

(f) *Distribution of annual quota.* (1) The annual quota specified according to the process outlined in paragraph (a) of this section shall be allocated between two semi-annual quota periods as follows: May 1 through October 31 (57.9 percent) and November 1 through April 30 (42.1 percent).

(2) All spiny dogfish landed for a commercial purpose in the states from Maine through Florida shall be applied against the applicable semi-annual commercial quota, regardless of where the spiny dogfish were harvested.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 050708183-5183-01; I.D. 070505D]

RIN 0648-AT45

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gulf Grouper Recreational Management Measures

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; interim measures.

**SUMMARY:** NMFS issues this temporary rule to amend, and extend the effective date of, the grouper bag limit provisions implemented by a temporary rule published by NMFS on July 25, 2005, to reduce overfishing of red grouper in Federal waters of the Gulf of Mexico. This temporary rule amends the bag limit provision consistent with the October 31, 2005, ruling of the United States District Court, Middle District of Florida (Court). The intended effect is to reduce overfishing of red grouper in the Gulf of Mexico.

**DATES:** This rule is effective January 24, 2006, through July 22, 2006.

**ADDRESSES:** Copies of documents supporting this rule may be obtained from the Southeast Regional Office, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701.

**FOR FURTHER INFORMATION CONTACT:** Phil Steele, telephone: 727-551-5784, fax: 727-824-5308, e-mail: phil.steele@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The reef fish fishery of the Gulf of Mexico is

managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

#### Background

During the March 7-10, 2005, Gulf of Mexico Fishery Management Council (Council) meeting, the Council reviewed red grouper landings and concluded that without additional regulations recreational red grouper landings were likely to exceed the recreational target level specified in the rebuilding plan provided in Secretarial Amendment 1 to the FMP. The Council passed a motion and subsequently submitted a letter requesting NMFS to implement an interim rule to reduce the recreational red grouper catch to levels consistent with the rebuilding plan specified in Secretarial Amendment 1. In response to the Council's request, NMFS issued a temporary rule (70 FR 42510, July 25, 2005) to reduce the likelihood of overfishing red grouper, while minimizing biological impacts on gag and other groupers that could result from shifts in effort due to red grouper management actions. To achieve this objective, the temporary rule reduced the red grouper bag limit from 2 fish per person per day to 1 fish per person per day; reduced the aggregate grouper bag limit from 5 grouper, combined, per person per day, excluding goliath grouper and Nassau grouper, but not to exceed 1 speckled hind or 1 warsaw grouper per vessel per day or 2 red grouper per person per day, to 3 grouper, combined, per person per day, excluding goliath grouper and Nassau grouper, but not to exceed 1 speckled hind or 1 warsaw grouper per vessel per day or 1 red grouper per person per day; and established a closure of the recreational fishery, from November through December of 2005, for all grouper species. Additional background regarding the need for and impacts of the July 25, 2005 temporary rule is contained in the preamble to that rule and is not repeated here.

On October 31, 2005, a decision was rendered by the Court on a lawsuit brought by the Coastal Conservation Association and The Fishing Rights Alliance, Inc. against NMFS (*Coastal Conservation Association, et al., vs. Carlos Gutierrez*, Case No. 2:05-cv-400-FtM-29DNF). The Court partially agreed with the plaintiffs and set aside aspects of the interim rule that applied to

species other than red grouper. As a result, NMFS is amending the temporary rule in accordance with the Court's ruling and extending the effective date for an additional 180 days.

#### Amendment and Extension of the Temporary Rule

Under section 305(c)(3)(B) of the Magnuson-Stevens Act, NMFS may extend the effectiveness of interim measures for one additional period of 180 days, provided the public has had an opportunity to comment on the interim measures, and the Council is actively preparing proposed regulations to address the issue on a permanent basis.

NMFS solicited comments on the initial interim measures through August 24, 2005. The comments received and NMFS' responses are provided in this temporary rule. After reviewing all public comments, NMFS has concluded that the interim measures were, and as amended remain, necessary to reduce the probability of overfishing.

The Council is preparing a regulatory amendment and associated proposed regulations that will address measures to address overfishing of red grouper. Those measures, if approved and implemented by NMFS, would replace this temporary rule. Action to address these issues via the proposed regulations associated with the regulatory amendment cannot be implemented before the current temporary rule expires on January 23, 2006. Extension and amendment of the temporary rule is necessary to conform with the Court's ruling, avoid a regulatory lapse, and ensure that the risk of overfishing is minimized.

This temporary rule extends the applicable provisions of the original temporary rule (70 FR 42510, July 25, 2005) for an additional 180 days and amends the original temporary rule consistent with the Court's ruling. Under this temporary rule, the aggregate grouper bag limit is 5 grouper (versus 3 grouper under the original temporary rule), combined, per person per day, excluding goliath grouper and Nassau grouper, but not to exceed 1 speckled hind or 1 warsaw grouper per vessel per day or 1 red grouper per person per day. The November through December closure of the recreational fishery for all grouper species, contained in the original temporary rule, is not relevant to the period of effectiveness of this temporary rule and, therefore, is removed in this temporary rule. Additional suspensions and extensions of regulatory text, necessary for regulatory consistency, are also included in this temporary rule.

## Comments and Responses

NMFS received the following public comments on the July 25, 2005, temporary rule: 267 form letters of similar content and two lists of signatures from interested members of the general public, and an additional 43 e-mails, 17 letters, and 5 facsimiles from the general public, recreational fishing organizations, boat associations, local governments, and the State of Florida. Almost all public comments received by NMFS opposed interim regulations. One public comment supported reducing the aggregate bag limit, and three public comments supported reducing the red grouper bag limit. Responses to these comments are provided below.

*Comment 1:* Numerous commenters stated the 2004 Marine Recreational Fisheries Statistics Survey (MRFSS) data were flawed and overestimated red grouper landings.

*Response:* The MRFSS program conducted a thorough review of red grouper landings and effort data, and an independent review of the MRFSS data was conducted by the Florida Fish and Wildlife Conservation Commission (FWC). MRFSS 2004 red grouper catch and landings estimates were considered sound and based on the best available science, and no technical flaws were evident in the estimates. Estimated landings had relatively low proportional standard error, suggesting precise, reliable estimates. As independent verification of the increase in MRFSS red grouper landings and catch rates, headboat (charter/party) captains reported much higher red grouper landings in logbooks submitted to the Southeast Fisheries Science Center in 2004. Numerous anecdotal reports from anglers and charter boat operators during 2004 also indicated red grouper were being caught in greater numbers and in areas where they were not previously caught.

*Comment 2:* Many commenters requested NMFS and the Council increase the recreational allocation for red grouper.

*Response:* Secretarial Amendment 1 to the FMP used historical landings from 1999–2001 to establish a 5.31 million-lb (2.41 million-kg), gutted weight (GW), commercial quota and 1.25 million-lb (0.57 million-kg), GW, recreational target catch level. This interim rule did not consider allocation changes. The Council can consider changes to allocation through amendments to its fishery management plans. At the November 2005 Council meeting, the Council voted to begin developing a plan amendment for allocating grouper.

*Comment 3:* Numerous commenters stated recreational anglers were not the problem and additional management measures were needed for commercial fishermen.

*Response:* Interim regulations were developed in response to landings overages by the recreational fishery. In 2004, an estimated 3.18 million lb (1.44 million kg), GW, of red grouper were landed by recreational anglers. These landings were well above the 1.25 million-lb (0.57 million-kg), GW, catch level specified by the red grouper rebuilding plan, requiring NMFS to implement interim regulations to reduce recreational landings.

The commercial grouper fishery is managed by quotas, trip limits, gear boundaries, size limits, and closed seasons. These management measures are intended to control commercial harvest and prevent overfishing. In both 2003 and 2004, commercial landings for red grouper were at or below the 5.31 million-lb (2.41 million-kg), GW, quota. NMFS closed the commercial shallow-water grouper fishery on November 15, 2004, and October 10, 2005, when the red grouper quota was projected to be met. The deep-water grouper fishery was closed on July 15, 2004, and June 23, 2005, when the deep-water grouper quota was projected to be met. Once the quotas have been met, the fisheries remain closed until the start of the next fishing season, which begins January 1 each year.

*Comment 4:* Two commenters supported increasing the minimum size limit for red grouper.

*Response:* The environmental assessment for the interim rule considered increasing the minimum size limit for red grouper from 20 inches (50.8 cm) to either 22 or 23 inches (55.9 or 58.4 cm) total length (TL). These alternatives were not preferred because size limits increase release mortality and may result in forgone yield. Higher size limits would contribute to more red grouper being released and dying when compared to status quo (20 inches (50.8 cm) TL). During 2003–2004, an average of 2.6 million red grouper, representing 88 percent of all red grouper caught, were released. Although release mortality for recreationally caught red grouper is assumed to be relatively low (10 percent), released fish accounted for 42 percent of all red grouper killed during 2003–2004. Increasing the minimum size limit is expected to further increase discard mortality. The proposed increase in the minimum size limit could also result in forgone yield because there would be additional mortality from natural causes before fish reached legal size.

*Comment 5:* Two commenters requested the red grouper stock assessment be moved to 2006.

*Response:* The Southeast Data, Assessment, and Review has rescheduled the red grouper stock assessment for fall 2006. The red grouper stock assessment was originally scheduled for spring 2007. The assessment will now occur after the gag stock assessment, which is scheduled to occur in spring 2006.

*Comment 6:* Numerous commenters opposed the seasonal closure, and three commenters questioned why the closure would apply to all grouper, including species not overfished or undergoing overfishing.

*Response:* NMFS established a recreational closure for all grouper to reduce bycatch mortality of red grouper and prevent effort shifting to other grouper because of red grouper management measures. However, a recent court decision (*Coastal Conservation Association, et al., vs. Carlos Gutierrez*, Case No. 2:05-cv-400–FtM–29DNF) concluded the closure could not be applied to species not undergoing overfishing. Therefore, the closure only applies to red grouper harvested from the exclusive economic zone of the Gulf of Mexico during November–December, 2005. The interim rule implementing the closure expires January 23, 2006. Because the expiration date of the interim rule will be after the closure ends and the interim rule can only be extended for an additional 180 days, extension of the interim rule will not include a seasonal closure.

*Comment 7:* Two commenters suggested only reducing the bag limit to one.

*Response:* This management option was preferred by the FWC. The environmental assessment for the interim rule did consider an alternative that would have only reduced the red grouper bag limit from two to one. However, this alternative would not have achieved a great enough reduction in recreational landings to eliminate or greatly reduce the likelihood of recreational red grouper overages in 2005.

*Comment 8:* One commenter suggested implementing a spawning season closure.

*Response:* The interim rule did not include a spawning season closure because reductions in red grouper landings were needed for 2005 and the interim rule was implemented after the 2005 spawning season for red grouper, gag, and many other grouper species. The Council is currently developing a regulatory amendment to establish more

permanent regulatory management measures for grouper. Several alternatives in the regulatory amendment include spawning season closures.

#### Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that the amendment and extension of this temporary rule is necessary to reduce overfishing of red grouper in the Gulf of Mexico consistent with the Court's ruling and is consistent with the Magnuson-Stevens Act and other applicable laws.

This temporary rule has been determined to be not significant for purposes of Executive Order 12866.

This temporary rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and public comment.

This temporary rule addresses overfishing. Delaying action to reduce overfishing in the red grouper fishery of the Gulf of Mexico to provide further notice and an opportunity for public comment prior to implementation would increase the likelihood of a loss of long-term productivity from the fishery and increase the probable need for more severe restrictions in the future. Accordingly, under authority set forth at 5 U.S.C. 553(b)(B), the AA finds, for good cause, namely the reasons set forth above, that providing prior notice and the opportunity for prior public comment would be contrary to the

public interest. Similarly, the need to implement these measures in a timely manner for the reasons stated above constitutes good cause under authority contained in 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness.

#### List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: January 12, 2006.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

#### PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.39, paragraphs (b)(1)(ii) and (b)(1)(v) are suspended, and new paragraphs (b)(1)(viii) and (b)(1)(ix) are added to read as follows:

#### § 622.39 Bag and possession limits.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(viii) Groupers, combined, excluding goliath grouper and Nassau grouper -5 per person per day, but not to exceed 1

speckled hind or 1 warsaw grouper per vessel per day or 1 red grouper per person per day.

(ix) Gulf reef fish, combined, excluding those specified in paragraphs (b)(1)(i), (iii), (iv), (vi), (vii), and (viii) of this section and excluding dwarf sand perch and sand perch—20.

\* \* \* \* \*

■ 3. In § 622.43, paragraph (a)(1)(i) is suspended and paragraph (a)(1)(iii) is added to read as follows:

#### § 622.43 Closures.

(a) \* \* \*

(1) \* \* \*

(iii) *Commercial quotas.* If the recreational fishery for the indicated species is open, the bag and possession limits specified in § 622.39(b) apply to all harvest or possession in or from the Gulf EEZ of the indicated species, and the sale or purchase of the indicated species taken from the Gulf EEZ is prohibited. In addition, the bag and possession limits for red snapper, when applicable, apply on board a vessel for which a commercial permit for Gulf reef fish has been issued, as required under § 622.4(a)(2)(v), without regard to where such red snapper were harvested. If the recreational fishery for the indicated species is closed, all harvest or possession in or from the Gulf EEZ of the indicated species is prohibited.

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