

Budget (OMB) finds has resulted in or is likely to result in: an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. NPL listing is not a major rule because, as explained above, the listing, itself, imposes no monetary costs on any person. It establishes no enforceable duties, does not establish that the EPA necessarily will undertake remedial action, nor does it require any action by any party or determine liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. Section 801(a)(3) provides for a delay in the effective date of major rules after this report is submitted.

3. What could cause a change in the effective date of this rule?

Under 5 U.S.C. 801(b)(1), a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802.

Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), and *Bd. of Regents of the University of Washington v. EPA*, 86 F.3d 1214, 1222 (D.C. Cir. 1996), cast the validity of the legislative veto into question, the EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into question, the EPA will publish a document of clarification in the **Federal Register**.

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous

substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: May 3, 2012.

**Mathy Stanislaus,**

*Assistant Administrator, Office of Solid Waste and Emergency Response.*

40 CFR part 300 is amended as follows:

**PART 300—[AMENDED]**

■ 1. The authority citation for Part 300 continues to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to Part 300 is amended by adding the following sites in alphabetical order to read as follows:

**Appendix B to Part 300—National Priorities List**

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes <sup>a</sup>
CA	Jervis B. Webb	South Gate	*
CA	Southern Avenue Industrial Area	South Gate	*
WA	Bremerton Gasworks	Bremerton	*

\* \* \* \* \*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 622**

[Docket No. 110511280–2424–02]

RIN 0648–BB10

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Snapper-Grouper Management Measures**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement a regulatory amendment to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region (Regulatory Amendment 11), as prepared by the South Atlantic Fishery Management Council (Council). This rule removes the harvest and possession prohibition of six deep-water snapper-grouper species (snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper) from depths greater than 240 ft (73 m) in the South Atlantic exclusive economic zone (EEZ). The intent of this final rule is to maintain the biological protection to speckled hind and warsaw grouper as well as reduce the socio-economic impacts to fishermen

harvesting deep-water snapper-grouper in the South Atlantic.

**DATES:** This rule is effective May 10, 2012.

**ADDRESSES:** Electronic copies of documents supporting this final rule, which include an environmental assessment and a regulatory impact review (RIR), may be obtained from the Southeast Regional Office Web site at <http://sero.nmfs.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Rick DeVictor, telephone: 727-824-5305, or email: [Rick.DeVictor@noaa.gov](mailto:Rick.DeVictor@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The snapper-grouper fishery of the South Atlantic is managed under the 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).

On December 20, 2011, NMFS published a proposed rule in the *Federal Register* for Regulatory Amendment 11 and requested public comment (76 FR 78879). The proposed rule and Regulatory Amendment 11 explained the rationale for the action contained in this final rule. A summary of the rationale and the action implemented by this final rule is provided below.

In the South Atlantic snapper-grouper fishery, speckled hind and warsaw grouper are currently undergoing overfishing and an annual catch limit (ACL) of zero was established through the final rule to implement Amendment 17B to the FMP (75 FR 82280, December 30, 2010). The accountability measure (AM) for this ACL prohibits all harvest and possession of speckled hind and warsaw grouper in the South Atlantic regardless of the depth where they are caught. Despite a prohibition on the harvest and possession of speckled hind and warsaw grouper, the Council anticipated that the bycatch mortality of these two species would continue as a result of the fishing effort for other deep-water snapper-grouper species. In order to reduce the anticipated bycatch mortality of speckled hind and warsaw grouper, Amendment 17B to the FMP and its implementing final rule prohibited all fishing for and possession of six deep-water snapper-grouper species (snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper) beyond a depth of 240 ft (73 m), beginning January 31, 2011.

However, a more recent analysis of data from 1973–2011, indicate that speckled hind and warsaw grouper are rarely caught with snowy grouper,

blueline tilefish, yellowedge grouper, misty grouper, queen snapper, or silk snapper. The low association between speckled hind and warsaw grouper landings and blueline tilefish may be attributable to the unique habitat preferences of speckled hind and warsaw grouper compared to blueline tilefish. The landings that were analyzed occurred prior to the implementation of the harvest and possession prohibition for speckled hind and warsaw grouper in Amendment 17B to the FMP (75 FR 82280, December 30, 2010). Speckled hind and warsaw grouper generally prefer hard bottom structure with habitat features such as steep cliffs, notches, and rocky ledges of the continental shelf break. Blueline tilefish, which is targeted for harvest by the deep-water component of the snapper-grouper fishery, inhabit irregular bottoms composed of troughs and terraces inter-mingled with sand, mud, or shell hash bottom where they live in burrows. In addition, the majority of snowy grouper landings in the South Atlantic are from waters deeper than 500 ft (152 m), where landings of speckled hind and warsaw grouper are extremely rare. Even though yellowedge grouper, misty grouper, queen snapper, and silk snapper primarily share the same hard bottom habitat preference as speckled hind and warsaw grouper, these four species are rarely encountered and are not targeted by commercial or recreational fishermen; between 2006 and 2010, the average annual commercial landings of yellowedge grouper, misty grouper, queen snapper, and silk snapper was 53,330 lb (24,190 kg) compared to 17,594,132 lb (7,980,564 kg) for the entire snapper-grouper commercial sector for this period. Instead, speckled hind and warsaw grouper, according to the new information available following the implementation of Amendment 17B to the FMP, are more commonly taken as incidental catch when fishermen target species such as gag, vermilion snapper, and red porgy inshore of 240 ft (73 m). Based on this information, at its August 2011 meeting, the Council voted to approve Regulatory Amendment 11 based upon the more recent analyses, and thereby, remove the deep-water snapper-grouper harvest and possession prohibition implemented through Amendment 17B.

The current speckled hind and warsaw grouper harvest and possession prohibition contained in Amendment 17B is not changed and is expected to continue to reduce fishing mortality of these two species even without the

additional deep-water snapper-grouper harvest and possession prohibition. As such, Regulatory Amendment 11 seeks to maintain the biological protection to speckled hind and warsaw grouper, prevent significant direct economic loss to snapper-grouper fishermen, and continue to achieve optimum yield for the fishery.

The Council is currently developing an amendment to further enhance the biological protections for speckled hind and warsaw grouper. That amendment, the Comprehensive Ecosystem-Based Amendment 3 (CE-BA 3), considers additional measures to reduce the bycatch of speckled hind and warsaw grouper, including the expansion of existing, and establishment of new closure areas.

### Comments and Responses

A total of 94 comments were received on the proposed rule for Regulatory Amendment 11, including comments from individuals, six fishing associations, a state agency, and three non-governmental agencies. NMFS received 87 comments of general support for Regulatory Amendment 11 and the proposed rule. NMFS also received two comments that opposed, and five comments that neither supported nor opposed, Regulatory Amendment 11 and the proposed rule. Specific comments related to the actions contained in Regulatory Amendment 11 and the proposed rule, as well as NMFS' respective responses, are summarized below.

*Comment 1:* One commenter stated that Regulatory Amendment 11 fails to end overfishing of speckled hind and warsaw grouper and that the Council and NMFS determined that a prohibition on landings would not, by itself, prevent overfishing because of the speckled hind and warsaw grouper mortality that would still result from discards of these species.

*Response:* NMFS and the Council intended that the prohibition on the harvest and possession of speckled hind and warsaw grouper would work in combination with the 240-ft (73-m) prohibition of six deep-water snapper-grouper species, as well as a variety of other management measures, to minimize harvest and reduce discard mortality of speckled hind and warsaw grouper. Based on new information presented at Council meetings in 2011, the Council and NMFS have decided to retain the prohibition on the harvest and possession of speckled hind and warsaw grouper but eliminate the 240-ft (73-m) prohibition on six deep-water snapper-grouper species. The Council concluded that other management measures would

be more effective in reducing discard mortality of speckled hind and warsaw grouper and minimizing the socio-economic effects to deep-water snapper-grouper fishers.

The Council's Scientific and Statistical Committee (SSC) could not determine if the 240-ft (73-m) prohibition is necessary to end overfishing of either speckled hind or warsaw grouper. After reviewing Amendment 17B to the FMP, the SSC stated the following in its report from its December 2009 meeting: "In general, the technical analyses supporting these species are acceptable, however, the SSC wishes to emphasize that these are extremely data poor species and that the uncertainty associated with any stock status information will be large. Consistent with that fact, the SSC cannot determine whether any of the proposed measures will end overfishing, because the overfishing level is unknown, the current mortality is unknown and discards are poorly known."

A species is described as undergoing overfishing if either the fishing mortality rate exceeds the maximum fishing mortality threshold (MFMT) for a period of 1 year or if the annual catch exceeds the annual overfishing limit (OFL) for 1 year or more (50 CFR 600.310(e)(2)(ii)(A)). Since 1997, speckled hind and warsaw grouper have been listed as undergoing overfishing in NMFS' Report to Congress on the Status of U.S. Fisheries. The Council and NMFS specify which method will be used to determine a species' overfishing status. The OFL, which is the overfishing limit in pounds or numbers of fish, is unknown for speckled hind and warsaw grouper. The Council defined the MFMT for speckled hind and warsaw grouper through the final rule implementing Amendment 11 to the FMP (64 FR 59126, November 2, 1998) as the fishing mortality rate in excess of the fishing mortality rate at 30 percent of the static spawning potential ratio. The most recent evaluations of fishing mortality in relation to MFMT were for the 1999 and 1990 fishing years for speckled hind and warsaw grouper, respectively. These evaluations determined that speckled hind and warsaw grouper were undergoing overfishing. The Council has taken action to decrease fishing mortality of speckled hind and warsaw grouper to address overfishing. However, data are insufficient to assess the most recent fishing mortality rates. As with many Council-managed species, measures to significantly restrict fishing mortality have hindered the ability of the Council and NMFS to obtain data and conduct

an assessment of a stock's health; fishery-dependent data are a major source of information in the assessment of stocks in the South Atlantic region.

The Council and NMFS have taken significant actions to decrease fishing mortality of speckled hind and warsaw grouper and address overfishing. Speckled hind and warsaw grouper were included in the five grouper aggregate recreational bag limit in 1992 (56 FR 56016, October 31, 1991), and then a commercial and recreational limit of one per vessel of each species with a commercial sale prohibition was established in 1994 (59 FR 27242, May 26, 1994). A complete harvest prohibition for both species and ACLs of zero (landings only) were established in 2011, through the final rule implementing Amendment 17B to the FMP (75 FR 82280, December 30, 2010). The ACL is based on an acceptable biological catch (ABC) level of zero (landings only) for speckled hind and warsaw grouper provided by the Council's SSC. The SSC did not provide a recommendation for an acceptable level of discard mortality and based its ABC recommendation on landings only. As a result of these restrictions, average annual landings of speckled hind decreased from 28,107 (12,749 kg) during 1981–1994 to 8,318 lb (3,773 kg), whole weight. During 1995–2010, average annual landings of warsaw grouper decreased from 88,007 lb (39,919 kg) to 27,171 lb (12,325 kg), whole weight.

In addition to harvest restrictions, the Council and NMFS have implemented spatial closures to reduce discard mortality of speckled hind and warsaw grouper. In 1994, Federal regulations were implemented that prohibited fishing for and retention of snapper-grouper species within the Oculina Experimental Closed Area. The intent of these prohibitions was to "enhance stock stability and increase recruitment by providing an area where deep-water species can grow and reproduce without being subjected to fishing mortality" (59 FR 27242, May 26, 1994). In Amendment 13A to the FMP, these regulations were extended indefinitely (69 FR 15731, March 26, 2004). In 2009, eight marine protected areas (MPAs) were established in the South Atlantic, through the final rule implementing Amendment 14 to the FMP, in which possession, retention, and fishing for all of the species in the FMP, including speckled hind and warsaw grouper, is prohibited (74 FR 1621, January 13, 2009). The intent of these MPAs is to protect long-lived, deep-water snapper-grouper species, including speckled hind and warsaw grouper, through the

elimination of bottom-fishing activities in the closed areas. The presence of speckled hind and warsaw grouper has been documented in many of the MPAs.

Speckled hind and warsaw grouper are also known to inhabit depths inshore of 240 ft (73 m) where most of the commercial fishing effort occurs. Efforts to limit mortality of species occurring closer to shore would be expected to reduce the discard mortality of speckled hind and warsaw grouper because most speckled hind and warsaw grouper encounters occur inshore of 240 ft (73 m). Management measures to reduce both the commercial and recreational fishing effort relative to species occurring closer to shore such as black sea bass, gag, red snapper, red porgy, and vermilion snapper are likely to have a significant effect on speckled hind and warsaw grouper populations due to the strong harvest association among these species (SERO–LAPP–2011–06 Report). Because of these measures, some reduction in bycatch of speckled hind and warsaw grouper has likely already occurred since the number of recreational trips in the South Atlantic EEZ in 2011 was the lowest since 1982. In addition to the measures previously mentioned, these specific regulations that are likely to reduce bycatch of speckled hind and warsaw grouper for species occurring closer to shore include the following: (1) An annual vermilion snapper prohibition for the recreational sector from November through March (74 FR 30964, June 29, 2009); (2) an annual shallow-water grouper prohibition for all fishermen from January through April (74 FR 30964, June 29, 2009); (3) an annual red porgy prohibition for the commercial sector from January through April (65 FR 51253, August 23, 2000); (4) a three fish red porgy bag limit and a 120 fish commercial bycatch trip limit (71 FR 55096, September 21, 2006); and, (5) a prohibition of all red snapper harvest and possession (75 FR 76874, December 9, 2010). In addition, the establishment of ACLs and AMs for black sea bass, gag, golden tilefish, snowy grouper, and vermilion snapper through Amendment 17B to the FMP have resulted in in-season closures and reduced season lengths, which NMFS expects has further reduced the discard mortality of speckled hind and warsaw grouper.

To further reduce discards of speckled hind and warsaw grouper, the Council and NMFS plan to develop area and species prohibitions that would most effectively reduce encounters with speckled hind and warsaw grouper while minimizing, to the extent practicable, socio-economic effects to

the fishing industry. The intent of the deep-water prohibition implemented through Amendment 17B to the FMP was to reduce depth-related bycatch mortality. Following the implementation of Amendment 17B to the FMP, the Council and NMFS re-evaluated the effectiveness of the 24-ft (73 m) prohibition using the best scientific information available contained in Regulatory Amendment 11, scientific recommendations from the NMFS Southeast Fisheries Science Center (SEFSC), the Council's SSC, and public comments. Based on new information and new analyses, the Council and NMFS concluded that the 240-ft (73 m) prohibition is not an effective means to reduce discard mortality of speckled hind and warsaw grouper due to the location of the closure and the species prohibited.

According to the best scientific information available, in order to increase the effectiveness of additional regulations aimed at reducing the discard mortality of speckled hind and warsaw grouper, the Council and NMFS would need to consider areas shallower than 240 ft (73 m). A new analysis of landings data following the implementation of Amendment 17B to the FMP (SERO-LAPP-2011-06 Report) indicates that most encounters with speckled hind and warsaw grouper by fishermen occurred inshore of 240 ft (73 m), because fishing effort in the snapper-grouper fishery is greatest in these depths. Based on this new information, area closures on the shelf edge (between 160–240 ft (49–73 m) depths) would provide greater protection to speckled hind and warsaw grouper than the current harvest prohibition of the six species in depths greater than 240 ft (73 m).

New information suggests the effectiveness of the regulations for protecting speckled hind and warsaw grouper would also increase if a snapper-grouper prohibition applied to species other than those currently prohibited beyond a 240-ft (73-m) depth. Recent analysis of landings data (June 1, 2011, SERO-LAPP-2011-06 Report) indicate that speckled hind and warsaw grouper are rarely caught with the six species prohibited by the 240-ft (73-m) prohibition. Additionally, the low association between the harvest of blueline tilefish and speckled hind and warsaw grouper is supported by preliminary results from a study conducted with an exempted fishing permit (EFP) by the North Carolina Division of Marine Fisheries (NCDMF) that began on August 2, 2011. The primary purpose of the EFP is to determine if speckled hind and warsaw

grouper are bycatch in the commercial blueline tilefish component of the South Atlantic snapper-grouper fishery. Preliminary findings provided to the Council and NMFS by NCDMF on March 2, 2012, indicate that no speckled hind or warsaw grouper were caught on 73 commercial trips targeting blueline tilefish off North Carolina (19 percent of those trips contained an observer).

The low association between speckled hind and warsaw grouper landings and blueline tilefish may be attributable to the unique habitat preferences of speckled hind and warsaw grouper compared to blueline tilefish. Speckled hind and warsaw grouper generally prefer hard bottom structure with habitat features such as steep cliffs, notches, and rocky ledges of the continental shelf break. Blueline tilefish, which is targeted for harvest by the deep-water component of the commercial sector of the snapper-grouper fishery, inhabit irregular bottom features composed of troughs and terraces inter-mingled with sand, mud, or shell hash habitat where they live in burrows. In addition, the majority of snowy grouper landings in the South Atlantic are from waters deeper than 500 ft (152 m), where landings of speckled hind and warsaw grouper are extremely rare.

With the exception of blueline tilefish off the coasts of North and South Carolina, snowy grouper, and deep-water species off South Florida, the six species currently prohibited deeper than 240 ft (73 m), are not currently targeted by the commercial sector. Snowy grouper is not targeted as much as in the past. Harvest of snowy grouper is severely restricted (regulations include a 100-lb (45-kg) commercial trip limit and a one fish per vessel recreational trip limit) and harvests of the remaining species are minimal, compared to landings of snapper-grouper for the entire commercial sector. Between 2006 and 2010, the average annual commercial landings of yellowedge grouper, misty grouper, queen snapper, and silk snapper was 53,330 lb (24,190 kg) compared to 17,594,132 lb (7,980,564 kg) for the entire snapper-grouper commercial sector for this period. Instead, speckled hind and warsaw grouper, according to new information available following the implementation of Amendment 17B to the FMP, are more commonly taken as incidental catch when fishermen target species such as gag, vermilion snapper, and red porgy inshore of 240 ft (73 m).

Therefore, based on a review of new information from the June 1, 2011, SERO-LAPP-2011-06 Report and a study conducted with an EFP by the

NCDMF, neither of which was available during development of Amendment 17B to the FMP, the Council concluded that allowing the harvest of deep-water species, including blueline tilefish and snowy grouper, beyond a depth of 240 ft (73 m), would not likely result in significant increases in the bycatch mortality of speckled hind or warsaw grouper, although low levels of bycatch of these species might occur. Instead, the Council and NMFS determined that other measures besides the prohibition on harvest of six species deeper than 240 ft (73 m) would be more effective in reducing discard mortality of speckled hind and warsaw grouper and should be considered. The Council is currently developing CE-BA 3, which considers additional measures to reduce bycatch of speckled hind and warsaw grouper, including the expansion of existing, and establishment of new, mid-shelf MPAs. The completion of that amendment has been determined to be a high priority for the Council. The Council is planning to take final action and submit the amendment to the Secretary of Commerce at its December 2012 meeting for approval and subsequent implementation through rulemaking.

*Comment 2:* Regulatory Amendment 11 fails to minimize bycatch and bycatch mortality of speckled hind and warsaw grouper. Regulatory Amendment 11 would nullify the only AM currently in place for speckled hind and warsaw grouper and leave these species with no accountability for bycatch mortality anywhere, contrary to the requirements of National Standard 1 and section 303(a)(15) of the Magnuson-Stevens Act. Regulatory Amendment 11 would leave speckled hind and warsaw grouper unprotected against discard mortality. Additionally, NMFS has failed to implement an adequate standardized bycatch reporting methodology in the South Atlantic.

*Response:* NMFS disagrees that Regulatory Amendment 11 would nullify the only AM currently in place for speckled hind and warsaw grouper. AMs are management controls to prevent ACLs, including sector specific ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur. The 240-ft (73 m) prohibition was intended to reduce discard mortality of speckled hind and warsaw grouper. The current AM is the prohibition on the harvest and possession of speckled hind and warsaw grouper.

During the development of Amendment 17B to the FMP, the Council discussed the challenges of setting an AM for speckled hind and

warsaw grouper when the Council's SSC recommended an ABC equal to zero for landings only. For the majority of species managed by the Council, the ABC is above zero and the AMs, or management controls, are triggered when a certain level of harvest is reached in order to prevent overages of the ACLs. In the snapper-grouper fishery, actions are taken to correct or mitigate overages of the ACLs, such as reducing the ACL in the following year by the overage. Despite stating in a footnote of a table in the Summary of Amendment 17B to the FMP that "the deepwater closure may be considered as a type of AM" (emphasis added), the Council acknowledged in Regulatory Amendment 11 that the prohibition on the harvest and possession of speckled hind and warsaw grouper is the AM and serves as the management control to prevent ACLs from being exceeded.

NMFS disagrees that Regulatory Amendment 11 would leave speckled hind and warsaw grouper without management measures to protect against discard mortality. The Council and NMFS are required to implement measures, to the extent practicable, that (1) minimize bycatch and (2) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch, according to National Standard 9 of the Magnuson-Stevens Act (16 U.S.C. 1851). In Regulatory Amendment 11, the Council and NMFS evaluated the practicability of implementing measures to minimize bycatch and bycatch mortality. The Council and NMFS have concluded that regulations that both minimize bycatch and minimize the mortality of bycatch, such as those noted below, are in effect even with the removal of the 240-ft (73-m) prohibition. In addition, and as discussed in response to Comment 1, the Council and NMFS have concluded, based on new information presented to them following the implementation of Amendment 17B to the FMP, that measures other than the 240-ft (73-m) prohibition would be more effective in reducing discard mortality of speckled hind and warsaw grouper.

The Council and NMFS have previously implemented spatial closures and gear requirements intended to reduce bycatch and bycatch mortality of managed species, including speckled hind and warsaw grouper. In 1994, the Council and NMFS prohibited fishing for and retention of all species in the FMP within the Oculina Experimental Closed Area off Florida (59 FR 27242, May 26, 1994). The intent of the prohibition was to enhance stock stability and increase recruitment by providing an area where deep-water species can grow and reproduce without

being subjected to fishing mortality, including mortality from discards. In 2009, the Council and NMFS implemented eight MPAs in the South Atlantic, in or from which possession, retention, and fishing for all species in the FMP was prohibited (74 FR 1621, January 13, 2009). The intent of the eight MPAs was to protect long-lived, deep-water snapper-grouper species including speckled hind and warsaw grouper. Based on a review of new information that was not available during the development of Amendment 17B to the FMP, the 240-ft (73-m) prohibition is not the most effective means to reduce discard mortality of speckled hind and warsaw grouper, and the closure of other areas should be considered. The Council is currently developing CE-BA 3, which considers additional measures to reduce bycatch of speckled hind and warsaw grouper, including the expansion of currently established MPAs and the establishment of new mid-shelf MPAs.

The Council and NMFS have also implemented gear requirements intended to reduce recreational and commercial bycatch mortality. Beginning on July 29, 2009, the Council and NMFS required the possession of a dehooking device on board a vessel when fishing for South Atlantic snapper-grouper and required the use of such tools as needed to accomplish release of fish with minimum injury (74 FR 30964). In addition, beginning on March 3, 2011, the Council and NMFS required the use of non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N. lat. (75 FR 82280, December 30, 2010). The use of circle hooks is most effective in reducing bycatch mortality for juvenile speckled hind and warsaw grouper as these species are caught at shallower depths compared to adult fish.

The Council and NMFS adopted, through Amendment 15B to the FMP, the Atlantic Coastal Cooperative Statistics Program (ACCSP) Release, Discard and Protected Species Module as the preferred methodology for a standardized bycatch reporting methodology, and until the module is fully funded, require the use of a variety of sources to assess and monitor bycatch. Currently, discard estimates are supplied through the Marine Recreational Information Program (MRIP), the supplementary commercial and headboat discard logbooks, the previously-referenced EFP for North Carolina, and the Federal reef fish observer program. The Council has approved an action in Amendment 18A to the FMP to enhance data reporting in

the for-hire sector. The Council is also developing amendments to other FMPs, including the Snapper-Grouper FMP, to improve data reporting by the commercial sector, and the for-hire component of the recreational sector of the snapper-grouper fishery, and by dealers.

*Comment 3:* Regulatory Amendment 11 fails to rely on the best scientific information available by circumventing the established SSC peer-review process.

*Response:* The Council and NMFS incorporated the best scientific information available into Regulatory Amendment 11 and utilized the SSC peer-review process in the development of the amendment. As described by National Standard 2 in the Magnuson-Stevens Act (16 U.S.C. 1851), conservation and management measures shall be based upon the best scientific information available. The NMFS Southeast Regional Office (SERO) provided Regulatory Amendment 11, including analyses, to the SEFSC for both the initial review of Regulatory Amendment 11 and the "best available science" certification. The SEFSC certified that the analyses of the proposed action contained in the environmental assessment and Regulatory Amendment 11 were based upon the best available scientific information. In addition, SEFSC staff served on the interdisciplinary plan team (IPT) for both Amendment 17B and Regulatory Amendment 11 to the FMP. IPT members serve numerous roles during the development of an amendment, including analyzing the anticipated effects of the proposed actions.

At its April 5–7, 2011, meeting, the Council's SSC reviewed a Regulatory Amendment 11 issues paper including alternatives under consideration and a presentation titled "Preliminary data analyses to support Snapper-Grouper Regulatory Amendment 11." The SSC discussed Regulatory Amendment 11 and provided comments on Regulatory Amendment 11 in its written report of the meeting and in a presentation to the Council at the June 2011 Council meeting. At that meeting, the SSC chair noted in her presentation of the results of the April 2011 SSC meeting to the Council that the 240-ft (73-m) prohibition seemed counterintuitive to the intent of protecting speckled hind and warsaw grouper because of where the fish are primarily found.

*Comment 4:* One commenter stated that Regulatory Amendment 11 prioritizes short-term economic considerations over the Magnuson-Stevens Act's conservation measures

deemed essential to preventing overfishing.

*Response:* National Standard 1 of the Magnuson-Stevens Act (16 U.S.C. 1851) states that management measures shall both “prevent overfishing while achieving, on a continuing basis, the optimum yield (OY).” National Standard 8 of the Magnuson-Stevens Act states that, consistent with the conservation requirements of the Magnuson-Stevens Act, management measures shall, “to the extent practicable, minimize adverse economic impacts on such communities.” The Magnuson-Stevens Act provides for flexibility in the specific conservation and management measures used to achieve conservation goals. When a quantitative analysis of overfishing is absent, the Councils and NMFS must rely on informed judgment to weigh the costs and benefits of a proposed regulation to strike a balance between preventing overfishing, achieving optimum yield, and minimizing impacts to fishing communities. The Council and NMFS evaluated the costs and benefits to the biological and socio-economic environments of the 240-ft (73-m) prohibition, using the best scientific information available, as well as scientific recommendations from the SEFSC and the Council’s SSC, and public comments. The Council and NMFS concluded that the 240-ft (73-m) prohibition is not an effective means to reduce discard mortality of speckled hind and warsaw grouper, has significant socio-economic effects to deep-water snapper-grouper fishers, particularly to those harvesting blueline tilefish, and hinders the snapper-grouper fishery’s ability to achieve OY.

The Council’s SSC was not able to determine if the 240-ft (73-m) prohibition is needed to end overfishing of either speckled hind or warsaw grouper. However, as discussed in the response to comments 1 and 2, the Council and NMFS have implemented actions to eliminate the harvest and reduce the discard mortality of speckled hind and warsaw grouper. The Council and NMFS have concluded, based on new scientific information presented to them following the implementation of Amendment 17B to the FMP, that the 240-ft (73-m) prohibition is not an effective means to reduce the discard mortality of speckled hind and warsaw grouper, and other measures would be more effective in reducing discard mortality while minimizing the socio-economic effects.

The economic hardship imposed on fishermen from the 240-ft (73-m) prohibition is greater than was projected when Amendment 17B to the FMP was

approved by the Council. During the development and implementation of Amendment 17B to the FMP, in April of 2010, the SSC recommended an ABC of 49,221 lb (22,326 kg), whole weight, for blueline tilefish. Therefore, at the time the deep-water prohibition was being approved and implemented, the economic impacts from a prohibition of blueline tilefish were not substantial due to the anticipated low level of future allowable catch.

However, the SSC, at its April 2011 meeting, significantly increased the blueline tilefish ABC recommendation to 592,602 lb (268,780 kg), whole weight, to represent what they considered an expanding fishery north of Cape Hatteras, North Carolina, that resulted in increased commercial landings in recent years. In the Comprehensive ACL Amendment, the Council set the ACL equal to the ABC. Using an average ex-vessel price of \$1.56 per lb, whole weight, the annual economic loss to commercial vessels landing blueline tilefish from the 240-ft (73-m) prohibition is estimated to be \$438,114. Therefore, the continued prohibition of blueline tilefish harvest beyond a 240-ft (73-m) depth would result in significantly greater economic losses to a segment of commercial snapper-grouper fishers than originally anticipated when the Council approved Amendment 17B to the FMP for submission to NMFS.

*Comment 5:* NMFS and the Council previously determined that a landings prohibition was not sufficient to end overfishing of speckled hind and warsaw grouper and that the deep-water snapper-grouper prohibition was necessary for this purpose.

*Response:* NMFS has reviewed the text of Amendment 17B to the FMP, Regulatory Amendment 11, and the proposed and final rules for Amendment 17B to the FMP. The statement that a landings prohibition is not sufficient to end overfishing of speckled hind and warsaw grouper occurs only once in these documents. In the preamble’s classification section of the final rule for Amendment 17B to the FMP, NMFS states the following, “The second alternative to the final action would establish an ACL of zero for speckled hind and warsaw grouper but would not close any areas to fishing for deep-water species that co-occur with these two species. Although this alternative would have smaller negative economic effects on small entities than the final action, it would not be sufficient to end overfishing of speckled hind and warsaw grouper due to discard mortality from fishing for other co-occurring deep-water species.” (75 FR

82280, December 30, 2010). However, this previous statement appears to have been made in error, as NMFS finds no record to support that conclusion. The Council and NMFS’s decisions are based on the best scientific information available, including new information provided since the implementation of Amendment 17B to the FMP, that the prohibition on harvest of six deep-water snapper-grouper species beginning at a 240-ft (73-m) depth is not an effective means to reduce discard mortality of speckled hind and warsaw grouper.

NMFS states the following in the final rule to Amendment 17B to the FMP: (1) Speckled hind and warsaw grouper are extremely vulnerable to overfishing; (2) action must be taken to ensure overfishing is ended and does not occur; (3) the incidental catch of these species may be responsible for the continued overfishing; (4) the deep-water prohibition is intended to reduce depth-related bycatch mortality to reduce the probability that overfishing will occur; and (5) the implementation of the deep-water prohibition does not preclude the Council from proposing future action to modify the prohibition if scientific information indicates it is appropriate to do so. Because new scientific information has demonstrated that the 240-ft (73-m) prohibition to the harvest of six deep-water snapper-grouper species is not an effective means to reduce bycatch of speckled hind and warsaw grouper, and the action is having unnecessary and unanticipated negative socio-economic effects, the Council and NMFS are removing the 240-ft (73-m) prohibition through Regulatory Amendment 11 and are developing more effective means to enhance measures currently in place to protect these species.

*Comment 6:* Several commenters stated that the deep-water snapper-grouper prohibition does not enhance protection for the species it intends to protect. Many fishermen reported that they never caught speckled hind and warsaw grouper when targeting snowy grouper, tilefish, and queen snapper in deep water. Others stated that deep-water species receive little fishing pressure as it requires specific skills and knowledge (such as knowledge of bottom structure and fish location), significant financial investment, and specific equipment such as specialized vessels, to harvest these species. Rising fuel costs have also reduced effort for deep-water snapper-grouper species. One individual stated that spatial closures in shallow depths encompassing the shelf edge, with 160 ft (49 m) as the inshore depth limit, would have been more effective in

protecting speckled hind and warsaw grouper from discard mortality than a prohibition of six deep-water snapper-grouper species starting at a 240-ft (73-m) depth, and NMFS should focus management on places where these two species are being impacted to a greater degree. Commenters noted that, in deciding the location of the spatial closures, information should be utilized from technical divers, conservation-minded fishermen with direct knowledge of shelf-edge habitats, scientists who have completed studies on the shelf edge and further off-shore, and bottom habitat maps of the shelf edge and deeper waters.

*Response:* NMFS agrees that, in addition to the current measures to protect speckled hind and warsaw grouper, the Council should focus on spatial closures in shallower depths to further reduce discard mortality of these species. The Council is currently developing CE-BA 3, which considers additional measures to reduce bycatch of speckled hind and warsaw grouper, including the expansion of currently established MPAs and the establishment of new mid-shelf MPAs. The public, fishermen, and scientists will be given opportunities to provide input through the Council process, which includes meetings of the Council's Advisory Panels and SSC. The Council will be holding public workshops in 2012 where the public may provide input on management measures to protect speckled hind and warsaw grouper. The Habitat and Environmental Protection and the Coral Advisory panels will be given the opportunity to provide advice and knowledge concerning known locations of fish habitats important for speckled hind and warsaw grouper, including the shelf-edge habitat. The Council held public scoping meetings on CE-BA 3 from January 24–February 2, 2011. There will be other opportunities for the Council to receive public input on this issue.

*Comment 7:* The analysis presented in the SERO Catch Analysis (June 1, 2011, SERO-LAPP-2011-06 Report) is insufficient to draw conclusions about species associations because it lacks any information to evaluate the uncertainty in the hierarchical clustering and dimension reduction results. One way of assessing the uncertainty in clustering analyses is through bootstrap re-sampling which produces probabilities that allow us to assess the uncertainty associated with the model

outputs. To our knowledge, this was not done.

*Response:* At the time the catch analysis was developed, the authors of the species groupings analysis (June 1, 2011, SERO-LAPP-2011-06 Report) were unaware of the application of the bootstrap re-sampling technique to determine the uncertainty of the results from a hierarchical cluster analysis. However, using another method to address uncertainty and to reduce the relative impacts of the outcomes of any one cluster analysis, NMFS applied four different clustering methods to each of five different fishery-dependent and two fishery-independent data sources, then developed a methodology for aggregating the result of these analyses across clusters to form a weighted mean cluster association index. The SEFSC certified on October 26, 2011, that the analyses of the proposed action contained in the environmental assessment and Regulatory Amendment 11 were based upon the best available scientific information.

#### Classification

The Regional Administrator, Southeast Region, NMFS has determined that this final rule is necessary to more efficiently manage the species within Regulatory Amendment 11 and is consistent with the Magnuson-Stevens Act, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here.

No substantive comments were received on the certification provided in the proposed rule (76 FR 78879, December 20, 2011). Based on the information provided in the proposed rule, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration this final rule is not expected to have a significant economic impact on a substantial number of small entities. As a result, a final regulatory flexibility analysis was not required and none was prepared.

NMFS finds good cause under 5 U.S.C. 553(d)(1) to waive the delay in the effective date for this rule because this rule relieves a restriction by removing the harvest and possession prohibition of six deep-water snapper-grouper species from depths greater than 240 ft (73-m) in the South Atlantic EEZ. These measures will benefit commercial and recreational fishermen. Additionally, the immediate effectiveness of this final rule will allow fishermen to more effectively harvest deep-water snapper-grouper species (snowy grouper, blueline tilefish, yellowedge grouper, misty grouper, queen snapper, and silk snapper). Delaying implementation of these measures could result in snapper-grouper fishermen not having the opportunity to achieve OY from these stocks, because the sectors would have insufficient time to harvest the quota increase before the fishing year's end. A delay would thus diminish the social and economic benefits for deep-water snapper-grouper fishermen this final rule provides, and undermine part of the purpose of the rule itself. Finally, this rule creates no new duties, obligations, or requirements for the regulated community that would necessitate delaying this rule's effectiveness to allow them to come into compliance with it. Thus, this rule is made effective upon publication.

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

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

Dated: May 4, 2012.

**Paul N. Doremus,**

*Deputy Assistant Administrator for Operations, 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.*

#### **§ 622.35 [Amended]**

- 2. In § 622.35, paragraph (o) is removed and reserved.

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