

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 922

[Docket No. 090122043-9066-01]

RIN 0648-AX37

#### Gray's Reef National Marine Sanctuary Regulations on the Use of Spearfishing Gear

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Proposed rule; notice of public hearing.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) is proposing to prohibit the use of spearfishing gear in Gray's Reef National Marine Sanctuary. Spearfishing is often used to selectively target larger fish, and can significantly reduce abundance and alter the relative size structure of target species toward smaller fish. Therefore, the proposed prohibition would provide protection to the fishes and natural live-bottom community for which the sanctuary was designated. The proposal also would facilitate enforcement of an existing prohibition against the use of powerheads within the sanctuary. A draft environmental assessment has been prepared for this proposed action. NOAA is soliciting public comment on the proposed rule and draft environmental assessment.

**DATES:** Comments will be considered if received by May 4, 2009. A Public hearing will be held as detailed below: (1) March 19, 2009, 6-9 p.m., Stevens Wetlands Education Center, J.F. Gregory Park, Richmond Hill, Georgia.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Electronic submission (preferred method):* [www.regulations.gov](http://www.regulations.gov) (search for docket # NOAA-NOS-2009-0002)

- *Mail:* Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411, Attn: Dr. George Sedberry, Superintendent.

*Instructions:* All comments received are a part of the public record and will be generally 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. NOAA 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.

**FOR FURTHER INFORMATION CONTACT:** Becky Shortland at (912) 598-2381. Copies of the draft environmental assessment and proposed rule can be downloaded or viewed on the Internet at <http://www.regulations.gov> (search for docket # NOAA-NOS-2009-0002) or at <http://graysreef.noaa.gov>. Copies can also be obtained by contacting Stewardship Coordinator Becky Shortland, Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, Georgia.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Gray's Reef National Marine Sanctuary

GRNMS was designated as the nation's fourth national marine sanctuary in 1981 for the purposes of: Protecting the quality of this unique and fragile ecological community; promoting scientific understanding of this live bottom ecosystem; and enhancing public awareness and wise use of this significant regional resource. GRNMS protects 16.68 square nautical miles of open ocean and submerged lands of particularly dense and nearshore patches of productive live bottom habitat. The sanctuary is influenced by complex ocean currents and serves as a mixing zone for temperate (colder water) and sub-tropical species. The series of rock ledges and sand expanses has produced a complex habitat of caves, burrows, troughs, and overhangs that provide a solid base upon which a

rich carpet of temperate and tropical marine flora and fauna attach and grow.

This flourishing ecosystem attracts mackerel, grouper, black sea bass, angelfish, and a host of other fishes. An estimated 180 species of fish, encompassing a wide variety of sizes, forms, and ecological roles, have been recorded at GRNMS. Loggerhead sea turtles, a threatened species, use GRNMS year-round for foraging and resting, and the highly endangered northern right whale is occasionally seen in Gray's Reef. GRNMS is one of the most popular sportfishing areas along the Georgia coast.

##### B. Need for Action

This action is being proposed for two reasons. First, the proposed action would provide greater protection to sanctuary resources by removing a gear type that selectively targets larger fish, negatively altering the size structure of remaining populations. While the number of recreational divers spearfishing at GRNMS appears to be small, spearfishing is a highly efficient harvesting gear that is often used to selectively target larger fish relative to other fishing gears. Such fishing can significantly reduce abundance and alter the relative size structure of target species toward smaller fish. Some fish populations that are present in GRNMS are regionally overfished or approaching overfished status and researchers have commented on the lack of large snapper-grouper individuals at GRNMS.

Second, the proposed action would facilitate improved enforcement of an existing prohibition against the use of powerheads within the sanctuary. Powerheads, also sometimes referred to as bang sticks or shark sticks, are a specialized type of firearm intended for use underwater, that fire upon direct contact with the target. They are often used for spear fishing, or may be used to kill for sport or self defense. Under existing sanctuary regulations, it is unlawful to injure, catch or harvest any marine resource within the sanctuary, except by rod and reel, handline, or "spearfishing gear without powerheads." 50 CFR 922.02(a)(5)(i).

Law enforcement officials have repeatedly expressed the need to prohibit all spearfishing to enable them to more effectively enforce the existing powerhead prohibition. Although NOAA has prohibited the use and possession of powerheads since the

1981 GRNMS designation, powerhead spear tips and spent shells are still found in the GRNMS. Spearguns with a powerhead and without a powerhead are similar in appearance, which can raise significant issues in proving a violation of the powerhead prohibition.

### *C. Previous Action on the Use of Spearfishing Gear*

NOAA considered regulating spearfishing during the original management plan of 1981, but only spearfishing with powerheads was prohibited at the time. A complete spearfishing prohibition was again considered during the review and revision of the GRNMS Management Plan beginning in 1999. Along with the fact that visitor use (primarily recreational fishing; Ehler and Leeworthy 2002) had increased, evidence of powerhead use (despite the 1981 ban) created a growing concern. NOAA proposed to prohibit all spearfishing activities with the 2003 Draft Environmental Impact Statement/Draft Management Plan (DEIS/DMP) and associated proposed rule (68 FR 62033, October 31, 2003).

However, after consideration of public comments on the DEIS/DMP, NOAA concluded that additional socioeconomic information was needed and thus deferred any regulatory action on spearfishing. The 2006 Final EIS/MP instead included a commitment to gather additional socioeconomic information on spearfishing in GRNMS and review the issue again in two years.

The additional socioeconomic information was collected, analyzed and presented to the Sanctuary Advisory Council in September 2007. That information indicates no charter spearfishing activity and only a very small amount of private spearfishing activity within the GRNMS. Moreover, abundant opportunities to conduct spearfishing in nearby locations outside the sanctuary already exist. Copies of this report are available in the location mentioned in the **FOR FURTHER INFORMATION CONTACT** section.

### *D. Interactions With the South Atlantic Fishery Management Council (SAFMC)*

Section 304(a)(5) of the NMSA states that:

The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed

regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations. The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.

In 2003, the SAFMC prepared draft regulations, including a prohibition on spearfishing, for the proposed rule associated with the GRNMS Draft Environmental Impact Statement/Draft Management Plan (DEIS/DMP). However, after consideration of public comments on the DEIS/DMP, NOAA concluded that additional socioeconomic information was needed and thus deferred any regulatory action on spearfishing. The 2006 Final EIS/MP instead included a commitment to gather additional socioeconomic information on spearfishing in GRNMS and consider proposing a prohibition on spearfishing again two years later, with more extensive socioeconomic information on the impacts of the proposed rule.

NOAA presented an update of this issue at the October 2007 meeting of the Joint Habitat/Ecosystem Based Management Advisory Panel of the SAFMC and again at the December 2007 and March 2008 SAFMC meetings.

In June 2008, NOAA provided the SAFMC with the opportunity to prepare draft sanctuary fishing regulations concerning spearfishing activities for GRNMS. The SAFMC concurred with the proposed ban on spearfishing, but requested that NOAA prepare the draft regulations.

## **II. Summary of the Proposed Regulations**

The proposed regulatory action would prohibit the use of all spearfishing gear in Gray's Reef National Marine Sanctuary. Existing regulations would be amended to eliminate "spearfishing gear without powerheads" from the list of allowable gear in 15 CFR

922.92(a)(5)(i). The proposed action also would prohibit the possession of spearfishing gear in GRNMS, except when stowed on board vessels transiting the sanctuary.

## **III. Classification**

### *A. National Environmental Policy Act*

NOAA has prepared a draft environmental assessment to evaluate the impacts of the proposed rulemaking. Copies are available at the address and Web site listed in the **ADDRESSES** section of this proposed rule.

### *B. Executive Order 12866: Regulatory Impact*

This proposed rule has been determined to be not significant within the meaning of Executive Order 12866.

### *C. Executive Order 13132: Federalism Assessment*

NOAA has concluded this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

### *D. Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

This conclusion is based primarily on recent socioeconomic studies and on-site surveys of visitor use conducted by NOAA subsequent to the last proposed rulemaking. These studies and surveys revealed the following information.

First, there would be no economic impact upon consumptive recreational charter fishing businesses. These are the only small businesses known to operate within the sanctuary (businesses of this type are considered a "small" business if they have annual receipts not in excess of \$7 million (13 CFR 121.201)). More than 10 such fishing businesses are active in the GRNMS. Socioeconomic survey results, however, indicate that none of these businesses made spearfishing trips to GRNMS in recent years and none plan to in the future.

Second, there would be no economic impact upon recreational charter diving businesses, as none currently operate within the sanctuary. In September 2007, in-person interviews were conducted with all businesses and organizations offering scuba diving trips along the Georgia coast. Four charter scuba diving operations and one scuba diving club were identified and

interviewed. The interviews gathered information that included operating profiles, preferred diving locations and methods, detailed business data (revenue and costs), and general opinions of the current state of scuba diving and spearfishing off the Georgia coast. None of these businesses offer scuba diving trips to GRNMS.

Moreover, abundant commercial spearfishing opportunities currently exist outside of the sanctuary. Dive charters reported a total of 1,747 person-days of scuba diving off the Georgia coast in 2007. Approximately 55 percent of these person-days were non-consumptive (no spearfishing) person-days, 44 percent were consumptive (spearfishing) person-days, and the remaining 1 percent was sightseeing/sportfishing.

Because the impacts of this rule on the recreational charter fishing businesses and the recreational charter diving business would be minimal or would have no impact, the Chief Counsel for Regulation certified to the Chief Counsel for Advocacy at SBA that this rule would not have a significant economic impact on a substantial number of small entities.

#### *E. Paperwork Reduction Act*

This proposed rule would not require any additional collection of information, and therefore no paperwork reduction act action is required. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### **IV. Request for Comments**

NOAA requests comments on this proposed rule for 60 days after publication of this notice.

#### **List of Subjects in 15 CFR Part 922**

Administrative practice and procedure, Coastal zone, Fishing gear, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Wildlife.

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: February 26, 2009.

**John H. Dunnigan,**

*Assistant Administrator, National Ocean Service, National Oceanic and Atmospheric Administration.*

Accordingly, for the reasons set forth above, NOAA proposes amending part 922, title 15 of the Code of Federal Regulations as follows:

### **PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS**

1. The authority citation for part 922 continues to read as follows:

**Authority:** 16 U.S.C. 1431 et seq.

2. Revise paragraphs (a)(5)(i) and (a)(6) of § 922.92 to read as follows:

#### **§ 922.92 Prohibited or otherwise regulated activities.**

(a) \* \* \*

(5)(i) Injuring, catching, harvesting, or collecting, or attempting to injure, catch, harvest, or collect, any marine organism, or any part thereof, living or dead, within the Sanctuary by any means except by use of rod and reel, and handline gear.

(6) Except for possessing fishing gear or means for fishing stowed and not available for immediate use while passing through the Sanctuary without interruption or for valid law enforcement purposes, possessing, carrying, or using within the Sanctuary any fishing gear or means for fishing except rod and reel, and handline gear.

\* \* \* \* \*

[FR Doc. E9-4567 Filed 3-3-09; 8:45 am]

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### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

#### **42 CFR Part 84**

[Docket Number NIOSH-005]

**RIN 0920-AA10**

#### **Approval Tests and Standards for Closed-Circuit Escape Respirators**

**AGENCY:** Centers for Disease Control and Prevention, HHS.

**ACTION:** Notice of proposed rulemaking; Reopening of comment period and notice of public meetings.

**SUMMARY:** The Department of Health and Human Services (DHHS) is reopening the comment period until April 10, 2009 and will hold public meetings concerning the proposed rule for Approval Tests and Standards for Closed-Circuit Escape Respirators that was published in the **Federal Register** on Wednesday, December 10, 2008.

**DATES:** The comment period for the proposed rule published December 10, 2008 (73 FR 75027), is reopened. All written comments on the proposed rule must be received on or before April 10, 2009. Public meetings on this proposed rule will be held on March 16 and March 23, 2009. Details concerning

those meetings are in the **SUPPLEMENTARY INFORMATION** section below.

**ADDRESSES:** You may submit comments, identified by RIN: 0920-AA10, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [niocindocket@cdc.gov](mailto:niocindocket@cdc.gov). Include "RIN: 0920-AA10" and "42 CFR pt. 84" in the subject line of the message.

- *Mail:* NIOSH Docket Office, Docket #005, Robert A. Taft Laboratories, MS-C34, 4676 Columbia Parkway, Cincinnati, OH 45226.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking, RIN: 0920-AA10. All comments received will be posted without change to <http://www.cdc.gov/niosh/docket>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.cdc.gov/niosh/docket>.

**SUPPLEMENTARY INFORMATION:** The Department of Health and Human Services published a proposed rule on the Approval Tests and Standards for Closed-Circuit Escape Respirators on December 10, 2008. The Department requested comments on or before February 9, 2009. The Department planned to hold public meetings before that date but these meetings could not be scheduled.

The Department will hold two public meetings on the proposed rule at the following times and locations: March 16, 2009, beginning at 9 a.m., MST, and expected to end at 12:30 MST at the Marriot Denver Tech Center, 4900 S. Syracuse Street, Denver, CO 80237; and March 23, 2009, beginning at 1 p.m. est, and expected to end at 5 p.m. EST, at the Marriot Inn and Conference Center UMUC, 3501 University Boulevard E., Adelphi, MD 20783. As a result, the Department is also reopening the comment period until April 10, 2009 to permit additional time for interested parties to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Jonathan V. Szalajda, NIOSH, National Personal Protective Technology Laboratory (NPPTL), Post Office Box 18070, 626 Cochrans Mill Road, Pittsburgh, Pennsylvania 15236, telephone (412) 386-5200, facsimile (412) 386-4089, e-mail [zfx1@cdc.gov](mailto:zfx1@cdc.gov).