

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 622**

[Docket No. 120717247-3029-02]

RIN 0648-BC37

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 38

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement management measures described in Amendment 38 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). This final rule modifies post-season accountability measures (AMs) that affect the recreational harvest of shallow-water grouper species (SWG), changes the trigger for recreational sector AMs for gag and red grouper, and revises the Gulf reef fish framework procedure. The intent of this final rule is to achieve optimum yield (OY) while ensuring the Gulf reef fish fishery resources are utilized efficiently.

DATES: This rule is effective March 1, 2013.

ADDRESSES: Electronic copies of Amendment 38, which includes an environmental assessment, fishery impact statement, regulatory flexibility act analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web Site at <http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm>.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, Southeast Regional Office, NMFS, telephone: 727-824-5305; email: Susan.Gerhart@noaa.gov.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf 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 October 12, 2012, NMFS published a notice of availability for Amendment 38 to the FMP and requested public comments (77 FR 62209). On October 19, 2012, NMFS

published a proposed rule for Amendment 38 to the FMP and requested public comments (77 FR 64300). Amendment 38 was approved by the Secretary of Commerce on January 9, 2013. Amendment 38 and the proposed rule for Amendment 38 outlined the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule are provided below.

Management Measures Contained in This Final Rule

This rule modifies the recreational sector post-season AMs for gag and red grouper, which currently affects all SWG species (*i.e.*, gag, red grouper, black grouper, scamp, yellowfin grouper, and yellowmouth grouper), changes the trigger for recreational sector AMs for gag and red grouper, and revises the Gulf reef fish framework procedure. The intent of this final rule is to achieve OY while ensuring the fishery resources are utilized efficiently.

This final rule revises the post-season recreational sector AMs for gag and red grouper so that the shortening of the recreational fishing season following a fishing year with a recreational sector ACL overage applies only to the species with landings that exceeded the recreational ACL the prior year. Revising the recreational sector AMs should improve the likelihood of achieving OY for red grouper and avoid unnecessary closures of all SWG species.

This rule also revises the trigger for post-season AMs for gag and red grouper, so that AMs are based on a comparison of the current year's recreational sector landings to the recreational ACL. These recreational sector AM revisions should provide greater protection to the gag and red grouper stocks, be easier for fishermen to understand, and be less burdensome to administer.

Additional Measures Contained in Amendment 38

Amendment 38 adds AMs to the list of measures that may be revised through the Gulf reef fish framework process. No changes to the regulatory text are required to implement the Amendment 38 action to add AMs to the framework process, because NMFS previously erroneously included AMs in § 622.48(d) in the rule implementing the Generic ACL/AM Amendment (76 FR 82044, December 29, 2011). Amendment 38 also updates language in the framework procedure related to Council advisory panels and committees. More general language in reference to Council committees and advisory panels

replaces specific references that are no longer accurate. There is no regulatory text associated with this measure.

Additional Measures Contained in This Final Rule

In addition to the other changes to the FMP, this final rule revises the management measures contained in the regulations that may be established or modified by the framework procedure to match those that are contained in the FMP. In the final rule implementing the Generic ACL/AM Amendment, NMFS erroneously included sale and purchase restrictions, and transfer at sea provisions, in the list of management measures at § 622.48(d). Thus, NMFS is removing these two items from the list of management measures in § 622.48(d). Additionally, NMFS is removing total allowable catch (TAC) from § 622.48(d). TAC has been included in the Federal regulations since the adjustment of management measures was first codified in 1992 (57 FR 11914, April 8, 1992). With the implementation of ACLs and ACTs, TAC is no longer used in the management of Gulf reef fish.

In § 622.49, paragraphs (a)(4)(ii)(C) and (a)(5)(ii)(C), NMFS clarifies language regarding the management of a recreational sector ACL overage. If gag or red grouper are overfished, and the recreational ACL is exceeded, the recreational ACL overage is deducted from the recreational ACL established for the following year and from the ACT, as determined in § 622.49, paragraph (a)(4)(ii)(B) or (a)(5)(ii)(B). If the recreational ACT is scheduled to increase in the year following a recreational ACL overage, the recreational ACT could be maintained at the current level and the overage would be deducted from that prior year's ACT. However, if the best scientific information available determines that maintaining the prior year's recreational ACT is unnecessary, the recreational ACT could increase as scheduled and the recreational overage would be deducted from the increased ACT in the following fishing year. This distinction was not made in the final rule for Amendment 32 to the FMP (77 FR 6988, February 10, 2012); however, this clarification is consistent with not allowing the recreational ACT to increase above the recreational ACL after an overage occurs, maintains a larger buffer between the recreational ACT and recreational ACL when an overage occurs, and is what the Council intended in Amendment 32.

NMFS moves the following sentence in the regulations from § 622.49, paragraph (a)(4)(ii)(A) to paragraph (a)(4)(ii)(B): "In addition, the

notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year." This change will keep only recreational in-season AMs in paragraph (a)(4)(ii)(A), and include the recreational post-season AMs in paragraph (a)(4)(ii)(B).

Additionally, NMFS identified an inadvertent inconsistency between the regulatory text in the proposed rule for Amendment 32 to the FMP (76 FR 67656, November 2, 2011) and the second proposed rule for Amendment 32 to the FMP (77 FR 1910, January 12, 2012). To correct this mistake, in § 622.49, paragraph (a)(4)(ii)(B), NMFS revises the phrase "If gag are not overfished" to read "Without regard to overfished status," and in paragraph (a)(5)(ii)(B), NMFS revises the phrase "If red grouper are not overfished" to read "Without regard to overfished status."

Comments and Responses

NMFS received a total of five public comments on Amendment 38 and the proposed rule, including three comments from individuals. One Federal agency stated they had no comment on the proposed rule. Two commenters submitted suggestions for the reef fish fishery that were outside the scope of Amendment 38 and the proposed rule. Specific comments related to the actions contained in Amendment 38 and the proposed rule, as well as NMFS' respective responses, are summarized below.

Comment 1: In southwest Florida, a year-round open season for red grouper is needed. There are plenty of legal red grouper within 40 nautical miles (74 km) of the coast that can be targeted with little or no gag bycatch. If red grouper harvest is prohibited, fishermen will target snapper at wrecks and ledges. However, gag also occur at these wrecks and ledges, and, therefore, fishing in these locations results in continual catch and release of gag, which is contrary to the Council and NMFS' intent.

Response: Amendment 38 and this rule do not address the length of the recreational red grouper season and this comment is therefore beyond the scope of this rule. However, this final rule will remove the requirement to shorten the season for all SWG if the gag ACL is reached. This will allow the red grouper recreational season to remain open even if gag ACL is reached, except during the 2-month gag spawning season closure that applies to all SWG.

We also note that a separate framework action approved by the

Council at its October 2012 meeting would modify the 2-month gag spawning season closure as it applies to SWG other than gag. That action has not been implemented yet; however, if that action is implemented, the recreational sector for SWG other than gag, in or from the Gulf EEZ, would be open for harvest in February and March shoreward of the 20-fathom contour line. That action, combined with those in Amendment 38, could allow year-round recreational red grouper harvest in shallow-water areas, unless the red grouper recreational ACL is reached.

Comment 2: NMFS should reject Action 1, Preferred Alternative 3, which would remove the portion of the AMs that require an adjustment of the fishing season for all SWG in the year following a gag or red grouper recreational ACL overage until further bycatch practicability analyses can be performed. After gag, red grouper is the main species caught in the SWG complex. Although gag and red grouper occupy slightly different habitats, they are generally found in the same areas and depths and have a broader depth range of occurrence than the other SWG. Also, the proportion of annual gag fishing mortality due to dead discards is unknown.

Response: NMFS disagrees that it should reject Action 1, Preferred Alternative 3, until further bycatch practicability analyses can be performed. Amendment 38 includes a bycatch practicability analysis that concludes there would be no adverse biological impacts associated with modifying the gag recreational post-season AMs. NMFS agrees with this conclusion. NMFS acknowledges that some gag bycatch will occur if the gag recreational season is shortened and fishermen target other species in the SWG complex, including red grouper. However, the recreational gag ACL has not been reached since the AM was established in 2009 through Amendment 30B to the FMP (74 FR 17603, April 16, 2009), and the AM has not been triggered. Thus, no change in bycatch is expected from implementation of this final rule relative to the historical discard levels.

Further, the Council analyzed the impacts to gag bycatch when it established a 4-month recreational gag open season in Amendment 32 to the FMP, while continuing to allow recreational fishing for SWG other than gag year-round (except for the February-March gag spawning season closure). That analysis accounted for dead discards and concluded that even with an effort increase of 1.5 times what it would have been with year-round gag

fishing, reductions in total removals would be at the level necessary to rebuild the stock. If the recreational gag AM is triggered in the future, the changes implemented in this final rule are expected to result in only a minimal increase in gag bycatch beyond the current level because of the already limited 4-month gag season.

With respect to the proportion of annual gag fishing mortality due to dead discard, this is known and was included in the bycatch practicability analysis for Amendment 38. These data were originally produced during the 2010 re-run of the gag stock assessment. Although the discard and landings numbers are estimates, they are the best scientific information available.

Comment 3: NMFS should approve and implement Action 1, Preferred Alternative 4, which replaces the 3-year moving average AM trigger with an annual AM trigger.

Response: NMFS agrees. Comparing the recreational ACL to a single-year average of recreational landings is a more practical method of determining if recreational AMs should be triggered. The Council chose Alternative 4 as one of the two preferred alternatives in Action 1.

Comment 4: NMFS should reject Action 2, Preferred Alternative 2, which would modify the Gulf reef fish framework procedure to include changes to AMs through the standard documentation process for open framework actions. The existing framework procedure, as proposed and finalized in the Generic ACL/AM Amendment (76 FR 82044, December 29, 2011), already includes AMs as an appropriate action under the closed framework process. The framework procedure may only be used to take actions that have been anticipated and analyzed in the associated FMP. Prior to implementing such AMs for a fishery, those specific AMs must be fully analyzed in the context of the FMP.

Response: NMFS disagrees that it should reject Action 2, Preferred Alternative 2. The commenter apparently misunderstands the effect of the alternative chosen by the Council. The current AMs were established by plan amendment and are codified in the regulations at 50 CFR 622.49. When one of these AMs is triggered (e.g., the annual catch limit is met), then that AM (e.g., closing of the fishery) is implemented by NMFS under the closed framework procedure specified in the FMP by filing an appropriate notification in the **Federal Register**. The change in framework procedure described in Action 2, Preferred Alternative 2, would not change the

implementation of AMs through this closed framework procedure. Rather, Action 2, Preferred Alternative 2, would amend the FMP to allow the Council through an open framework action to modify the existing AMs or to establish new AMs. The new AMs that could be established would be limited to the list of potential AMs in the FMP's open framework procedure as amended by this Action. Once an existing AM is modified, or a new AM is established for a species through the open framework, the modified or new AM will be codified in the regulations and may then be implemented annually via a closed framework action. The primary difference between an open framework action and a plan amendment is that the open framework action may be implemented with a shorter review process than that required for a plan amendment. However, any AMs established or modified through the open framework procedure would be fully analyzed, in the context of the FMP, the MSA, and all other applicable laws. The open framework procedure requires that the Council develop documentation to support the action and that the Regional Administrator review the Council's recommendations and supporting information and notify the Council of the determinations, in accordance with the MSA and other applicable law. The open framework procedure also includes the opportunity for public participation, during both the Council's development of the action and NMFS's rulemaking to implement the action.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that the actions contained in this final rule and Amendment 38 are necessary for the conservation and management of the reef fish fishery and are consistent with the Magnuson-Stevens Act and other applicable laws.

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 this certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. No changes to the final rule were made in

response to public comments. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

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

Dated: January 25, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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

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

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

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

■ 2. In § 622.48, paragraph (d) is revised to read as follows:

§ 622.48 Adjustment of management measures.

* * * * *

(d) *Gulf reef fish.* For a species or species group: reporting and monitoring requirements, permitting requirements, bag and possession limits (including a bag limit of zero), size limits, vessel trip limits, closed seasons or areas and reopenings, annual catch limits (ACLs), annual catch targets (ACTs), quotas (including a quota of zero), accountability measures (AMs), MSY (or proxy), OY, management parameters such as overfished and overfishing definitions, gear restrictions (ranging from regulation to complete prohibition), gear markings and identification, vessel markings and identification, allowable biological catch (ABC) and ABC control rules, rebuilding plans, and restrictions relative to conditions of harvested fish (maintaining fish in whole condition, use as bait).

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■ 3. In § 622.49, paragraphs (a)(4)(ii), (a)(5)(ii)(B), (a)(5)(ii)(C), and (a)(5)(ii)(D) are revised to read as follows:

§ 622.49 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

(a) * * *
(4) * * *

(ii) *Recreational sector.* (A) Without regard to overfished status, if gag recreational landings, as estimated by

the SRD, reach or are projected to reach the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register, to close the recreational sector for the remainder of the fishing year. On and after the effective date of such a notification, the bag and possession limit of gag in or from the Gulf EEZ is zero. This bag and possession limit applies in the Gulf on board a vessel for which a valid Federal charter vessel/headboat permit for Gulf reef fish has been issued, without regard to where such species were harvested, *i.e.* in state or Federal waters.

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a)(4)(ii)(A) of this section, if gag recreational landings, as estimated by the SRD, exceed the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the gag ACT, specified in paragraph (a)(4)(ii)(D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition, the notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year.

(C) If gag are overfished, based on the most recent status of U.S. Fisheries Report to Congress, and gag recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(4)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(4)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(4)(ii)(B) of this section, by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The applicable recreational ACLs for gag, in gutted weight, are 1.232 million lb (0.559 million kg) for 2012, 1.495 million lb (0.678 million kg) for 2013, 1.720 million lb (0.780 million kg) for 2014, and 1.903 million lb (0.863 million kg) for 2015 and subsequent fishing years. The recreational ACTs for gag, in gutted weight, are 1.031 million

lb (0.468 million kg) for 2012, 1.287 million lb (0.584 million kg) for 2013, 1.519 million lb (0.689 million kg) for 2014, and 1.708 million lb (0.775 million kg) for 2015 and subsequent fishing years.

(5) * * *

(ii) * * *

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a)(5)(ii)(A) of this section, if red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(5)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the red grouper ACT, specified in paragraph (a)(5)(ii)(D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior

year's ACT is unnecessary. In addition, the notification will reduce the bag limit by one fish and reduce the length of the recreational red grouper fishing season the following fishing year by the amount necessary to ensure red grouper recreational landings do not exceed the recreational ACT in the following fishing year. The minimum red grouper bag limit for 2014 and subsequent fishing years is two fish.

(C) If red grouper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(5)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(5)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near

the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(5)(ii)(B) of this section, by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The recreational ACL for red grouper, in gutted weight, is 1.90 million lb (0.862 million kg) for 2012 and subsequent fishing years. The recreational ACT for red grouper, in gutted weight, is 1.730 million lb (0.785 million kg) for 2012 and subsequent fishing years.

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