catch level that was 20% below the recreational quota. See id. NMFS

subsequently promulgated a Final Rule revising the accountability measures, as described in a framework action prepared by the Gulf Council. 80 Fed. Reg. 14,328 (Mar. 19, 2015). The Final Rule revised the recreational accountability measures for red snapper in the Gulf of Mexico EEZ by permanently establishing a recreational ACT with the 20% buffer and establishing a quota overage adjustment that applies when red snapper are listed as overfished on the Status of U.S. Fisheries Report to Congress and would reduce the recreational quota the year following a quota overage by the amount of that overage. Id.

4. 2017 season

In 2017, prior to implementation of the temporary rule at issue in this case, the recreational season for private anglers was only three days. 82 Fed. Reg. 21,140. The short season length resulted from several considerations including: a reduced recreational quota to account for an overage of the 2016 total recreational quota; updated projections of when recreational landings would reach the applicable ACT; the prior rule setting the ACT 20% below the component quotas as a buffer to avoid overharvests; and taking into account the red snapper harvest in state waters expected to occur during the recreational seasons set by the five Gulf states. Id. at 21,141. NMFS was concerned that short fishing seasons for the private angler component in Federal waters had resulted in "derby style" fishing that forces anglers to take increased risks to fish in bad weather and concentrates fishing effort in a narrow time window. 82 Fed. Reg. at 27,778. Such derby conditions may also result in the fishery closing prematurely, before the applicable ACT is harvested, or too late, after the ACT has already been exceeded. See generally, New York v. Evans, 162 F. Supp. 2d 161, 168 n.5 (E.D. N.Y. 2001) ("'Derby-style' fishing is 'a race to fish' in which fishermen are encouraged due to limitations on

a fishery to attempt to catch as much of a species as quickly as possible in order to maximize their harvest before a season or fishery is closed.").

After discussions with the States over concerns about the shortness of the season and the benefits of coordinated management regimes that more closely aligned state seasons with each other's seasons and the Federal season, on June 19, 2017, NMFS published a temporary rule reopening the recreational red snapper fishery on select weekend and holiday dates through September 4, 2017. 82 Fed. Reg. 27,777. This action was based on an agreement between the Secretary of Commerce and the five Gulf states to implement a singular private recreational summer fishing season. Id. at 27,779. The Secretary determined that this increased Federal-State cooperation will benefit the long term recovery of the red snapper stock while maximizing the economic benefits from recreational fishing in the Gulf region. Id. The Secretary acknowledged that "[t]his approach likely could not be continued through time without significantly delaying the rebuilding timeline." Id. Accordingly, the Secretary acted with the understanding that, "absent Congressional action to modify the Magnuson-Stevens Act requirements for the Gulf, the recreational season next year would be significantly reduced." AR 1134. Plaintiffs filed their complaint in this case on July 17, 2017. The temporary rule expired on its own accord and the private recreational red snapper season closed on September 4, 2017.

The Assistant Administrator for NMFS, Chris Oliver, has affirmed that "the reopening of the private angler season in 2017 was a one-time action based on creating a singular uniform season between the Federal Government and the Gulf States, which has happened." Declaration of Chris Oliver ¶ 6, filed herewith as Ex. 1 ("Oliver Decl."). Furthermore, Assistant Administrator Oliver has affirmed that "NOAA does not intend to reopen the private angler

season in the same manner in 2018." Id. "Absent Congressional action resulting in a change in applicable law, and subject to existing authority under 16 U.S.C. § 1855(c) regarding emergency actions and interim measures, in 2018 the private angler season length will be determined consistent with the process used to set the original 2017 season as described in the document titled '2017 Gulf of Mexico Red Snapper Recreational Season Length Estimates, NOAA Fisheries, Southeast Regional Office' (Administrative Record at 1053)." Id. This process will account for any landings in excess of the 2017 recreational annual catch limit in accordance with the accountability measures specified in the applicable regulations, 50 C.F.R. § 622.41(q)(2)(ii). Id. As noted above, the regulations require a "payback" of any overage only if red snapper are listed as "overfished" on the Report to Congress. Therefore, if the proposed Amendment 44 is approved and red snapper are no longer listed as "overfished" in 2018, no "payback" of any 2017 overage would be required under the current regulations. See 50 C.F.R. § 622.41(q)(2)(ii).

STANDARD OF REVIEW

The party invoking Federal court jurisdiction bears the burden of establishing jurisdiction and that such jurisdiction continues to exist throughout all stages of the litigation, not just at the time the complaint was filed. Davis v. Fed. Election Comm'n, 554 U.S. 724, 732–33 (2008).

Judicial review of agency action under the MSA and NEPA is governed by the APA, 5 U.S.C. § § 701-706. See, e.g. Marsh, 490 U.S. 360; Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 72 (D.C. Cir. 2011). Section 706(2)(A) of the APA directs a reviewing court to affirm final agency action, unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious"

standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). Thus, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Overton Park, 401 U.S. at 416. In making this determination, the court's review is limited to the administrative record. TOMAC v. Norton, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing Overton Park, 401 U.S. at 420), aff'd, 433 F.3d 852 (D.C. Cir. 2006).

ARGUMENT

I. The Court Lacks Jurisdiction Because Plaintiffs' Claims Are Moot.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" La. Envt'l Action Network v. Browner, 87 F.3d 1379, 1382 (D.C. Cir. 1996) (citation omitted). Courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 316 (1991) (citation omitted). Here, Plaintiffs cannot overcome that presumption, and their Complaint must be dismissed. In the alternative, even if the Court determines that Plaintiffs' claims are not constitutionally moot, it is unnecessary for the Court to reach the merits of such claims. The Court may dismiss Plaintiffs' claims based on the doctrines of prudential mootness and/or primary jurisdiction.

A. Plaintiffs' claims are moot because the challenged temporary rule expired by its own terms.

Federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v.

Green, 159 U.S. 651, 653 (1895)). A dispute must be live when the complaint is filed and remain so during litigation. Daimler Trucks N. Am. LLC v. EPA, 745 F.3d 1212, 1216 (D.C. Cir. 2013). Conversely, "[i]f events outrun the controversy such that the court can grant no meaningful relief, the claim must be dismissed as moot." NTCH, Inc. v. FCC, 841 F.3d 497, 504 (D.C. Cir. 2016) (citation omitted), cert. denied, 137 S. Ct. 2277 (2017). Here, the Court cannot provide meaningful relief because the temporary rule has already expired. Further litigation concerning the expired temporary rule would invite the Court to render an advisory opinion without practical consequences.

Plaintiffs incorrectly suggest that the Court may yet fashion effective relief, notwithstanding the expiration of the temporary rule. ECF No 17 at 13. For example, Plaintiffs suggest that the Court may grant effective relief by "declaring the Extension Rule unlawful and enjoining NMFS from taking similar action in the future." Id. However, the challenged temporary rule, by its own terms, was a one-time action that is no longer in effect. Oliver Decl. ¶ 6 ("the reopening of the private angler season in 2017 was a one-time action based on creating a singular uniform season between the Federal Government and the Gulf States, which has happened"). Given the dynamic nature of fishery management any myriad of factors could affect the appropriate season length or other management limitations in the coming years. A generic order enjoining NMFS from taking "similar action" in hypothetical *future* agency actions boils down to an impermissible request for an "obey the law" order. NLRB v. Express Publ'g Co., 312 U.S. 426, 435-36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the

future commit some new violation unlike and unrelated to that with which he was originally charged."). This is not cognizable meaningful relief.

In sum, the Court may neither invalidate nor grant effective relief concerning an expired agency action that has "disappeared into the regulatory netherworld." Nw. Pipeline Corp. v. FERC, 863 F.2d 73, 76 (D.C. Cir. 1988). Stated differently, judicial relief as to an expired agency action cannot redress Plaintiffs' alleged injuries.[9] See Gulf of Maine Fisherman's All. v. Daley, 292 F.3d 84, 88 (1st Cir. 2002) ("This court has no means of redressing either procedural failures or substantive deficiencies associated with a regulation that is now defunct."). Plaintiffs' claims are moot, and the Court lacks jurisdiction to reach the merits of Plaintiffs' claims, because the challenged temporary rule expired by its own terms.

B. Plaintiffs' claims do not meet the capable of repetition yet evading review exception.

Although Plaintiffs do not dispute that the challenged temporary rule has expired under its own terms, Plaintiffs suggest that the Court may exercise jurisdiction under the "capable of repetition, yet evading review" exception to the mootness doctrine. ECF No. 17 at 14. This

[9] For similar reasons, Plaintiffs lack standing because their alleged injuries are not redressable. "[T]he core component of standing is an essential and unchanging part of [Article III's] case-or-controversy requirement . . . ." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires Plaintiffs to establish, among other things, that their alleged injuries are redressable by a favorable decision. Id. at 560-61. This is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case. . . ." Id. at 561. The temporary rule has expired and the agency has advised the Court that the 2018 private angler season length will be determined pursuant to the applicable regulations, 50 C.F.R. § 622.41(q)(2), consistent with the process used to set the original 2017 season. Oliver Decl. ¶ 7. Under the circumstances, Plaintiffs cannot meet their burden to show that it is "likely, as opposed to merely speculative" that their alleged injuries are redressable. Lujan, 504 U.S. at 561 (citation omitted).

exception applies "only in exceptional situations," Newdow v. Roberts, 603 F.3d 1002, 1009 (D.C. Cir. 2010) (citation omitted), and the party invoking the exception bears the burden of showing that both elements are satisfied. Del Monte Fresh Produce Co. v. United States, 570 F.3d 316, 322 (D.C. Cir. 2009). Plaintiffs cannot sustain this burden here.

1. The challenged temporary rule is not capable of repetition.

In order to prove that a challenged agency action is capable of repetition, Plaintiffs must show that "there [was] a reasonable expectation that the same complaining party would be subject to the same action again." Del Monte, 570 F.3d at 322 (citation omitted); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (same). While Plaintiffs are not required to show that "the precise historical facts" are likely to recur, Plaintiffs must show that the legal wrong complained of is reasonably likely to recur. Del Monte, 570 F.3d at 324. The gravamen of Plaintiffs' complaint here is that NMFS allegedly re-opened the 2017 red snapper recreational season without complying with the MSA and NEPA. Neither this same action, nor any alleged legal wrong is likely to recur.

First, the Defendants have proffered a sworn declaration from the NOAA Assistant Administrator advising the Court that "NOAA does not intend to reopen the private angler season in the same manner in 2018." Oliver Decl. ¶ 6. Rather, the 2018 private angler season length will be determined pursuant to the applicable regulations, 50 C.F.R. § 622.41(q)(2), consistent with the process used to set the original 2017 season. Id. ¶ 7. Courts may appropriately give weight to sworn statements from responsible government officials to determine mootness. Fletcher v. U.S., Civ. No. 11-1943 (ABJ), 2013 WL 5422951, *1 (D.D.C. Memorandum Opinion filed Sept. 30, 2013) ("In support of summary judgment, the government

has filed a sworn declaration from a Loan Analyst at the Department of Education which clearly states that any student loan debts have been discharged and that Ms. Fletcher does not owe any balance."); PETA v. U.S. Fish and Wildlife Serv., 59 F. Supp. 3d 91, 96 (D.D.C. 2014) ("A sworn declaration from the [responsible agency official] makes this clear as well."). See also Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 72 (1983) ("Having announced its decision to Iron Arrow, the public and the courts, we conclude that there is 'no reasonable likelihood' that the University will later change its mind and decide to invite Iron Arrow to return."); Associated Fisheries of Me. v. Evans, 350 F. Supp. 2d 247, 256 (D. Me. 2004) ("It is highly improbable that the Government would have made such an admission [in both a summary judgment motion and a Federal Register notice] if it intended to continue the practice . . . ."). Thus, Plaintiffs' assertions that judicial intervention is necessary to prevent NMFS from implementing an extended season in Federal waters in 2018, e.g., ECF No. 17 at 18, are entirely unfounded.

Second, as noted above, any decision on the length of future red snapper recreational seasons, much less an extension of a season as occurred here, depends on numerous contingencies. These include, among other things: the possibility that red snapper will not be considered overfished; red snapper stock assessments, including impacts of the recent Gulf Hurricanes on fishing effort; action by the Gulf Council; and the effect of this season's aligned State seasons. The NOAA Assistant Administrator's statement that NOAA does not intend to use the process again combined with the fact that a multitude of contingencies will inform the setting of future seasons undermine any notion that this scenario is likely to recur. In sum, "there

is no reasonable expectation that the specific procedural infirmities alleged by Plaintiff will be repeated." Associated Fisheries of Me., 350 F. Supp. 2d at 256.[10]

2. The challenged temporary rule did not evade review.

In addition to the fact that the alleged legal violations resulting from the challenged temporary rule will not recur, under the circumstances here Plaintiffs cannot meet the second prong of the exception. To qualify for this narrow exception, a plaintiff must show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." Weinstein, 423 U.S. at 149. Moreover, the Court is not compelled to apply the "capable-of-repetition" exception in every circumstance, and should not do so where, as here the case was mooted, in part, by the Plaintiffs' own litigation decisions. Newdow, 603 F.3d at 1009. ("The capable-of-repetition doctrine is not meant to save mooted cases that may have remained live but for the neglect of the plaintiff." To the contrary, "a plaintiff [must] make a full attempt to prevent his case from becoming moot. . . .").

Precisely because fishery regulations often have limited duration and effect, Congress has established specific procedures to facilitate expedited judicial review. 16 U.S.C. § 1855(f). "[T]hree key aspects of § 1855(f) [of the Magnuson-Stevens Act] – the thirty-day time limitation, the bar on preliminary injunctive relief, and the provision for expedited review –

[10] The Guindon I court found that the same "legal wrongs" giving rise to Plaintiffs' claims in that case were likely to recur because recreational overages had already occurred in six of the previous seven years. 31 F. Supp. 3d at 188 ("In estimating the likelihood of an event's occurring in the future, a natural starting point is how often it has occurred in the past.") (citations omitted). By contrast, as explained above, the Defendants' decision to reopen the recreational fishery here was a one-time action, and Plaintiffs cannot identify any other comparable action. See Oliver Decl. ¶ 6.

demonstrate Congress's intent to ensure that regulations promulgated under the Magnuson Act are effectuated without interruption and that challenges are resolved swiftly." Turtle Island Restoration Network v. U.S. Dep't of Commerce, 438 F.3d 937, 948 (9th Cir. 2006). Here, although Plaintiffs sought expedited review as provided under the 16 U.S.C. § 1855(f)(4), the fact is that Plaintiffs waited almost a month after the temporary rule was published on June 19, 2017, before filing this lawsuit on July 17, 2017. And while it is true that the MSA precludes motions for preliminary injunctions, 16 U.S.C. § 1855(f)(1)(A), if Plaintiffs had filed their complaint sooner, it is possible that Plaintiffs' claims could have been litigated prior to cessation or expiration of the temporary rule. Indeed, another district court entered summary judgment in a case challenging a red snapper emergency rule, Texas v. Crabtree, 948 F. Supp. 2d 676, on May 31, 2013, less than 45 days after plaintiffs filed their complaint on April 22, 2013. See also Gulf of Maine Fishermen's All., 292 F.3d at 89 ("Given the actual, as opposed to theoretical, interval between most Frameworks and the historical fact that review is indeed possible, we decline to hold that Framework 25 was 'too short in duration' to be fully litigated before its expiration.").

Thus, even assuming Plaintiffs' challenge is otherwise deemed capable of repetition notwithstanding the sworn declaration of the responsible agency official, Plaintiffs cannot credibly assert that their challenge evaded review because they delayed in commencing this action. Armstrong v. FAA, 515 F.3d 1294, 1296 (D.C. Cir. 2008) ("[a] litigant cannot credibly claim his case 'evades review' when he himself has delayed its disposition"). Plaintiffs' claims concerning the temporary rule should therefore be dismissed as jurisdictionally moot.

C. In the alternative, Plaintiffs' claims should be deemed prudentially moot.

Even assuming, *arguendo,* that Plaintiffs' claims are not constitutionally moot, the Court may nevertheless exercise its discretion to dismiss such claims under the doctrine of prudential mootness. Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980). ("This distinction between mootness proper and its remedial counterpart has been long recognized and clearly articulated.") (citing United States v. W.T. Grant Co., 345 U.S. 629 (1953)). See also Cmty. for Creative Non-Violence v. Hess, 745 F.2d 697, 700 (D.C. Cir. 1984) ("[C]ourts have developed principles, which are closely related to the Article III mootness doctrine, guiding their discretion to forego decision on the merits in some circumstances actually leaving them with power to act."). In Chamber of Commerce, the plaintiffs challenged the Department of Energy's ("DOE") decision to provide funds to a consumer organization so the organization could pay the costs of intervention in a DOE proceeding, a decision that plaintiffs alleged was one instance of a continuing practice of such funding to intervenors. 627 F.2d at 290-91. The district court dismissed the case as jurisdictionally moot, on the grounds that the challenged DOE proceeding had ended. Id. at 290.

On appeal, the circuit court upheld the case as moot, but as prudentially moot rather than jurisdictionally moot. In making this finding of prudential mootness, the D.C. Circuit noted that the challenged funding of consumer intervenors by DOE was "under review and may never recur." 627 F.2d at 292. Thus, the court concluded that "considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." Id. at 291. Moreover, the court further observed that, if the challenged

funding did recur, there would be "ample opportunity for [the plaintiffs] to renew their complaint." Id. at 292.

Here, as in Chamber of Commerce, the challenged conduct is not likely to recur. Again, the head of the responsible agency has advised the Court that "NOAA does not intend to reopen the private angler season in the same manner in 2018." Oliver Decl. ¶ 6. Also, as in Chamber of Commerce, the Plaintiffs here would be free to bring a new suit if they object to Federal Defendants' actions to determine the 2018 recreational fishing season for the private angling component for red snapper in the EEZ of the Gulf of Mexico. The Court should "stay its hand" and withhold further action with respect to the temporary rule governing recreational red snapper fishing during the 2017 season in light of Federal Defendants' assurance that the 2018 recreational season will be determined in the ordinary course. See Chamber of Commerce, 627 F.2d at 291; Oliver Decl. ¶ 7.

D. The Court should defer to the primary jurisdiction of NMFS.

The Court also has discretion to dismiss Plaintiffs' claims in deference to the primary jurisdiction of NMFS. The doctrine of primary jurisdiction was first recognized by the Supreme Court in the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). As the Supreme Court later explained, it is intended to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. W. Pac. Ry. Co., 352 U.S. 59, 63 (1956). A district court may dismiss a suit "on the ground that [an agency] has primary jurisdiction [over it], i.e., that [the agency] is best suited to make the initial decision on the issues in dispute, even though the district court had subject matter jurisdiction." Allnet Commc'n Serv. v. Nat'l Exch. Carrier Ass'n, 965 F.2d 1118, 1120 (D.C.

Cir. 1992). See also Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1316 (D.C. Cir. 1971) (Pursuant to the doctrine, "a court may entertain an action for permanent relief and defer its consideration of the merits until an agency 'with special competence' in the field has ruled on the issues. . . .") (internal citation omitted).

Here, it is unnecessary for the Court to retain jurisdiction because the responsible agency official has advised the Court concerning the process that will be utilized to determine the season length in 2018. Oliver Decl. ¶ 8. Consistent with its statutory role in managing U.S. fisheries, see Oliver Decl. ¶ 2, NMFS has special competence and therefore is best suited to undertake the highly technical process of determining the season length in 2018, which will necessitate compiling the relevant 2017 landings data, requesting information from State representatives about the 2018 State seasons, calculating mean weights and mean catch rates, and running projections based on observations from the previous year as well as information from projections from 2004 and subsequent years. Id. ¶ 8. It is unnecessary for the Court to retain jurisdiction as NMFS undertakes this technical process. "Sound discretion bids a court stay its hand upon petition by the Administrator where there is reason to believe that further agency consideration may resolve the dispute and obviate the need for further judicial action." Nat. Res. Def. Council v. Train, 510 F.2d 692, 703 (D.C. Cir. 1974).

II. In the alternative, if the Court determines that Plaintiffs are entitled to any relief, remand is the only appropriate remedy.

Even if the Court determines that this case is not moot, Plaintiffs plainly are not entitled to their requested remedy that the Court "[m]aintain jurisdiction over this action until the Fisheries Service is in compliance with the Magnuson-Stevens Act, NEPA, the APA, and every

order of this Court." ECF No. 1 at 36. Such affirmative relief is legally unavailable and inappropriate.

A. A remand to NMFS is the only appropriate remedy pursuant to the APA.

Plaintiffs' requested relief, see ECF No. 17 at 13-14, is inconsistent with the limited judicial review afforded to Plaintiffs' claims under the MSA. As relevant here, the MSA judicial review provision only authorizes the Court to set aside a NMFS rule consistent with APA sections 706(2)(A)-(D). 16 U.S.C. § 1855(f)(1)(B). Under the APA, it is well-settled that the appropriate remedy in cases where the court finds an agency has erred generally is, at most, to set aside the action if warranted and remand to the agency for further proceedings consistent with the agency's duties. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). See also INS v. Ventura, 537 U.S. 12, 16 (2002) ("Generally speaking, a court ... should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

Here, of course, there is no action to set aside because the temporary rule already has expired. And as to remand, in cases subject to APA review, as here, the Court does not attempt to fashion what it deems to be an appropriate prospective remedy for a legal violation. Rather, "the guiding principle ... is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) (Where the decision of the agency is not sustainable on the record, the proper remedy is "remand to the agency in order that it can exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops."); Ford Motor Co. v. NLRB, 305 U.S.

364, 374 (1939) ("The 'remand' . . . means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law.") (citation omitted); Cty. of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.") (citations omitted). It follows that the Court cannot order specific relief or otherwise dictate to the agency how to proceed on remand. See, e.g., Palisades Gen. Hosp. v. Leavitt, 426 F.3d 400, 403 (D.C. Cir. 2005) ("The district court had no jurisdiction to order specific relief.").

Again, it is unnecessary for the Court to reach the merits of Plaintiffs' claims because the challenged temporary rule expired. Moreover, many of the facts underlying Plaintiffs' claims are stated in the temporary rule itself. See Defendants' Answer, ECF No. 15 ¶¶ 86-93 (allegations are "admitted to the extent stated in the Temporary Rule . . ."). Assuming *arguendo* that the Court does not dismiss Plaintiffs' claims as moot or otherwise dispose of Plaintiffs' claims in deference to the primary jurisdiction of NMFS, the Court should deny the relief requested by Plaintiffs. Instead, at most the Court should remand to preserve the respective roles of the Gulf Council and the Secretary in developing and implementing any remedial measures they deem appropriate for the 2018 recreational red snapper season.[11]

[11] Federal Defendants request the opportunity to submit further briefing on the scope of any appropriate remedy, in particular to be able to apprise the Court of any further actions taken by the Council or NMFS from now until the time the Court issues its decision.

B. In no event are Plaintiffs entitled to the requested relief pursuant to the MSA.

The prospective remedies requested by Plaintiffs, see ECF No. 17 at 13-14, are also inconsistent with the procedures for amending FMPs pursuant to the MSA. For example, the remedial measures suggested by Plaintiffs may entail the promulgation of new regulations implementing existing FMPs or amendments (e.g., if the Defendants were to promulgate regulations "to ensure any overage resulting from the reopening does not negatively impact the red snapper population and ability to rebuild"). ECF No. 17 at 13. Alternatively, some of the remedial measures suggested by Plaintiffs may entail the development of new amendments in addition to the promulgation of regulations implementing such new amendments, in cases where regulatory authority does not exist based on existing amendments (e.g., if the Defendants were to "initiate necessary regulatory changes to ensure the stock rebuilds by 2032 consistent with the deadline it approved in the Reef Fish Fishery Management Plan"). Id. Further, the necessity for any of the particular remedial measures is also highly dependent on whether and the extent to which the extension of the season has resulted in overharvests, which will require analysis of information that is not yet fully available.[12] See Oliver Decl. ¶ 8.

It is the Gulf Council–not the Secretary–that has the primary responsibility for developing FMPs and amendments pertaining to red snapper under the MSA. See, e.g., 16 U.S.C. §§ 1852(h) (functions of councils); 1853(a) (required provisions of FMPs); 1853(c) (procedure for submittal of proposed regulations by Council to Secretary). The MSA authorizes

[12] While the Temporary Rule described certain *potential* consequences of extending the season, further analysis will be required to determine the actual scope of the impacts of the additional days on rebuilding and other considerations.

the Secretary to independently develop an FMP or amendment in limited circumstances not applicable here. 16 U.S.C. § 1854(c)(1). For example, the Secretary has not disapproved or partially approved any relevant plan or amendment concerning red snapper, so there has been no failure by the Council to submit a revised or further revised plan or amendment. Moreover, NMFS' decision whether to bypass the Council and prepare its own FMP amendment is entirely discretionary. Martha's Vineyard/Dukes Cty. Fishermen's Ass'n v. Locke, 811 F. Supp. 2d 302, 308 n.7 (D.D.C. 2011) ("Although authorized to promulgate such regulations, the Federal defendants' power to do so is discretionary.").

In view of the regulatory process established by Congress in the MSA, the specific remedial measures suggested by Plaintiffs are plainly not appropriate. They would contravene requirements of the MSA and inappropriately inject the Court into the administrative process. They also would usurp the primary role of the Gulf Council to propose any FMP amendments or regulations necessary to address the Court's Order. Accordingly, to the extent the Court does not dismiss the case, any remedy should be limited to a remand to NMFS for further action pursuant to the applicable statutory and regulatory regime.

CONCLUSION

The Court should not reach the merits of Plaintiffs' claims because the Court lacks jurisdiction. The challenged temporary rule expired by its own terms, and all of Plaintiffs' claims concerning the challenged temporary rule are both jurisdictionally and prudentially moot. In the alternative, if the Court determines that Defendants have committed any legal violation, the only appropriate remedy is for the Court to remand this matter to the responsible agency for further action pursuant to the applicable statutory and regulatory regime.

DATED this 13th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

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