

landings in this fishery. Therefore, there would be no constraints, and, thus, no revenue reductions, associated with these specifications. However, the first alternative was considered unacceptable because an ABC specification of 30,000 mt may not prevent overfishing in years of moderate to low abundance of *Illex* squid. Conversely, under the second alternative an ABC of 19,000 mt would not allow the fishery to perform at its optimal exploitation level during a year of relatively high abundance, and was therefore rejected.

For butterfish, the Council considered two alternatives; the first alternative set a Max OY of 16,000 mt and an ABC, IOY, DAH, and DAP of 7,200 mt, and the second alternative set a Max OY of 16,000 mt and a ABC, IOY, DAH, and DAP at 10,000 mt. These specifications far exceed recent harvests in the butterfish fishery and would not constrain or impact the industry; however, they could lead to overfishing of the stock, and, thus, were rejected by the Council.

It has been determined that this rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

This proposed rule does not contain or involve any information collection requirements that require the approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

A copy of the IRFA is available from the Council (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 17, 2001.

#### Rebecca Lent,

Deputy Assistant Administrator for Fisheries, NOAA, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

### PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.21, paragraph (f)(3) is added to read as follows:

#### § 648.21 Procedures for determining initial annual amounts.

\* \* \* \* \*

(f) \* \* \*

(3) Beginning January 1, 2002, if commercial landings in Quarter I are determined to be less than 70 percent of the Quarter I quota allocation, any

remaining Quarter I quota that is less than 70 percent will be reallocated to Quarter III (e.g., if the Quarter I quota was 100,000 lb (220,462 kg) and 50,000 lb (110,231 kg) was landed, then the remaining Quarter I quota, up to 70 percent, or 20,000 lb (44,092 kg), would be reallocated to Quarter III. A balance of 30 percent, or 30,000 lb (66,139 kg), would remain in Quarter I).

\* \* \* \* \*

[FR Doc. 01-26688 Filed 10-22-01; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 011011249-1249-01; I.D. 092701A]

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Petition for Emergency Rulemaking for Red Snapper

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

**ACTION:** Notice of agency decision; denial of a petition for emergency rulemaking.

**SUMMARY:** NMFS announces the denial of a petition for emergency rulemaking for the red snapper fishery in the Gulf of Mexico that was filed with the U.S. Department of Commerce by the Texas Shrimp Association (TSA). TSA's petition requested emergency rulemaking to reduce the 2001 total allowable catch (TAC) in the fishery and to shorten the associated recreational fishing season.

**FOR FURTHER INFORMATION CONTACT:** Phil Steele, telephone 727-570-5305, fax 727-570-5583, e-mail Phil.Steele@noaa.gov.

**SUPPLEMENTARY INFORMATION:** TSA petitioned the U.S. Department of Commerce to promulgate an emergency rule to reduce the 2001 TAC in the directed fisheries for red snapper in the Gulf of Mexico from 9.12 million lb (MP)(4.14 million kg) to not more than 3 million lb (1.36 million kg) and to shorten the recreational fishing season as part of the TAC reduction. The petition alleged that overfishing has been occurring in the fishery and will occur again in 2001 without the requested emergency rulemaking. On April 19, 2001, NMFS published a

notice of receipt of the TSA petition and requested public comments on the petition (66 FR 20129). After thorough consideration of the petition and of all public comments received, NMFS has denied TSA's petition for emergency rulemaking.

#### Basis for Denial of the Petition

The TSA petition states that the following are causes of previous and continuing overfishing (NMFS responses are provided as appropriate):

(1) TSA asserts that the current definition of "optimum yield" (OY) in the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP) does not conform to the more rigorous definition of OY required by the Sustainable Fisheries Act (SFA) of 1996, which amended the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

**Response:** The current definition of OY in the Reef Fish FMP is "any harvest level which maintains, or is expected to maintain, over time a survival rate or biomass into the stock of spawning age to achieve at least 20 percent spawning potential ratio (SPR)." Additionally, the Reef Fish FMP currently requires that overfished red snapper stocks be restored to a level of 20 percent SPR by 2019. However, the Magnuson-Stevens Act and NMFS' National Standard Guidelines (NSG) (63 FR 24212; May 1, 1998) require that the Councils and NMFS develop new definitions of "overfishing" and "overfished" for managed stocks based on the ability of a stock to produce maximum sustainable yield (MSY) on a continuing basis. While NMFS has approved proposed definitions of overfishing that are based on static SPR as a proxy for fishing mortality rate, definitions of overfished and stock rebuilding targets must be biomass-based, as required by the Magnuson-Stevens Act and the NSG. For overfished stocks, the Magnuson-Stevens Act and the NSG require that a recovery plan must be developed to restore overfished stocks to the biomass level capable of producing MSY on a continuing basis (B<sub>MSY</sub>).

NMFS agrees that these Magnuson-Stevens Act (as amended by the SFA) and NSG requirements represent a more conservative fishery management approach than is reflected in the Reef Fish FMP's current definition of overfishing (when a reef fish stock or stock complex is overfished, overfishing is defined as harvesting at a rate that is not consistent with a program established to rebuild the stock or stock complex to the 20 percent SPR level), which is estimated to be the minimal

level needed to prevent future declines in the stock. On November 17, 1999, NMFS disapproved the Gulf of Mexico Fishery Management Council's (Council) red snapper rebuilding targets, as proposed in its Generic Sustainable Fisheries Act (SFA) Amendment to the Council's FMPs (Generic SFA Amendment), because the Generic SFA Amendment specified a fishing mortality-based stock rebuilding target rather than the required biomass-based target. Further, the Generic SFA Amendment did not estimate the time to rebuild in the absence of fishing mortality, as required by the Magnuson-Stevens Act and the NSG. NMFS also disapproved the Generic SFA Amendment's proposed SPRs as proxies for MSY, OY, and other stock status determination criteria. In conjunction with these disapproval actions, NMFS informed the Council that it must submit a new red snapper rebuilding plan as soon as possible for agency review.

In order to comply with the requirements of the Magnuson-Stevens Act, the Council has recently submitted to NMFS, for Secretarial review, a framework action under the Reef Fish FMP that provides for a revised red snapper rebuilding plan through 2032. While a final agency decision on this proposal has not yet been made, the rebuilding plan does contain new biomass-based targets and thresholds, including a revised OY and recovery time-frame parameters that, upon preliminary review, appear consistent with the Magnuson-Stevens Act, as amended by the SFA, and the NSG. The proposed action would institute a red snapper 31-year rebuilding plan with 5-year interim management goals. The rebuilding plan would maintain the current TAC set at 9.12 MP under a constant catch scenario for the years 2001-2005, with existing bycatch reduction requirements. Thereafter, the plan would shift to a constant fishing mortality rate strategy. At that time, a reduction in the red snapper TAC is likely, unless other means of reducing bycatch and bycatch mortality are more effective than currently anticipated and the stock achieves a greater level of rebuilding than currently anticipated. Under the constant fishing mortality rate strategy, TAC is set as a constant proportion of the stock that can be removed that would allow the stock to rebuild within the required time period. As stock size increases, so can the TAC (i.e., as the stock size approaches BMSY, TAC will be approaching OY). Because red snapper are such a long-lived species and the fishery is in need of

stability in all sectors, the rebuilding plan aspires to make TAC adjustments, as necessary, at 5-year intervals. Of course, section 304(e)(7) of the Magnuson-Stevens Act requires the Secretary of Commerce (Secretary) to review independently the stock rebuilding plan itself in no more than 2-year intervals to ensure adequate progress toward ending overfishing and rebuilding the affected stock. The framework procedure under the Reef Fish FMP currently contemplates annual review of the status of managed fish stocks. If the Secretary's independent review, pursuant to section 304(e)(7), results in a finding that the rebuilding plan is not making adequate progress, the Secretary is required to notify the Council immediately and recommend appropriate further conservation and management measures (see section 304(e)(7)(b) of the Magnuson-Stevens Act). In light of the Council's recent proposal for a revised red snapper stock rebuilding plan, a reduction in TAC now, based on the current Reef Fish FMP's OY definition, would be premature.

(2) TSA asserts that NMFS' scientific studies indicate that bycatch reduction devices (BRDs) required in shrimp trawls in the Exclusive Economic Zone (EEZ) of the Gulf of Mexico west of Cape San Blas, Florida, have reduced juvenile red snapper mortality by 40 percent or less instead of the 50- to 60-percent reduction necessary as a basis for the present TAC of 9.12 MP. Further, TSA asserts that NMFS and the Council have greatly exaggerated the importance (positive impact) of bycatch reduction for rebuilding the red snapper stock; and

(3) TSA asserts that recent scientific information presented to the Council's Reef Fish Stock Assessment Panel (RFSAP) (a Council scientific advisory committee) indicates that the overfished condition of the red snapper fishery is a result of excessive fishing pressure by the directed fisheries, in particular the recreational sector of the fishery, and not a result of bycatch mortality associated with shrimp harvest.

*Response:* The RFSAP again endorsed the red snapper stock rebuilding plan under consideration by the Council and currently under review by NMFS. The RFSAP did not alter its long-standing opinion that bycatch reduction in the shrimp fishery is necessary to rebuild the red snapper stock. The combined effects of excessive fishing mortality in the directed fishery and bycatch mortality of juvenile red snappers in the shrimp fishery have all contributed to the overfished status of red snapper in the Gulf of Mexico. Red snapper stock

assessments reviewed by the RFSAP, dating back to 1990, as well as the Congressionally Mandated Red Snapper Peer Review (1997), have not only indicated that fishing mortality in the directed fishery must be reduced, but also that the Gulf red snapper stock will not recover from its overfished condition without a significant reduction in bycatch mortality of juvenile red snappers associated with shrimp trawling. In fact, the magnitude of the shrimp fishery's bycatch of juvenile red snappers far outweighs the impacts of TAC adjustments on rebuilding the red snapper stock. The best available scientific information, as represented by continuing scientific stock assessments and various scientific peer reviews over recent years during which the 9.12 MP TAC has been in place, consistently demonstrates that even if the red snapper TAC were set at zero, BRDs and other measures to address bycatch mortality of juvenile red snappers in the shrimp fishery would still be required in order to rebuild this fish stock. As described earlier, NMFS is currently reviewing the Council's stock rebuilding plan, which will likely result in future reductions in the red snapper TAC. However, it appears that an immediate TAC reduction would achieve only limited short-term conservation benefits not justified in the face of resulting significant and immediate adverse impacts on the red snapper fishery.

A 40-percent reduction in juvenile red snapper bycatch mortality in the Gulf shrimp fishery has been achieved, as substantiated by data that NMFS submitted to the Council (Nichols, 1990; Nichols & Pellegrin, 1992), and that the RFSAP reviewed. Further, NMFS biologist Dr. Scott Nichols, at the September 20-24, 1999, RFSAP meeting, and at the October 27, 1999, meeting of the Council's Scientific and Statistical Committee, stated that, excluding the now illegal configuration of a fisheye BRD covered by the trawl net's elephant ear, fisheye BRDs are currently attaining a 40-percent reduction in fishing mortality of juvenile red snappers and that a 50-percent reduction appears feasible. Additionally, NMFS biologist Dr. John Watson, in statements to the Council at its November 8-12, 1999, and November 13-16, 2000, meetings, indicated that a 50-percent bycatch reduction could be achieved from fisheye BRDs. NMFS believes that further reductions are possible with improved BRD technology. Tests conducted by NMFS have already demonstrated that prototype BRDs can reduce bycatch mortality of red snapper

in shrimp trawls by as much as 70 percent.

BRDs have significantly reduced shrimp trawl bycatch mortality of red snapper and other species in the western Gulf. However, National Standard 9 requires that bycatch be reduced to the extent practicable and the Council must continue to review possible measures that would achieve higher levels of bycatch reduction and minimize bycatch mortality. NMFS has encouraged the Council to take additional actions throughout the Gulf to reduce shrimp trawl bycatch. Such actions could include extending the requirement for BRDs into Federal waters east of Cape San Blas, FL; effort reduction in the shrimp fishery; closed areas; or seasonal closures. Additionally, monitoring of bycatch in the shrimp fishery must be improved. This could be accomplished with vessel permits (as proposed under Amendment 11 to the FMP for the Shrimp Fishery of the Gulf of Mexico (Shrimp FMP)), mandatory observers, and mandatory logbooks.

Consultants for TSA presented scientific information regarding the preceding TSA assertion (No. 3) at the RFSAP meeting held at the NMFS Southeast Fisheries Science Center (SEFSC) on September 28-October 1, 2000. The RFSAP considered three presentations in the context of the proposed revised red snapper rebuilding plan: Two were by the TSA consultants, Mr. Gazey and Dr. Gallaway, and one was by Dr. Shipp. The RFSAP concluded that "the presentations by Mr. Gazey, Dr. Gallaway, and Dr. Shipp do not affect our previous endorsement of the rebuilding plan."

(4) TSA asserts that the recreational sector of the directed fishery continues to exceed its annual quota under the present season opening and closing dates.

*Response:* While NMFS recognizes that quota overruns in the recreational fishery have occurred in the past, the Council and NMFS have taken steps to rectify this situation. In December 1999, at the Council's request, NMFS issued an interim rule to implement management measure changes for the red snapper fishery to address quota overages in the recreational sector and, thus, reduce overfishing (64 FR 71056). The interim rule established a Federal recreational season from April 21 through October 31. Also, the rule reduced fishing effort that would have occurred in state waters after the closure of the Federal season under the regulations in effect prior to implementation of the interim rule. These actions appear to have been

successful, as preliminary data for the 2000 fishing year indicate that the recreational red snapper harvest was approximately 320,000 pounds under the allowable quota (4.47 MP). The interim rule measures were implemented on a permanent basis under an approved regulatory amendment, pursuant to the Reef Fish FMP's framework procedure, through a final rule issued August 17, 2000 (65 FR 50158). NMFS' goal is to continue monitoring the recreational fishery quota and to take additional action as warranted. Further discussion of NMFS and Council efforts to structure a red snapper recreational fishing season that best prevents recreational fishery quota overruns is contained in the response to public comment number 2 (see below).

(5) TSA asserts that NMFS is significantly underestimating fishing effort in the recreational sector, which allows that sector to harvest red snapper in excess of its share of the TAC; and

(6) TSA asserts that NMFS has failed to make a reduction in the recreational sector's share of the TAC to account for these excessive harvests.

*Response:* The best scientific information available indicates that effort in the red snapper charter vessel sector, the largest component of the recreational fishery, has not been underestimated, and that charter vessels currently account for approximately 42 percent of the total annual recreational harvest of red snapper in the Gulf of Mexico. NMFS has recently adopted new and more precise and accurate methodologies for estimating the recreational red snapper harvest that were developed cooperatively by NMFS and the Gulf States Marine Fisheries Commission. This is part of a continuing effort by NMFS to improve data collection for the recreational sector. There is no evidence to suggest that recreational landings have been underestimated.

#### Comments and Responses

NMFS received 1,567 comments addressing this petition. They are summarized and responded to here:

*Comment 1:* Fifteen hundred and sixty three comments were received that opposed the petition for emergency rulemaking submitted by TSA including any reduction in the TAC or shortening of the 2001 recreational fishing season.

*Response:* The best available scientific information indicates that the 9.12 MP (4.14 million kg) TAC for 2001 may slow the recovery in the early part of any stock rebuilding program but would not jeopardize recovery of the stock consistent with the rebuilding requirements of the Magnuson-Stevens

Act, particularly if greater reductions in bycatch mortality are achieved, as expected. However, an immediate reduction in TAC or shortening of the recreational fishing season for red snapper would have serious adverse economic effects upon participants in the fishery.

*Comment 2:* Included in the group of comments opposed to the TSA petition was a comment from an environmental group expressing its concerns regarding NMFS' regulation of the red snapper recreational fishing season and the history of TAC overruns in this fishery. Further, this group requested that NMFS close the recreational and commercial red snapper fisheries, once their allocations are met, based on available real-time data.

*Response:* The Magnuson-Stevens Act requires that the Gulf of Mexico red snapper recreational fishery be closed when its quota is reached. To comply with this requirement, NMFS works jointly with the Council to implement management measures and establish closure dates that, based upon the best available scientific information, are likely to result in annual catches that approximate the quota, within the margin of error of the harvest projections. NMFS uses a computer simulation model to assess the future status of the red snapper stock. The model integrates estimates of stock abundance with fishing effort to project how many fish will be caught for various time periods. This projection assumes that the current year's fishing effort will be similar to that of previous years. In-season data are not used to establish or adjust closure dates; instead, a closure date is based entirely on projections of the model used. This is the only practicable method of setting closure dates because the NMFS Marine Recreational Fishery Statistics Survey (MRFSS) is not designed for real-time quota monitoring. MRFSS data are available in 2-month blocks, referred to as waves, and landings are not available until 5 weeks after the end of a wave. Thus, there is a time lag of at least 3 months before even preliminary MRFSS landings data can be evaluated; consequently, NMFS cannot determine the closure date based on real-time fishery data. In projecting recreational fishery harvest rates and closure dates, NMFS attempts to approximate the quota in the long term, while recognizing that annual variations in the catch are inevitable. Based on the last two years' monitoring, the projections appear accurate since no overruns occurred.

*Comment 3:* Four comments were received in support of the petition,

including two from TSA that requested an immediate reduction in TAC to no more than 3 MP (1.36 million kg) and a shortening of the 2001 recreational fishing season.

*Response:* NMFS has reviewed the administrative records and court decisions from prior litigation on the issue of the red snapper TAC. NMFS has also reviewed more recent information regarding the conduct of the red snapper fishery, as discussed above, including the petition received on behalf of TSA and the public comments received on the petition. NMFS disagrees with TSA that the law or the present circumstances in the red snapper fishery require an immediate reduction in TAC. As described below, this is because (a) the Council's proposed red snapper stock rebuilding plan appears to comply with the Magnuson-Stevens Act requirements to end overfishing; (b) the deployment of BRDs in the shrimp fishery appears to be more effective than TAC adjustments in rebuilding the red snapper stock; (c) NMFS believes that greater than current levels of reduction in bycatch mortality of juvenile red snapper in shrimp trawls are attainable; and (d) the shrimp fishery does not appear to be subject to any disproportionate regulatory impacts compared to the directed red snapper fisheries.

For these reasons, NMFS disagrees with TSA's assertions, the majority of which have been raised previously by TSA and refuted by NMFS (see *Florida Wildlife Federation, et al. v. Daley*, Case No. 4:98cv101RH (N. D. Fla.); affirmed Case No. 99-14747c (11th Circuit Court of Appeals); *Texas Shrimp Association v. Daley*, Case No. 4:000v20RH (N. D. Fla.); affirmed Case No. 00-12328 (11th Circuit Court of Appeals). As TSA, through its legal counsel, recently noted, "nothing in the petition raised any novel questions" (see July 11, 2001, letter from TSA Counsel to Dr. William T. Hogarth). Rather, TSA asserts that the agency is making decisions based on political pressure rather than on scientific information and the Magnuson-Stevens Act (id.).

The best available scientific information affirms that the status quo TAC of 9.12 MP (4.14 million kg) is compatible with the stock rebuilding requirements of the Magnuson-Stevens Act, provided that expected bycatch reduction levels are met, that harvests will not exceed quotas, and that future recruitment, on average, will increase as spawning stock biomass increases. Additionally, the Council has submitted a framework action under the Reef Fish FMP to NMFS for approval and implementation that would establish a

revised red snapper rebuilding plan through 2032. The plan contains new biomass-based targets and thresholds, including a revised OY and recovery time-frame parameters that are consistent with the Magnuson-Stevens Act, as amended by the SFA, and the NSG. The proposed action would institute a red snapper 31-year rebuilding plan with 5-year interim management goals. The rebuilding plan would maintain the current TAC set at 9.12 MP under a constant catch scenario for the years 2001-2005, with existing bycatch reduction requirements. Thereafter, the plan would shift to a constant fishing mortality rate strategy, and the status of the stock would be reviewed every 5 years to evaluate the need for additional bycatch reductions or adjustments in TAC. Under the constant fishing mortality rate strategy, TAC is set as a constant proportion of the stock that can be removed that would allow the stock to rebuild within the required time period. As stock size increases, so can the TAC (i.e., as the stock size approaches  $B_{MSY}$ , TAC will be approaching OY).

The best available scientific information, as represented by continuing scientific stock assessments and various scientific peer reviews over the recent years during which the 9.12 MP TAC has prevailed, consistently demonstrates that even if the red snapper TAC were set at zero, BRDs and other measures to address bycatch mortality of juvenile red snappers in the shrimp fishery would still be required in order to rebuild this stock. Although the Court in the BRD litigation held that a sufficient nexus existed between the need for BRDs and the red snapper TAC for purposes of conferring legal standing upon the shrimp industry so they could challenge the BRD requirement, elsewhere in the opinion, as noted above, the Court acknowledged that shrimp trawlers' severe effects upon the red snapper population is beyond dispute (Order Denying Petitions Challenging Regulations, at 7, 41). The magnitude of the impacts of the shrimp fishery's bycatch of juvenile red snappers far outweighs the impacts of TAC adjustments on rebuilding the red snapper stock. However, the current and foreseeable future regulatory burden for the shrimpers is far less than that of the red snapper fishery participants.

Section 304(e)(4)(A) of the Magnuson-Stevens Act explicitly states that, in pertinent part, fishery management plans, plan amendments, or proposed regulations for an overfished fishery shall "specify a time period for ending overfishing." The Council's proposed red snapper stock rebuilding plan, inter

alia, would do just that, while maintaining stability in the fishery. As Judge Hinkel noted in the decision upholding the BRD requirement, which was affirmed on appeal, rejecting one viewpoint in favor of another, when weighing competing scientific opinions and making policy determinations, is not an abuse of discretion (see Order Denying Petitions Challenging Regulations, Case No. 4:98cv101-RH, N. D. Fla. at 22). Further, the Court noted that uncertain scientific evidence does not preclude making a decision based, in part, upon reasonable expectations (id. at 43).

NMFS believes that greater reductions in bycatch mortality of juvenile red snapper in shrimp trawls are attainable, and further believes that this expectation is reasonable based upon the following considerations. First, the Jones-Davis BRD already by far exceeds the necessary level of bycatch reduction, demonstrating concretely that, in fact, such reduction is attainable. Although the Jones-Davis BRD is not widely used, due in large part to greater shrimp loss rates, given its outstanding performance at reducing bycatch mortality, it may be practicable to expand its usage, particularly if shrimp loss rates can be reduced. Second, the level of reduction in bycatch mortality for the more widely used BRD designs has steadily improved since the BRD requirement became effective. Initially, reduction levels among those BRDs measured 27 percent, but current levels are between 40 percent and 50 percent. Some of this improvement has resulted from minor modifications to the gear arising from actual use, such as adjusting the "elephant ear" flap in the shrimp trawls. Finally, NMFS is in the process of revising its BRD certification protocol following its experience since the original protocol was implemented several years ago. Information from BRD users as well as the Gulf and South Atlantic Fisheries Foundation has indicated the need for greater flexibility in the provisions of the BRD certification protocol. NMFS expects that once these revisions are effected, more efficient and better performing BRD designs will be developed and certified, resulting in greater reductions of bycatch and bycatch mortality of red snapper.

These developments show that reductions in red snapper bycatch mortality based on technology are feasible and likely. However, technological advances are not the only means under consideration for reducing red snapper bycatch in the shrimp fishery. In addition to technological considerations, the Council is

developing Amendment 10 to its Shrimp FMP to further address general bycatch issues. Among the alternative actions included in Amendment 10 are those that would require the use of BRDs east of Cape San Blas, FL. Although the original BRD requirement exempted this area because of minimal red snapper occurrence in that area, more recent information (Schirripa & Legault, 1999) demonstrates a significantly increased occurrence of red snapper there. The objective of Amendment 10 is not limited to reducing bycatch and bycatch mortality of red snapper, but it now appears that red snapper bycatch mortality would be reduced somewhat, along with that of other species, if such a geographic expansion in the use of BRDs were implemented. Amendment 10 also contains other action alternatives, such as those based on seasonal and areal adjustments that, in the course of addressing bycatch issues in a general sense, will clearly effect some level of reduction in red snapper bycatch mortality.

In addition to Amendment 10, further regulation of the Gulf shrimp fishery to address red snapper issues may become necessary. For example, the Council has proposed, under its Reef Fish FMP's framework action, a 31-year rebuilding program for red snapper. A fundamental element of that proposal is the achievement of greater reductions in red snapper bycatch mortality; however, the plan also provides for the contingency of not achieving that goal. It seems clear that without greater red snapper bycatch mortality reductions, both a future reduction in the red snapper TAC and further regulation of the shrimp fishery in the EEZ are likely. The latter possibility appears to form the basis for TSA's assertions that the Council's and NMFS' management of the red snapper fishery is somehow unfair to shrimpers. These claims were addressed in prior litigation, and the Court then wrote that although the BRD requirement placed serious costs on the shrimp industry, the directed red snapper fishery had for years been subject to numerous restrictions, including increased minimum fish size limits, TAC limits, and reduced bag limits and trip limits. The judge also noted that the shrimp industry had, until recently, not only

been required to do very little to address bycatch, but actually enjoyed a statutory prohibition against regulations addressing the bycatch issue. In an earlier footnote within that Court opinion, the Court stated that the specific and severe effects upon the red snapper population from shrimp trawlers is "beyond dispute." The judge concluded that imposing the BRD requirement and attendant costs, even with a TAC at 9.12 MP, was not only not an abuse of agency discretion or inequitable, but "perhaps required" (Order Denying Petitions Challenging Regulations, Case No. 4:98cv101-RH, at 7, 23, 24, 25, 43-46).

These conclusions are still applicable today. The Council has submitted Amendment 11 to the Shrimp FMP, which would establish mandatory Federal permits for the shrimp fishery, for Secretarial review, approval, and implementation. However, this is the only additional regulation currently proposed for the shrimp fishery. The Gulf shrimp fishery is the only federally managed fishery in the southeastern United States not subject to a permit requirement. The Federal shrimp permit would be available without any qualifying criteria, and the permit requirement would constitute only a minimal burden on shrimp fishermen. The red snapper commercial and recreational fisheries, however, are now and have long been subject to a much more complex and burdensome regulatory program. In particular, since entry of the legal opinion referred to above, the recreational red snapper fishing season has been significantly reduced in order to comply with the statutory quota provisions enacted under the SFA in 1996. While TSA seems to overlook this development, one benefit is that the quota appears to have eliminated the recreational overruns about which TSA complains. If approved and implemented, Shrimp FMP Amendment 10, discussed above, is likely to result in additional regulations for the Gulf shrimp fishery. However, even if the most restrictive of the amendment's alternative actions under consideration were implemented, they would not necessarily produce an inequitable result for shrimp fishermen.

The NSG make clear that under National Standard 4 an allocation of

fishing privileges may impose a hardship upon one group if it is outweighed by the total benefits received by another group or groups (50 CFR 600.325 (c)(3)(i)). Although this guidance generally applies to a single fishery, in this instance, the red snapper stock is more significantly affected by the shrimp fishery than by the directed red snapper fishery. The situation is clearly analogous to an allocation of fishing privileges within a single fishery.

In light of the foregoing, it appears that additional regulation of the shrimp fishery would not result in a disproportionate regulatory impact upon shrimpers. Further, rebuilding the red snapper stock and minimizing shrimp fishery bycatch is mandated by law. Clearly, reductions in shrimp trawl bycatch mortality would benefit red snapper fishery participants. However, even with additional shrimp regulations and maintenance of a 9.12 MP TAC for red snapper, the overall result would not leave the shrimp fishery with a greater regulatory burden than the red snapper fishery.

Even if the shrimp fishery does incur additional regulatory burdens, any hardships for the shrimpers will likely be far outweighed by the overall benefits of ending overfishing of red snapper and restoring the red snapper fishery. Conversely, immediately lowering the red snapper TAC, as suggested by TSA, would not result in any apparent benefit to the shrimp industry.

Based on the discussion above, since lowering the red snapper TAC would not relieve either the biological need nor the legal requirement to address the bycatch and bycatch mortality of juvenile red snappers in shrimp trawls, and since such a TAC change would severely disrupt and adversely impact the red snapper fishery, the National Marine Fisheries Service has denied the TSA petition.

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

Dated: October 16, 2001.

**John Oliver,**

*Acting Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

[FR Doc. 01-26678 Filed 10-18-01; 1:37 pm]

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