

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100713296-0333-01]

RIN 0648-BA06

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Emergency Rule to Re-Open the Recreational Red Snapper Season

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

ACTION: Proposed emergency rule; request for comments.

SUMMARY: NMFS issues this proposed emergency rule to authorize the Regional Administrator, Southeast Region, NMFS (RA) to re-open the Gulf of Mexico (Gulf) recreational red snapper season after the September 30, 2010, end of the fishing season. Such a re-opening would only occur if NMFS determines that the recreational red snapper quota was not met by the 12:01 a.m., local time, July 24, 2010, closure date. Because of the Deepwater Horizon MC252 oil spill and the associated large-area fishery closure (fishery closed area) in the north-central Gulf, the Gulf of Mexico Fishery Management Council (Council) requested NMFS publish this proposed emergency rule. The Council does not expect the recreational quota will be reached by the closure date because the fishery closed area is located where a substantial portion of the recreational red snapper fishing effort occurs. The intent of this rulemaking is to provide fishermen the opportunity to harvest the recreational red snapper quota, and flexibility to achieve the optimum yield for the fishery, thus enhancing social and economic benefits to the fishery.

DATES: Comments must be received no later than 5 p.m., eastern time, on August 31, 2010.

ADDRESSES: You may submit comments, identified by "0648-BA06", by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>.
- Fax: 727-824-5308, Attn: Steve Branstetter.
- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: No comments will be posted for public viewing until after the comment period is over. All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: <http://www.regulations.gov>, enter "NOAA-NMFS-2010-0124" in the keyword search, then check the box labeled "Select to find documents accepting comments or submissions", then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the environmental assessment, the initial regulatory flexibility analysis (IRFA), and the regulatory impact review for this rule may be obtained from the Southeast Regional Office, NMFS, 263 13th Avenue S., St. Petersburg, FL 33701; telephone 727-824-5305; fax 727-824-5308; e-mail steve.branstetter@noaa.gov; or may be downloaded from the SERO Web site at <http://sero.nfms.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, 727-824-5796.

SUPPLEMENTARY INFORMATION: The Gulf reef fish fishery is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Magnuson-Stevens Act provides the legal authority for the promulgation of emergency regulations under section 305(c).

Background

On April 20, 2010, an incident involving a deepwater oil drilling platform occurred approximately 50 miles (80.5 km) southeast of Venice, Louisiana. An explosion and subsequent fire damaged the Deepwater Horizon MC252 oil rig, which capsized and sank. Oil has continued to flow into the Gulf from a damaged well head on the sea floor. In response to the Deepwater Horizon MC252 oil spill, NMFS issued

a series of emergency rules (75 FR 24822, May 6, 2010; 75 FR 26679, May 12, 2010; 75 FR 27217, May 14, 2010) to close a portion of the Gulf exclusive economic zone (EEZ) to all fishing. NMFS continues to adjust the spatial dimensions of the fishery closed area as new information becomes available regarding areas affected by the oil. Currently, EEZ waters are closed to all fishing from western Louisiana eastward to Pensacola, Florida, and reopened to finfish only in the EEZ waters from Pensacola to Cape San Blas, Florida. This fishery closed area has had a severe impact on recreational fishing efforts within the north-central Gulf, which is the primary fishing area for red snapper by the recreational sector.

The recreational red snapper fishing season opened on June 1, 2010, and the fishing season ends on September 30, 2010 (in accordance with regulations at 50 CFR part 622.34(m)), unless the quota is met before this date, in which case NMFS will publish a notification in the **Federal Register** announcing an earlier closure date. NMFS announced the closure date on May 3, 2010 (75 FR 23186), through a final rule that adjusted the recreational and commercial quotas for the red snapper. The closure date for the recreational red snapper season of 12:01 a.m., local time, July 24, 2010, was based on projections of when the recreational red snapper quota would be met.

Need for This Proposed Emergency Rule

Because of the Deepwater Horizon MC252 oil spill and the associated fishery closed area, the Council did not expect the recreational red snapper quota would be met by the projected closure date. Therefore, in a letter to the RA dated June 23, 2010, the Council requested that NMFS promulgate emergency regulations authorizing the RA to re-open the recreational red snapper season after the September 30, 2010, closure. The re-opening would only occur if NMFS determines that the quota has not been met during the June 1 through July 23 open season and the re-opening would otherwise be in accordance with the Magnuson-Stevens Act and other applicable law, taking into account the best available science. The "Policy Guidelines for the Use of Emergency Rules" (62 FR 44421, August 21, 1997) list three criteria for determining whether an emergency exists.

(1) Results from recent, unforeseen events or recently discovered circumstances; and

(2) Presents serious conservation or management problems in the fishery; and

(3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts to the same extent as would be expected under the normal rulemaking process.

This proposed rule meets all three criteria for promulgation of emergency regulations. This rule meets the first criteria for an emergency in that the explosion and subsequent sinking of the Deepwater Horizon MC252 oil rig and subsequent uncontrolled release of oil and the fishery closures it necessitated, constitutes recent unforeseen circumstances.

The rule meets the second criteria for an emergency because the spread of oil, which resulted in the need for an unprecedented safety closure of more than 30 percent of the Gulf, has prevented fishermen from being able to fish for red snapper in this area. This reduction in fishing effort has resulted in economic hardship to the recreational fishing industry and reduced the likelihood the 3.403 million lb (1.544 million kg) recreational quota would be reached before the July 24 closing date. The framework procedure under the FMP authorizes the RA to re-open a fishery that has been closed prematurely to allow the quota to be filled, but such authority extends only through September 30 for the recreational red snapper season.

The rule meets the third criteria for an emergency because allowing the recreational season to re-open after September 30 will alleviate some of the economic hardship caused by the Deepwater Horizon MC252 oil spill. Neither a regulatory amendment nor a plan amendment can be implemented in time to provide economic relief to the recreational fishing community in 2010. The Council has determined an emergency rule is the only way to provide these potential benefits. However, based on the rationale provided below, NMFS has included a 15-day comment period in this rulemaking to solicit comments on the economic effects associated with the proposed regulations.

In accordance with the Council's request for emergency action, this proposed rule would provide the authority to the RA to re-open the recreational red snapper season after September 30 if it is determined the quota was not met by July 24, thereby providing fishermen the opportunity to harvest the full recreational red snapper quota. The intent of this rule is to provide the flexibility necessary to achieve optimum yield for the fishery

and increase social and economic benefits to fishery participants.

NMFS currently has the authority to re-open the recreational red snapper season prior to September 30. However, because of the delay in obtaining harvest data, it is likely a re-opening could occur only a short time before September 30. If substantial amounts of recreational red snapper quota remain, the quota may not be caught by September 30. Without this rule, the fishing season would close on September 30 whether the quota was met or not. A re-opening after September 30 would have three possible outcomes. In the first outcome, the fishery closed area could remain closed and re-opening the recreational red snapper season would allow economic and social benefits to accrue to those fishermen who had access to the fishery prior to the July 24 closure. Under a second outcome, if the well head is permanently capped and portions of the current closed area are re-opened to fishing, re-opening the recreational red snapper season would allow economic and social benefits to be distributed to fishermen in different states and ports. In the third outcome, delaying the recreational red snapper season re-opening until after September 30 could increase the possibility of the fishery closed area being even larger. As a result, total economic benefits would be reduced for any recreational red snapper season re-opening. Because of these potential effects, NMFS is soliciting public comment on this proposed rule before making a final determination.

Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(c).

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

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

The purpose of this proposed rule is to facilitate the harvest of optimum yield and maximize the social and economic benefits of the red snapper component of the recreational sector of

the reef fish fishery. This is expected to be accomplished by providing an opportunity for fishermen who were prevented from fishing for or harvesting red snapper as a result of oil-related closures to fish for red snapper if it is determined the quota was not been met by July 24, 2010, and previously closed waters are re-opened. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This proposed rule, if implemented, would be expected to directly affect federally permitted for-hire fishing businesses that sell services to fish for red snapper in the Gulf of Mexico. The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. A Gulf reef fish for-hire permit is required to harvest red snapper in the Federal waters of the Gulf of Mexico. During 2009, there were 1,424 Federal reef fish for-hire permits that were valid (non-expired) and, therefore, fishable for any portion of the year. Although the Federal for-hire permit does not distinguish between headboats and charter boats, an estimated 79 headboats operate in the Gulf of Mexico.

It cannot be determined with available data how many of the for-hire vessels permitted to operate in the reef fish fishery fish for or harvest red snapper, either through directed effort or incidental harvest, so all permitted vessels are assumed, for this analysis, to comprise the universe of potentially affected vessels. The average charterboat is estimated to earn approximately \$88,000 (2008 dollars) in annual revenues, while the average headboat is estimated to earn approximately \$461,000 (2008 dollars).

No other small entities have been identified that would be expected to be directly affected by this proposed action.

The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters. A business involved in the for-hire fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$7.0 million (NAICS code 713990, recreational industries). Based on the average revenue estimates provided above, all for-hire vessels expected to be directly affected by this proposed rule are determined for the purpose of this analysis to be small business entities.

This proposed rule would not establish any new reporting, record-

keeping, or other compliance requirements. No duplicative, overlapping, or conflicting Federal rules have been identified.

As previously discussed, this proposed rule, if implemented, would be expected to directly affect all for-hire vessels that fish for red snapper. All vessels that possess a Federal reef fish for-hire permit may fish for red snapper. There were 1,424 vessels that possessed a valid (non-expired) Federal reef fish for-hire permit in 2009. While not all federally permitted reef fish for-hire vessels fish for red snapper, all such vessels are assumed, for the purpose of this analysis, to be potentially directly affected by this proposed rule.

It cannot be determined, with available data, whether this proposed rule, if implemented, would result in a significant reduction in profits for a substantial number of small entities. Neither the number of affected entities nor the magnitude of effects can be determined with available data. This proposed rule would allow for the re-opening of the recreational red snapper season after September 30 if the quota has not been met during the June 1 through July 23 fishing season. Assuming quota is available, re-opening the season after September 30 rather than prior to September 30 (which can occur under the status quo), may result in re-allocation of revenues and profits from for-hire businesses in some areas of the Gulf to businesses in other areas of the Gulf. This could occur if previously closed areas are re-opened and fishermen in those areas are able to go fishing, or if a larger area of the Gulf is closed due to an expansion of the presence of oil and fishermen in the newly closed area are not able to fish. Either situation may reduce the total revenues and profits that accrue to all relevant for-hire businesses.

While specific quota underages cannot be forecast at this time, in the absence of this proposed rule (status quo), any re-opening, if appropriate and practical, would occur prior to September 30. As a result, resultant economic benefits would likely accrue to the same small business entities that have been able to sell red snapper for-hire trips during the June 1 through July 23 fishing season. Delaying the re-

opening of the season until after September 30 increases the opportunity that the fishery closed area expands and a reduction in revenues and profits for for-hire businesses previously able to operate in the fishery occurs. Delaying the re-opening also increases the opportunity that closed areas may be re-opened to fishing in general.

While the re-opening of waters previously closed due to the oil spill would be expected to result in increased revenues and profits for for-hire businesses in adjacent communities, the total revenues associated with the remaining red snapper quota would potentially be distributed over a larger number of businesses (businesses near previously open areas and those near newly opened areas), resulting in a redistribution of revenues and a reduction in revenues to businesses that might have had less competitive access to the resource prior to September 30.

Thus, re-opening of the red snapper recreational season after September 30 could result in decreased profits overall (if the fishery closed area expands), and decreased profits for some business entities due to a re-distribution of revenues. However, due to uncertainty associated with these findings, public comment is solicited on whether this proposed rule would be expected to result in a significant reduction in profits for a substantial number of small entities.

Two alternatives to the proposed action were considered. The first alternative to the proposed action would not allow any re-opening either before or after September 30 of recreational red snapper season if the quota is not met during the June 1 through July 23 season. Failure to re-open the season and not allow the quota to be harvested would be expected to result in reduced profits to small business entities than the proposed action and would not achieve the Council's objectives.

The second alternative to the proposed action would re-open the recreational red snapper season before September 30 if quota is available (status quo). It cannot be determined with available data whether this alternative would be expected to result in an increase or decrease in profits to small business entities compared to the

proposed action. If the season is re-opened before September 30, benefits could continue to accrue to fishermen who were fishing in the open areas before July 24. However, if the season re-opens after September 30, more of the fishery closed area could be re-opened and benefits could be dispersed among fishermen who were fishing before July 24 as well as additional fishermen in or from other states or ports. Therefore, this alternative would not increase, as much as the proposed action, the opportunity for fishermen who have been prevented from fishing for or harvesting red snapper as a result of the fishery closed area to fish for any red snapper quota that is available after July 23. As a result, this alternative would not achieve the Council's objectives.

List of Subjects in 50 CFR Part 622

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

Dated: August 11, 2010.

Samuel D. Rauch III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be 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 § 622.34, paragraph (m) is revised to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(m) Closure of the recreational fishery for red snapper. The recreational fishery for red snapper in or from the Gulf EEZ is closed from January 1 through May 31, each year. During the closure, the bag and possession limit for red snapper in or from the Gulf EEZ is zero.

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[FR Doc. 2010-20191 Filed 8-11-10; 4:15 pm]

BILLING CODE 3510-22-S