

begin contacting and coordinating with State/Territory and NOAA resource managers to identify activities that may adversely affect the species and potential take exemptions that should be identified in a 4(d) rule, as necessary to provide for the conservation of these threatened species.

After publication of a proposed rule to list the species and establish protective regulations, regulations at 50 CFR 424.16 specify that NMFS allow for public comments regarding the proposed rule and hold public hearings if requested. Within 1 year of publishing the proposed listing regulation, a final rule to list the species, a notice extending the 1-year period, or a notice withdrawing the proposed listing must be published in the **Federal Register**.

The ESA requires that a final rule designating critical habitat of an endangered or threatened species shall be, to the maximum extent prudent, published concurrently with the final rule listing the species (ESA 4(a)(3)(A)). If at that time critical habitat is undeterminable, the period may be extended by not more than 1 additional year.

#### Authority

The authority for this section is the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 11, 2005.

**William T. Hogarth,**  
Assistant Administrator for  
Fisheries, National Marine Fisheries Service.  
[FR Doc. 05-5346 Filed 3-14-05; 4:33 pm]  
BILLING CODE 3510-22-S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 050309066-5066-01; I.D. 030105D]

RIN 0648-AS53

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Amendment 15

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS issues this proposed rule to implement Amendment 15 to the

Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). This proposed rule would establish a limited access system for the commercial fishery for Gulf and Atlantic migratory group king mackerel by capping participation at the current level. The proposed rule also would change the fishing year for Atlantic migratory group king and Spanish mackerel to be March through February. The intended effects of this proposed rule are to provide economic and social stability in the fishery by preventing speculative entry into the fishery and to mitigate adverse impacts associated with potential quota closures.

**DATES:** Comments must be received no later than 5 p.m., eastern time, on May 2, 2005.

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

- E-mail: 0648-AS53.Proposed@noaa.gov. Include in the subject line the following document identifier: 0648-AS53.
- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.
- Fax: From March 22, 2005, through May 2, 2005, 727-824-5308. Comments cannot be received via fax from March 18 through March 21, 2005.

Copies of Amendment 15, which includes an environmental assessment, a regulatory impact review (RIR), and an initial regulatory flexibility analysis (IRFA), may be obtained from the Gulf of Mexico Fishery Management Council, The Commons at Rivergate, Suite 1000, 3018 U.S. Highway 301 North, Tampa, FL 33619; telephone: 813-228-2815; fax: 813-225-7015; e-mail: [gulfcouncil@gulfcouncil.org](mailto:gulfcouncil@gulfcouncil.org); or from the South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; telephone: 843-571-4366; fax: 843-769-4520; e-mail: [safmc@safmc.net](mailto:safmc@safmc.net).

**FOR FURTHER INFORMATION CONTACT:** Steve Branstetter; telephone: 727-570-5305; fax: 727-570-5583 (through March 18, 2005), 727-824-5308 (on and after March 22, 2005); e-mail: [Steve.Branstetter@noaa.gov](mailto:Steve.Branstetter@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The fisheries for coastal migratory pelagic resources are managed under the FMP. The FMP was prepared jointly by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council (Councils),

approved by NMFS, and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

#### Background

Prior to 1998, the commercial king mackerel fishery in the exclusive economic zone of the Gulf of Mexico and Atlantic operated under open access. Due to concerns about increasing levels of participation in these fisheries, the Councils established a commercial king mackerel vessel permit moratorium in Amendment 8 to the FMP in March 1998. Amendment 12 extended the expiration date of the moratorium through October 15, 2005, or until the moratorium could be replaced with a license limitation, limited access, and/or individual fishing quota or individual transferable quota system, whichever occurred earlier. The effects of the existing permit moratorium have been to prevent increases in effort, reduce the number of permittees in the king mackerel fishery, and help stabilize the economic performance of current participants. Under the moratoria, the number of commercial king mackerel permits has declined from a peak of 2,172 in July 1998 to 1,683 in August 2004.

Current commercial king mackerel fishery participants, especially in the Gulf of Mexico, have demonstrated the capability of harvesting the applicable quotas well in advance of the end of the various fishing seasons, resulting in early closures of the fishery. Allowing the fishery to revert to open access would result in an increased number of participants in these mackerel fisheries, most likely negating any reductions in effort that have been achieved as a result of the current moratorium. Any increase in participants would: exacerbate the current derby fisheries that occur in the western Gulf zone and in the Florida west coast gillnet fishery, lead to even earlier closures, possibly result in closures of the Atlantic group king mackerel fishery, and have an adverse impact on the economic performance of current participants. Increased participation would also compound the complexity of any future consideration by the Councils to develop a more comprehensive controlled access system for this fishery. For these reasons, the Councils have concluded that a limited access system to continue restrictions on participation levels in these fisheries is appropriate.

## Provisions of Amendment 15

### *Limited Access System*

Amendment 15 would establish a limited access system for the commercial fishery for Gulf and Atlantic group king mackerel by capping participation at the current level. Under the proposed limited access system, an owner of a vessel with a valid commercial vessel permit for king mackerel and/or a valid king mackerel gillnet endorsement on the date that Amendment 15 is approved (assuming approval) would be issued the applicable permits under the limited access system. Commercial vessel permits for king mackerel would become limited access permits and king mackerel gillnet endorsements would become king mackerel gillnet permits, upon their renewal. Other than the changes in the terminology, i.e., limited access versus moratorium, there would be no changes to the current procedures for application, qualification, issuance, renewal, or transferability of these permits.

### *Change the Fishing Year*

Amendment 15 would also change the fishing year for Atlantic migratory groups of king and Spanish mackerel to March 1 through February 28–29. The current fishing year for Atlantic migratory groups of both king and Spanish mackerel extends from April 1 through March 31. The commercial quota for Atlantic group king mackerel has only been met three times to date. However, should quotas need to be reduced in the future, there is a potential for the commercial quota to be met and the fishery to be closed prior to and through the end of the season (i.e., in March). A March closure could adversely affect the social and economic stability of South Atlantic mackerel fisheries due to the compounding effect of established seasonal commercial closures for alternative target species during that same month. For example, the red pogy fishery is closed January through April, and the gag and black grouper fishery is closed in March and April. By changing the opening date of the season to March 1, the Councils reduce the possibility of multiple overlapping or simultaneous commercial fishery closures.

### **Classification**

At this time, NMFS has not determined whether Amendment 15, which this rule would implement, is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account

the data, views, and comments received during the comment periods on Amendment 15 and on this proposed rule.

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

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

This proposed rule would establish a limited access system for the commercial fishery for Gulf and Atlantic group king mackerel and change the Atlantic migratory group king and Spanish mackerel fishing year to begin March 1 rather than the current April 1. The purpose of the proposed rule is to provide stability in the Southeast commercial king mackerel fishery as part of the overall strategy to achieve optimum yield and maximize the overall benefits to the Nation provided by the fishery and insure that the Atlantic group king mackerel fishery is open in March. The Magnuson-Stevens Act provides the statutory basis for the proposed rule.

No duplicative, overlapping, or conflicting Federal rules have been identified.

An estimated 1,740 vessels were permitted to fish for commercial king mackerel in 2003, down from 2,172 in 1998. Approximately half of the vessels with permits had logbook-reported landings, 1,066 in 1998 and 951 in 2003. The median annual gross revenue from all logbook-reported sales of finfish by these vessels ranged from approximately \$11,000 to \$12,000 during this period. The median percentage of gross revenues attributable to king mackerel ranged from 22 percent to 33 percent. Although participation in the fishery has declined since 1998, this decline has been voluntary and presumed attributable to economic conditions in this fishery and fishing in general and not due to regulatory restrictions. Although a permit moratorium has been in place in this fishery since 1998, permit transfer is not restricted, and those seeking to enter the fishery can purchase a permit from permit holders. Such transfers in fact occur, and 309 of the 1,740 permits in 2003 were permits that had been transferred since 1998.

Thus, entry into the fishery occurs; however, total participation, in terms of both the number of permits and the number of permitted vessels that land fish, has consistently declined since 1998, indicating that entry is not limited by a lack of available permits.

The proposed rule would affect all current participants in the fishery. The rule would similarly affect all entities interested in entering the fishery. No estimate of this number can be provided, though it is not expected to be substantial due to the decline in total participation in the fishery despite available entry opportunities.

The proposed rule would not change current reporting, recordkeeping, and other compliance requirements under the FMP. These requirements include qualification criteria for the commercial vessel permit and logbook landing reports. All of the information elements required for these processes are standard elements essential to the successful operation of a fishing business and should, therefore, already be collected and maintained as standard operating practice by the business. The requirements do not require professional skills; therefore, they are not deemed to be onerous.

One general class of small business entities would be directly affected by the final rule—commercial fishing vessels. The Small Business Administration defines a small business that engages in commercial fishing as a firm that is independently owned and operated, is not dominant in its field of operation, and has annual receipts up to \$3.5 million per year. Based on the revenue profiles provided above, all commercial entities operating in the king mackerel fisheries are considered small entities.

The proposed rule would apply to all entities that operate in the commercial king mackerel fishery and those entities interested in or seeking to enter the fishery. The proposed rule would, therefore, affect a substantial number of small entities.

Whether a rule has a “significant economic impact” can be ascertained by examining two issues: disproportionality and profitability. The disproportionality question is: Do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? All the vessel operations affected by the proposed rule are considered small entities, so the issue of disproportionality does not arise in the present case.

The profitability question is: Do the regulations significantly reduce profit for a substantial number of small

entities? The proposed rule would continue the limited access system in the fishery. Continuation of this system would be expected to increase profitability for the entities remaining in the fishery if participation continues to decline, as has occurred since 1998. Should the decline in participation cease, profits would be expected to continue at current levels. Should the fishery revert to open access, participation would be expected to increase, and average profit per participant would be expected to decline, possibly to the point of elimination of all profits from this fishery. The specification of the fishing year is essentially an administrative action, because no closures of either the Atlantic migratory group king or Spanish mackerel fisheries are expected. Thus, change of the start of the fishing year is not expected to have any effect on profits of fishery participants.

The proposed rule would continue the requirement to have a vessel permit in order to participate in the commercial king mackerel fishery. The cost of the permit is \$50, and renewal is required every other year (the permit is automatically renewed the second year). Because this is a current requirement, there would be no additional impacts on participant profits as a result of this requirement.

Three alternatives were considered to establishment of the proposed limited access system. The no action alternative would allow the fishery to revert to open access. Open access conditions would be expected to lead to an increase in the number of permitted vessels (1,740 vessels in 2003), or, at least, slow the rate of decline in participation that has occurred. Any increase in the number of vessels landing king mackerel would lead to an expected decrease in producer surplus from that in 2003, estimated at \$142,650 to \$380,400.

Two alternatives would continue the current moratorium on issuing new king mackerel commercial permits for 5 years or 10 years, respectively, compared to the proposed rule which would establish an indefinite limited access program. Thus, the fishery would continue as a limited access fishery under each of these alternatives. It is not possible to distinguish these alternatives from the proposed rule empirically in terms of fishery behavior using available data. However, it is not unreasonable to assume that fishermen believe that regardless of the duration of the program specified, a precedent for indefinite use of private market mechanisms to allow entry into the fishery has been established, given the

history of successfully functioning private markets for vessel permits. Thus, the outcomes of these three alternatives are expected to be functionally equivalent. As stated previously, under the current permit moratorium program, the fishery is estimated to have generated \$142,650 to \$380,400 in producer surplus. Assuming the increase in producer surplus mirrors the rate of fleet contraction exhibited from 1998 through 2003 (2.2 percent), the resultant estimates of producer surplus are approximately \$166,000 to \$443,000 by 2010, and \$185,000 to \$494,000 by 2015. Each alternative would also continue to provide for market-based compensation for vessels that exit the fishery, and the permit market would continue to provide an economically rational basis for regulating the entry of vessels into the commercial king mackerel fishery and allocating access to fishery resources among competing users in the commercial fisheries.

Although the preferred alternative would imply a more permanent system than the alternatives, the system established under any alternative could be suspended at any time through appropriate regulatory action. Establishing an indefinite duration, however, eliminates the need for action to continue the system at specific time intervals, thereby eliminating the costs associated with the regulatory process. The administrative and development cost of the current action is estimated to be \$200,000. Further, the preferred alternative may better address the Councils' purpose of providing stability in the commercial and recreational fisheries for king mackerel, preventing speculative entry into the commercial fisheries, and achieving optimum yield. The status quo alternative would not achieve the Councils' objectives.

Two alternatives are considered relative to the proposed change in the fishing year for Atlantic migratory group king and Spanish mackerel. The status quo alternative would maintain the current fishing year, April 1 through March 31, while a second alternative would establish a January 1 through December 31 fishing year. The Councils' objective is to insure that the Atlantic group mackerel fisheries are open in March, because other fishing opportunities are limited during this month. Both the preferred alternative and a January 1 opening would reduce the potential of a March closure, however, only the preferred alternative would guarantee such, absent a 0-lb (0-kg) quota. Thus, the preferred alternative best meets the Councils' objectives.

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

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

Dated: March 14, 2005.

#### Rebecca Lent

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service

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

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

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

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

2. In § 622.4, paragraphs (a)(2)(ii), (a)(2)(iii), (g)(1), (o), and (q) are revised to read as follows:

#### § 622.4 Permits and fees.

(a) \* \* \*

(2) \* \* \*

(ii) *Gillnets for king mackerel in the southern Florida west coast subzone.*

For a person aboard a vessel to use a run-around gillnet for king mackerel in the southern Florida west coast subzone (see § 622.42(c)(1)(i)(A)(3)), a commercial vessel permit for king mackerel and a king mackerel gillnet permit must have been issued to the vessel and must be on board. See paragraph (o) of this section regarding a limited access system applicable to king mackerel gillnet permits and restrictions on transferability of king mackerel gillnet permits.

(iii) *King mackerel.* For a person aboard a vessel to be eligible for exemption from the bag limits and to fish under a quota for king mackerel in or from the Gulf, Mid-Atlantic, or South Atlantic EEZ, a commercial vessel permit for king mackerel must have been issued to the vessel and must be on board. To obtain or renew a commercial vessel permit for king mackerel, at least 25 percent of the applicant's earned income, or at least \$10,000, must have been derived from commercial fishing (i.e., harvest and first sale of fish) or from charter fishing during one of the three calendar years preceding the application. See paragraph (q) of this section regarding a limited access system applicable to commercial vessel permits for king mackerel, transfers of permits under the limited access system, and limited exceptions to the earned income or gross sales requirement for a permit.

\* \* \* \* \*

(g) \* \* \*

(1) *Vessel permits, licenses, and endorsements and dealer permits.* A vessel permit, license, or endorsement or a dealer permit issued under this section is not transferable or assignable, except as provided in paragraph (m) of this section for a commercial vessel permit for Gulf reef fish, in paragraph (n) of this section for a fish trap endorsement, in paragraph (o) of this section for a king mackerel gillnet permit, in paragraph (p) of this section for a red snapper license, in paragraph (q) of this section for a commercial vessel permit for king mackerel, in paragraph (r) of this section for a charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Gulf reef fish, in § 622.17(c) for a commercial vessel permit for golden crab, in § 622.18(e) for a commercial vessel permit for South Atlantic snapper-grouper, or in § 622.19(e) for a commercial vessel permit for South Atlantic rock shrimp. A person who acquires a vessel or dealership who desires to conduct activities for which a permit, license, or endorsement is required must apply for a permit, license, or endorsement in accordance with the provisions of this section. If the acquired vessel or dealership is currently permitted, the application must be accompanied by the original permit and a copy of a signed bill of sale or equivalent acquisition papers.

\* \* \* \* \*

(o) *Limited access system for king mackerel gillnet permits applicable in the southern Florida west coast subzone.* Except for applications for renewals of king mackerel gillnet permits, no applications for king mackerel gillnet endorsements will be accepted. Application forms for permit renewal are available from the RA.

(1) An owner of a vessel with a king mackerel gillnet permit issued under this limited access system may transfer that permit upon a change of ownership of a permitted vessel with such permit from one to another of the following: Husband, wife, son, daughter, brother, sister, mother, or father. Such permit also may be transferred to another vessel owned by the same entity.

(2) A king mackerel gillnet permit that is not renewed or that is revoked will not be reissued. A permit is considered to be not renewed when an application for renewal is not received by the RA within one year after the expiration date of the permit.

\* \* \* \* \*

(q) *Limited access system for commercial vessel permits for king mackerel.* (1) No applications for additional commercial vessel permits

for king mackerel will be accepted. Existing vessel permits may be renewed, are subject to the restrictions on transfer or change in paragraphs (q)(2) through (q)(5) of this section, and are subject to the requirement for timely renewal in paragraph (q)(6) of this section.

(2) An owner of a permitted vessel may transfer the commercial vessel permit for king mackerel issued under this limited access system to another vessel owned by the same entity.

(3) An owner whose percentage of earned income or gross sales qualified him/her for the commercial vessel permit for king mackerel issued under this limited access system may request that NMFS transfer that permit to the owner of another vessel, or to the new owner when he or she transfers ownership of the permitted vessel. Such owner of another vessel, or new owner, may receive a commercial vessel permit for king mackerel for his or her vessel, and renew it through April 15 following the first full calendar year after obtaining it, without meeting the percentage of earned income or gross sales requirement of paragraph (a)(2)(iii) of this section. However, to further renew the commercial vessel permit, the owner of the other vessel, or new owner, must meet the earned income or gross sales requirement not later than the first full calendar year after the permit transfer takes place.

(4) An owner of a permitted vessel, the permit for which is based on an operator's earned income and, thus, is valid only when that person is the operator of the vessel, may request that NMFS transfer the permit to the income-qualifying operator when such operator becomes an owner of a vessel.

(5) An owner of a permitted vessel, the permit for which is based on an operator's earned income and, thus, is valid only when that person is the operator of the vessel, may have the operator qualification on the permit removed, and renew it without such qualification through April 15 following the first full calendar year after removing it, without meeting the earned income or gross sales requirement of paragraph (a)(2)(iii) of this section. However, to further renew the commercial vessel permit, the owner must meet the earned income or gross sales requirement not later than the first full calendar year after the operator qualification is removed. To have an operator qualification removed from a permit, the owner must return the original permit to the RA with an application for the changed permit.

(6) NMFS will not reissue a commercial vessel permit for king mackerel if the permit is revoked or if

the RA does not receive an application for renewal within one year of the permit's expiration date.

\* \* \* \* \*

3. In § 622.30, paragraph (b)(2) is revised, and paragraph (b)(3) is added to read as follows:

**§ 622.30 Fishing years.**

\* \* \* \* \*

(b) \* \* \*

(2) *Gulf migratory group Spanish mackerel* - April through March.

(3) *South Atlantic migratory group king and Spanish mackerel* - March through February.

\* \* \* \* \*

4. In § 622.44, paragraph (a)(2)(ii)(A) is revised to read as follows:

**§ 622.44 Commercial trip limits.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(A) *Gillnet gear.* (1) In the southern Florida west coast subzone, king mackerel in or from the EEZ may be possessed on board or landed from a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued, as required under § 622.4(a)(2)(ii), in amounts not exceeding 25,000 lb (11,340 kg) per day, provided the gillnet fishery for Gulf group king mackerel is not closed under § 622.34(p) or § 622.43(a).

(2) In the southern Florida west coast subzone:

(i) King mackerel in or from the EEZ may be possessed on board or landed from a vessel that uses or has on board a run-around gillnet on a trip only when such vessel has on board a commercial vessel permit for king mackerel and a king mackerel gillnet permit.

(ii) King mackerel from the southern west coast subzone landed by a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued will be counted against the run-around gillnet quota of § 622.42(c)(1)(i)(A)(2)(i).

(iii) King mackerel in or from the EEZ harvested with gear other than run-around gillnet may not be retained on board a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued.

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