

Dated: February 3, 2010.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 300

[Docket No. 070717350-9936-02]

RIN 0648-AV63

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Initial Implementation of the Western and Central Pacific Fisheries Convention; Correction

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

ACTION: Final rule; correction.

SUMMARY: This action corrects the effective date of final regulations published in the Federal Register on January 21, 2010, from February 22, 2010, to April 21, 2010. The rule establishes regulations needed to carry out the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention). The regulations include requirements related to permitting, vessel monitoring systems, vessel observers, vessel markings, reporting and recordkeeping, at-sea transshipment, and boarding and inspection on the high seas, among others. The rule will have the effect of requiring that all relevant U.S. fishing vessels are operated in conformance with the provisions of the Convention.

DATES: The effective date of the final regulations published in the Federal Register on January 21, 2010, at 75 FR 3335, is April 21, 2010.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS Pacific Islands Region, 808-944-2219.

SUPPLEMENTARY INFORMATION:

Need for Correction

In the document published January 21, 2010 (75 FR 3335), under the **DATES** section, the effective date of the final rule was erroneously stated as being

February 22, 2010. This document corrects the effective date to read as follows:

DATES: This final rule is effective April 21, 2010.

Authority: 16 U.S.C. 5501 et seq.; 16 U.S.C. 6901 et seq.

Dated: February 12, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 090122043-0025-02]

RIN 0648-AX37

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

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

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is issuing a final rule to prohibit the use of spearfishing gear in Gray's Reef National Marine Sanctuary (GRNMS or sanctuary). Possession of spearfishing gear is also prohibited except for vessels passing through the sanctuary without interruption, and only when the gear is stowed and not available for immediate use. Spearfishing can selectively target larger fish, and can significantly reduce abundance and alter the relative size structure of target species toward smaller fish. In addition, spearfishing can impact ecosystem health by altering the composition of the overall natural communities of species. The largest fish are important as predators in maintaining a balanced and complete ecosystem; their selective removal may cause ecological imbalance. Therefore, the prohibition provides protection to the fishes and natural live-bottom community for which the sanctuary was designated. The final rule also facilitates enforcement of an existing prohibition against the use of powerheads within the sanctuary. An environmental assessment has been prepared for this proposed action.

DATES: Effective Date: These regulations are effective on March 22, 2010.

ADDRESSES: Copies of the environmental assessment and the socio-economic study described in this rule are available upon request to Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411, Attn: Dr. George Sedberry, Superintendent. These documents can also be viewed on the Web and downloaded at <http://graysreef.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Stewardship Coordinator Becky Shortland at (912) 598-2381.

SUPPLEMENTARY INFORMATION:

I. Background

A. Gray's Reef National Marine Sanctuary

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

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

B. Need for Action

This regulation is being promulgated for two reasons. First, the action provides greater protection to sanctuary resources by removing a gear type that can be used to selectively target larger fish, and can thereby negatively alter the size structure of fish populations. While the number of recreational divers spearfishing at GRNMS appears to be

small, spearfishing is a highly efficient harvesting gear that allows larger fish to be selectively targeted relative to other fishing gears. Such fishing can significantly reduce abundance and alter the relative size structure of target species toward smaller fish. Some fish populations that are present in GRNMS are regionally overfished or approaching overfished status and researchers have commented on the lack of large snapper-grouper individuals at GRNMS.

Second, the action facilitates improved enforcement of an existing prohibition against the use of powerheads within the sanctuary. Powerheads, also sometimes referred to as bang sticks or shark sticks, are a specialized type of firearm intended for use underwater that employ an ammunition cartridge that fires upon direct contact with the target. Powerheads are often attached to the end of a spear gun and used for spear fishing, or may be used for self-defense underwater. Under existing GRNMS regulations, it is unlawful to injure, catch or harvest any marine resource within the sanctuary, by using a powerhead (50 CFR 922.02(a)(5)(i)).

Law enforcement officials have expressed the need to prohibit all spearfishing to enable them to more effectively enforce the existing powerhead prohibition. Although NOAA has prohibited the use of powerheads since the 1981 GRNMS designation, powerhead spear tips and spent shells are still found in GRNMS. Spearguns with a powerhead and without a powerhead are similar in appearance, which can make it much more difficult to detect and prove a violation of the powerhead prohibition. Prohibiting spearfishing in the sanctuary would make the restriction against powerheads more enforceable by law enforcement officers.

C. Previous Regulatory Action Regarding Spearfishing Gear

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

associated proposed rule (68 FR 62033, October 31, 2003).

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

Additional socioeconomic information was collected, analyzed and presented to the Sanctuary Advisory Council in September 2007. That information indicates no charter spearfishing activity and only a very small amount of private spearfishing activity within the GRNMS. Moreover, abundant opportunities to conduct spearfishing in nearby locations outside the sanctuary already exist. Copies of this report are available at the address and Web site listed in the **ADDRESSES** section of this rule.

D. Participation of the South Atlantic Fishery Management Council (SAFMC)

In accordance with Section 304(a)(5) of the NMSA (16 U.S.C. 1434(a)(5)) GRNMS provided the South Atlantic Fishery Management Council with the opportunity to prepare spearfishing regulations for the sanctuary.

In 2003, the SAFMC agreed with NOAA that spearfishing should be prohibited in the sanctuary and requested that NOAA promulgate the regulations. As previously discussed, however, after consideration of public comments on the Draft Environmental Impact Statement/Draft Management Plan (DEIS/DMP) and the proposed rule, NOAA concluded that additional information was needed and thus deferred taking regulatory action on spearfishing for two years. The final rule (71 FR 60055, October 12, 2006) stated that NOAA would assess socioeconomic factors of spearfishing in GRNMS and would conduct a study to determine the level of spearfishing and other fishing activities. NOAA would then determine what action to take, if any, given the additional data.

NOAA presented an update of this issue, including the additional socioeconomic information that had been collected, at the October 2007 meeting of the Joint Habitat/Ecosystem Based Management Advisory Panel of the SAFMC and again at the December 2007 and March 2008 SAFMC meetings. In June 2008, NOAA provided the SAFMC with the opportunity to prepare draft sanctuary fishing regulations concerning spearfishing activities for GRNMS, recommending that the

Council prohibit spearfishing. The SAFMC again concurred with the proposed ban on spearfishing, and requested that NOAA prepare the regulations.

II. Summary of the Changes to the Regulations

This rule amends the regulations for GRNMS by prohibiting the use of all spearfishing gear in the Sanctuary. Specifically, this rule eliminates the phrase "spearfishing gear without powerheads" from the list of allowable gear set forth at 15 CFR 922.92(a)(5)(i). This action also prohibits the possession of spearfishing gear in GRNMS, except when stowed on a vessel and not available for immediate use, and only while passing through the Sanctuary without interruption. Section 922.91(6) has also been revised for greater clarity and to correct an unintended result that was contained in the proposed rule (74 FR 9378, March 4, 2009). As proposed, possession of all fishing gear except rod and reel and handline gear would have been allowed in the Sanctuary only if it was stowed on a vessel, not available for immediate use, and only if the vessel was passing through the Sanctuary without interruption. As revised, the language of the amended regulation is consistent with the current regulations that were promulgated in 2006 and reflects NOAA's intent to allow vessels to enter and stop in the Sanctuary with types of fishing gear on board other than rod and reel and handline gear, (except spearfishing gear), provided that the gear is stowed and not available for immediate use. The requirement for uninterrupted passage is being applied only to vessels with spearfishing gear on board to facilitate enforcement of the prohibitions against spearfishing and the use of powerheads, as explained in greater detail in the responses to comments.

These and all regulations issued pursuant to the National Marine Sanctuaries Act are applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States, unless in accordance with: (1) Generally recognized principles of international law; (2) an agreement between the United States and the foreign state of which the person is a citizen; or (3) an agreement between the United States and the flag state of a foreign vessel, if the person is a crewmember of the vessel (16 U.S.C. 1435).

III. Classification

A. National Environmental Policy Act

NOAA has prepared an environmental assessment to evaluate the impacts of the rulemaking. A finding of no significant impact was issued on December 23, 2009. Copies are available at the address and Web site listed in the ADDRESSES section of this rule.

B. Executive Order 12866: Regulatory Impact

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

C. Executive Order 13132: Federalism Assessment

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

D. Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this final rule would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published with the proposed rule. No comments were received regarding this certification.

E. Paperwork Reduction Act

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

IV. Responses to Public Comments

1. *Comment:* The proposed rule should not be adopted.

Response: As a result of a thorough review of data, literature, surveys, and public and expert comment, NOAA has determined the proposed rule should be adopted to better protect sanctuary resources and facilitate the enforcement of the existing prohibition against the use of powerheads. Spearfishing can be used to selectively target larger fish, and can significantly reduce abundance and alter the relative size structure of target species toward smaller fish. In addition, spearfishing can impact ecosystem health by altering the composition of the

overall natural communities of species. The largest fish are important as predators in maintaining a balanced and complete ecosystem; their selective removal may cause ecological imbalance. Therefore, prohibition of all spearfishing gear in GRNMS will provide needed protection to the fishes and the overall natural live-bottom community for which the sanctuary was designated. In addition, the combination of the absence of charter spearfishing activity at GRNMS and the abundant substitution opportunities nearby lead to the conclusion that a prohibition on spearfishing at GRNMS would result in no measurable economic impact.

2. *Comment:* The proposed action will set a precedent of compromising fishing rights.

Response: NOAA disagrees that the action establishes a precedent. NOAA considers the need for regulations in each national marine sanctuary individually, based on a rigorous analysis of the circumstances at each location. The promulgation of a regulation in one sanctuary does not automatically result in an export of that regulation to other sanctuaries.

3. *Comment:* The decision to ban spearfishing gear in GRNMS was made on biased, unsubstantiated information; the action is unwarranted, discriminatory and arbitrary.

Response: NOAA disagrees. As noted in the response to comment #1, the action to ban spearfishing was carefully considered after evaluation of the best science available. The proposed rule is based on multiple, scientifically-sound, peer-reviewed studies of the biological impacts of spearfishing activities in numerous locations around the world.

The socioeconomic surveys and analysis methods were based on OMB-approved guidelines. These methods have been used in the past for other socioeconomic studies (e.g.: FKNMS, CINMS and Dry Tortugas Ecological Reserve in Florida.) The purpose of the socioeconomic review—which showed there would be little economic impact—was not to enumerate the number of spearfishermen, but to evaluate the overall economic impact of a ban, including alternatives to a ban.

In addition, GRNMS has learned that allowing spearfishing makes it difficult to enforce the prohibition against powerheads, due to the similarity in the gear. The decision to prohibit spearfishing is justified for this separate, additional reason. See response to comment 16, below.

4. *Comment:* Data are unclear or unknown regarding the percentages of take between spearfishing and rod and reel fishing.

Response: NOAA acknowledges that the percentage of take between spearfishing and rod and reel fishing is unknown, not only in GRNMS, but regionally. The current level of spearfishing activity at GRNMS is anticipated to be low and the corresponding level of take could also be low. It is known that rod and reel fishing comprises the majority of recreational fishing at GRNMS with the majority of rod and reel fishermen targeting coastal pelagic species around and during tournaments.

However, impacts from spearfishing and impacts from rod and reel fishing differ. Scientific evidence indicates that larger fish are favored targets of recreational spearfishermen. Spearfishing allows fishermen to more effectively select for larger individuals within target species populations. Spearfishing has been shown to remove greater biomass of reef fishes than rod and reel fishing relative to effort expended. Scientific research has also found that the intrinsic vulnerability of fish populations under pressure is exacerbated by spearfishing. SCUBA-supported spearfishing is likely to have a significantly greater catch per unit effort than non-SCUBA-supported spearfishing. The effectiveness and efficiency of SCUBA-supported spearfishing has resulted in bans on this activity in numerous parts of the world.

5. *Comment:* Fishing regulatory discard figures in the rulemaking are wrong.

Response: NOAA has reconsidered the 3 percent figure that was cited in the draft environmental assessment as regulatory discards by spearfishing. This figure does not apply to this action because the discards in the referenced study included lobster, which are not known to be a target of spearfishing at GRNMS. Nevertheless, the best available data on regulatory discards (fish caught but discarded due to size restrictions) indicates that a small percentage of fish speared may be discarded and that some percentage of fish also escape with spear induced injuries.

6. *Comment:* GRNMS lacks sufficient baseline data to determine the effect of the prohibition on spearfishing over time.

Response: NOAA disagrees that there is a lack of baseline information on fish size and abundance. NOAA has conducted visual fish censuses for almost 20 years, resulting in information on fish size and abundance in the sanctuary. NOAA anticipates that future censuses will provide information that can be used to detect a change in fish size and abundance over time.

7. *Comment:* GRNMS's assumption that spearfishing targets larger, more reproductively-valuable fish is incorrect for the following reasons:

- There is no scientific evidence that spearfishing targets larger fish and that taking larger fish decreases reproductive capacity of breeding stock;
- There is no scientific evidence to show there is more impact on specific kinds and sizes of fish from spearfishing than rod and reel fishing;
- Spearfishermen must harvest larger fish due to catch size limits;
- Spearfishermen do not harvest the larger fish because fish swim away from spearfishermen;
- Spearfishermen can harvest the largest and most prolific species in tropical clear water, but not in waters off Georgia where visibility is poor and target species are migratory in nature;
- The lack of larger individual fish at GRNMS may be due to lack of food supply and not spearfishing.

Response: Scientific evidence indicates that larger fish are favored targets of recreational spearfishermen. Spearfishing also allows fishermen to more effectively select for larger individuals within target species populations.

Spearfishing is an efficient harvesting activity that can significantly alter abundance and size structure of target species toward fewer and smaller fish by selective removal of larger individual fish. The removal of larger individual fish of the target species leaves behind smaller individuals to spawn. Over time this can decrease the size and age at sexual maturity and decrease the average size of the population.

Studies of areas where fishing pressure has been removed have shown that populations of spearfishing target species, often larger predatory fish such as snapper and grouper, have improved in size distribution and, often, in fish abundance. While a ban on spearfishing would result only in the removal of a small amount of fishing pressure at GRNMS, NOAA believes that the removal of selected targeting of larger predatory fish, which is typical of spearfishing, may result in more robust populations.

In addition, selectively removing larger individuals from populations of protogynous (sex-changing) species can make such populations susceptible to sperm limitation. This is especially true for species such as gag grouper, a regionally overfished, protogynous resident of GRNMS, that form small spawning aggregations. Vulnerable pre-spawning aggregations of gag occur at GRNMS.

Reduction in the larger predatory fishes can also have a "top-down" effect on fish assemblages by allowing other fish populations to increase, altering the composition of the overall natural community of species, including invertebrates. The largest fish are important as predators in maintaining a balanced and complete ecosystem; their selective removal may cause ecological imbalance.

Many snapper-grouper species of fish are regionally overfished or undergoing overfishing. All indications are that large individuals of the targeted snapper-grouper species in GRNMS are already limited. Large individual snapper-grouper fish are a source of reproductive abundance for the sanctuary. Recent research using tagging techniques is showing a high amount of site fidelity, versus migratory behavior, by individual snapper and grouper fish at GRNMS. All indications are that food supply for the top predator fish species is abundant in GRNMS.

Other studies of acoustically-tagged snapper and grouper fish in GRNMS also seem to indicate site fidelity, making these resident fish more vulnerable to spearfishing. Although the overall level of spearfishing at GRNMS is low, recent research suggests that a very low level of increased fishing pressure on the sanctuary's ledges could reduce local abundance of snapper-grouper complex species within a short amount of time. Compared to the no action alternative, the proposed action is expected to prevent potential negative impacts to the sanctuary's large predatory fish species. This may in turn have a positive effect on the larger ecosystem as a whole by maintaining its natural balance.

NOAA has found no scientific references indicating decreased visibility changes the preference of larger fish as the target for spearfishermen, or that spearfishermen are unable to harvest larger fish because the larger fish swim away from them.

8. *Comment:* A study of private, boat-based spearfishing should be done to show the full socioeconomic impact of the proposed rule.

Response: Although NOAA did not conduct a study of private, boat-based spearfishing, the socioeconomic study showed the existence of adequate substitution areas for spearfishing in the vicinity of GRNMS for charter boats. This suggests that there are nearby opportunities as well for private-boat based spearfishing. Therefore, NOAA believes that any potential displacement caused by the proposed action could be mitigated by the presence of substitution areas.

9. *Comment:* Spearfishing opportunities are limited outside of GRNMS; GRNMS is best location for small boats.

Response: The socioeconomic survey shows there are multiple—and preferred—substitution areas to spearfish in the vicinity. Some of these are at a shorter distance from shore than GRNMS and thus a good destination for smaller boats.

10. *Comment:* The proposed rule is unnecessary because there are so few people spearfishing in GRNMS; therefore, the no action alternative is preferred.

Response: While the current number of divers spearfishing within GRNMS appears to be small, as stated above (see response to comment #7), spearfishing is an efficient harvesting gear that selectively targets larger fish relative to other fishing gears and can significantly alter abundance and size structure of targeted species toward fewer and smaller fish. Prohibition of all spearfishing gear in GRNMS will enhance enforcement for the prohibition against the use of powerheads. Allowing spearfishing at any level undermines the enforcement of this restriction. In addition, although the overall level of spearfishing at GRNMS is low, recent research suggests that a very low level of increased fishing pressure on the sanctuary's ledges could reduce local abundance of snapper-grouper complex species within a short amount of time.

11. *Comment:* NOAA should establish zones in the sanctuary where spearfishing would be allowed and zones where spearfishing would be prohibited instead of banning spearfishing gear throughout the sanctuary; or NOAA should at least conduct controlled impact studies of spearfishing in GRNMS.

Response: Given the priorities for resource protection and research and the relatively small size of GRNMS, zoning for allowed and prohibited spearfishing activities would be less effective, more difficult to enforce, and provide less protection to sanctuary resources. The costs associated with zoning (e.g., controlled impact studies, outreach and public awareness) and the complexities for user compliance and law enforcement would also complicate management of the sanctuary.

12. *Comment:* Spearfishing is beneficial and should not be eliminated from GRNMS for the following reasons:

- Spearfishing is a selective form of fishing with no bycatch;
- There is no marine debris associated with spearfishing;
- Spearfishermen could contribute to research data.

Response: NOAA acknowledges that spearfishing generates little marine debris. Nevertheless, spearfishing gear and ammunition shells associated with powerhead use have been found discarded (*i.e.*, debris) on the bottom at GRNMS. The properties of spearfishing gear are quite selective and thus could result in low waste (*e.g.*, regulatory discards or bycatch). As stated above (*see* response to comment #5) NOAA has determined that the operation of spearfishing gear can result in some regulatory discard. Also, the benefit of selectivity is dependent upon what the fisherman is selecting for and the ability of the targeted fish population to sustain the pressure. As noted above, the selectivity of spearfishing gear allows spearfishermen to often remove large individuals within the target population. A slight increase in the fishing pressure at GRNMS could lead to significant impact. Studies of areas where fishing pressure has been removed have shown that populations of spearfishing target species, often larger predatory fish such as snapper and grouper, have improved in size distribution and, often, in fish abundance. Studies also show that spearfishing can alter fish behavior. Fish are learning to hide from divers and sometimes move to less beneficial habitat as a result.

13. *Comment:* The proposed rule would unfairly restrict the number of fish allocated to spearfishermen and unfairly restrict access to spearfishing harvest.

Response: As described above in the responses to comments 8 and 9, numerous and preferred alternatives exist in the vicinity of GRNMS for charter spearfishing, thus access and harvest opportunities are not unfairly restricted.

14. *Comment:* The proposed rule punishes law-abiding spearfishermen who don't use prohibited powerheads in GRNMS.

Response: The reason for this action is not only to facilitate enforcement of the powerhead ban. It is also to protect sanctuary resources from the impacts of all spearfishing activities.

15. *Comment:* If spearfishing is banned in GRNMS, rod and reel fishing should also be banned; where fishing is allowed, spearfishing should be allowed.

Response: Impacts from spearfishing and impacts from rod and reel fishing differ. *See* response to comment #7 above.

16. *Comment:* The law enforcement rationale to prohibit spearfishing gear in GRNMS is flawed for the following reasons:

- Spearfishermen using powerheads and powerheaded fish should be easy to detect;

- The fact that there have been no law enforcement cases made in GRNMS of spearfishermen using powerheads indicates that powerhead use is not an issue;

- Evidence of powerhead use in GRNMS is unsubstantiated;

- Prohibiting the use of spearfishing gear will not result in effective law enforcement due to limited law enforcement resources.

Response: Although the use of powerheads is prohibited at GRNMS, powerhead spear tips and spent shells found in the sanctuary indicate that this gear has been used since the ban went into place. Powerheads are so closely associated with spearguns that it is difficult to determine from a distance whether a speargun has a powerhead. Because the powerhead may be removed without detection upon approach by enforcement, there may be difficulties proving that a speargun with a powerhead was in the sanctuary. Proof may not be self-evident from the fish itself, which may require forensic testing to determine, if possible, the method of injury or harvest sufficient for evidentiary purposes. Law enforcement officials have expressed the desire to prohibit the use of all spearguns in order to effectively enforce the powerhead prohibition. While NOAA acknowledges the need to increase enforcement presence in sanctuaries in general, the proposed action will better protect resources within the sanctuary by facilitating effective enforcement of the existing prohibition against the use of powerheads.

17. *Comment:* Law enforcement efforts should be increased to address concerns on the use of powerheads instead of banning all spearfishing gear.

Response: *See* response to comment #16 above. The way that powerheads are designed and used make them difficult to distinguish from spearguns that are not equipped with powerheads. Increasing enforcement effort for an activity that may be extremely difficult to detect is also not an efficient or reasonable approach to addressing the issue.

18. *Comment:* Spearfishing gear (*i.e.*, powerhead) is easily stowed away when not in use, so enforcement relies largely on the rare coincidence of an officer watching while spearfishing gear is pulled out or is already in use.

Response: NOAA agrees that there is difficulty in enforcing the existing regulation prohibiting spearfishing with a powerhead because the gear can be

easily concealed or discarded without detection. *See* response to comment 19.

19. *Comment:* A complete ban on spearfishing gear in GRNMS will aid law enforcement in the sanctuary; powerhead equipment can be jettisoned without notice during an approach by law enforcement personnel.

Response: NOAA agrees that law enforcement will be greatly enhanced with a prohibition on all spearfishing gear and with the "no stopping" provision for transit if spearfishing gear is on board. As noted above, illegal powerhead spearfishing is difficult to detect when spearfishing gear is allowed. Powerheads are generally small attachments to spearfishing gear that allow the use of ammunition cartridges to harvest fish. The close association between a speargun and a powerhead makes it difficult for law enforcement officers to detect from a distance. A powerhead can also easily be jettisoned, hidden or dropped into the water.

20. *Comment:* NOAA should prohibit all non-research activities in GRNMS to enhance law enforcement capacity, which is subject to insufficient resources, and to achieve the purposes of the NMSA and GRNMS designation.

Response: The scope of this action is limited to problems related to spearfishing and enforcement of the prohibition of powerhead spearfishing in particular. Prohibiting spearguns is necessary to ensure adequate law enforcement of the powerhead prohibition. In addition to the primary purpose of resource protection under the National Marine Sanctuaries Act (NMSA), one of the purposes of the national marine sanctuaries is to "to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities" (16 U.S.C. 1431(b)(6)). Therefore, NOAA believes that banning all recreational activities throughout GRNMS to enhance law enforcement is not consistent with the purposes and policies of the NMSA.

21. *Comment:* No fishing of any kind should be permitted in any marine sanctuary.

Response: Each sanctuary in the national marine sanctuary system is unique. One of the purposes and policies of the NMSA is to "facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities." Given this mandate, NOAA must consider all uses of a marine sanctuary and make a

case-by-case determination of compatibility with the Act's primary objective of resource protection.

22. *Comment:* Spearfishing is a threat to the purpose and goals of GRNMS and the primary purpose of resource protection.

Response: NOAA agrees that given the circumstances and conditions at GRNMS continued spearfishing, particularly with powerheads, would make harvest of large snapper-grouper species more likely and could complicate achievement of GRNMS goals as outlined in the purposes for designation of the sanctuary and in the purposes and policies of the NMSA.

23. *Comment:* Although NOAA appears unable to provide specific data as to the quantity of spearfishing that occurs in GRNMS, a spearfishing ban will likely address at least one of the causes for declines in larger fish and fish populations and is worth adopting.

Response: As noted above, impacts from spearfishing and impacts from rod and reel fishing differ. Spearfishing has generally been shown to target larger fish and remove more biomass per unit of effort than recreational fishermen using rod and reel gear. A recent 2008 study found that free-diving (non-SCUBA) spearfishermen removed larger fish than rod and reel fishermen and that they removed more biomass per unit of effort, if baitfish are excluded. The study also noted that SCUBA-supported spearfishing is likely to have a significantly greater catch per unit of effort than that found in their study. The intrinsic vulnerability of fish populations under pressure is exacerbated by spearfishing. The effectiveness and efficiency of SCUBA-supported spearfishing have resulted in bans on this activity in numerous parts of the world.

A ban on spearfishing will protect resources. NOAA will continue to monitor fish size and abundance in GRNMS after the prohibition is in place, using that information to detect changes to the larger fish population over time. NOAA agrees that a ban on all spearfishing gear in GRNMS and a provision to transit without stopping if spearfishing gear is on board a vessel will enhance NOAA's ability to protect fish and other natural marine resources, particularly fish of the snapper-grouper species complex which are in decline regionally.

24. *Comment:* There should be no spearfishing allowed in GRNMS; a decline in abundance and size of targeted fish species in GRNMS is cause to ban spearfishing gear.

Response: NOAA has determined that the preferred alternative to prohibit all

spearfishing gear in GRNMS will enhance the capabilities of law enforcement to protect resources such as large, reproductively-valuable individual fish in the sanctuary. Compared to the no action alternative, the proposed action is expected to prevent potential negative impacts, and as a result to improve, measurably but not significantly, the condition of sanctuary's biological resources.

According to NOAA's National Marine Fisheries Service, some reef-associated fish species are regionally overfished (snowy grouper, black sea bass and red porgy), approaching overfished status (gag) and/or undergoing overfishing (vermillion snapper, red snapper, snowy grouper, red grouper, black sea bass, gag, speckled hind, warsaw grouper, tilefish and black grouper). Gag and scamp have decreased in abundance in visual census transects at GRNMS, and length-frequency measurements of black sea bass, gag and scamp (from trap and visual census data) indicate that a large portion of the population is removed upon reaching minimum size, either by fishing or by migration out of the sanctuary. The reduced abundance of selected key species may inhibit full community development and function in GRNMS.

25. *Comment:* Spearfishing by its nature encourages taking of reproductively mature (larger), more successful members of the fisheries communities at GRNMS; therefore, spearfishing should be banned in GRNMS.

Response: NOAA agrees. See response to comment #7.

26. *Comment:* Spearfishing activities are increasing; there is more efficiency with the current use of camouflage wetsuits, mirrored lenses in dive masks, and more powerful spearguns.

Response: NOAA shares concerns expressed by this commenter that gear is available to spearfishing enthusiasts for the purpose of increasing spearfishing harvest efficiency. That concern highlights the need to protect the limited resources in GRNMS from activities that could reduce predator fish abundance thus altering the natural live-bottom community of the sanctuary.

27. *Comment:* How will the presence of increased numbers of large predatory fish impact other smaller fish species and the availability of food for other residents of the reef?

Response: Increased numbers of large predatory fish in GRNMS would be expected to result in a more natural community balance. Scientists, in fact, have commented on the absence of numbers of large predatory fish which

would be expected to be found in GRNMS. Reduction/absence in the larger predatory fishes can have a "top-down" effect on fish assemblages by allowing other fish populations to increase, altering the composition of the overall natural community of species, including invertebrates. The largest fish are important as predators in maintaining a balanced and complete ecosystem; their selective removal causes ecological imbalance.

28. *Comment:* No studies have been done on the effects of the no-anchoring rule, which was banned in part to prevent spearfishermen from taking fish around anchor lines.

Response: The prohibition on anchoring in GRNMS was adopted to protect bottom habitat from anchor damage, thus enhancing the overall health of the sanctuary's natural systems that depend on the hard bottom and the invertebrates attached and growing (71 FR 60055). The purpose of the anchor prohibition was not related to the prevention of spearfishing around anchor lines.

29. *Comment:* Stop commercial fishing to protect fish instead of banning spearfishing gear in GRNMS.

Response: GRNMS regulations allow only rod and reel, handline, and spearfishing gear without powerheads. There is little to no indication that commercial fishing takes place in GRNMS.

30. *Comment:* Some spearfishermen may want to just dive without spearing in GRNMS when transiting through the sanctuary after a spearfishing trip further offshore, but they are not permitted to stop with spearfishing gear on board.

Response: NOAA considered an alternative allowing boats to stop in the sanctuary with spearfishing gear, provided it was stowed and unavailable for use. That alternative was eliminated because NOAA found that it did not meet the purpose and need for this action. The ability to more effectively enforce GRNMS regulations, one of the purposes of this action, would be further compromised under this alternative. Law enforcement officials have expressed concerns about enforcing a provision that would allow stopping when spearfishing gear is on board even if it is stowed.

31. *Comment:* Fishing pressure will increase on other areas outside of GRNMS, and/or rod and reel fishing will increase in GRNMS while spearfishing increases outside of GRNMS.

Response: NOAA acknowledges that fishing pressure could increase outside of GRNMS as a result of this action.

However, given the relatively small amount of spearfishing that seems to occur in GRNMS, and the indication from surveys that most spearfishing activity already occurs outside of the sanctuary, a prohibition on spearfishing is not likely to result in significant changes in fishing activities in or outside of the sanctuary.

32. *Comment:* Size limits could address the problem of spearfishing selectively targeting larger fish.

Response: NOAA interprets the comment to mean that rather than banning spearfishing altogether, NOAA should consider banning the take of large fish by spearfishing (*i.e.*, maximum size limit). The suggestion provided by the commenter would not address the powerhead ban enforcement issue, which is one of the purposes of this action.

33. *Comment:* NOAA should limit fishing to only those fish species that are not at risk (*e.g.*, king mackerel) to address the mandate to protect resources while allowing compatible uses.

Response: This comment is suggesting that NOAA should restrict all kinds of fishing activities and gear, limiting them only to fish species that are not at risk. This is beyond the scope of this action (*see response to comments #20, 21, 22*).

34. *Comment:* NOAA should postpone a decision on the proposed rule and work with spearfishermen to thoroughly research the issue.

Response: NOAA postponed its previous decision to ban spearfishing in 2006, for the purpose of gathering further socioeconomic information on the impact of a possible ban on all spearfishing in GRNMS. In addition, NOAA has thoroughly researched the possible detrimental effects to the natural marine resources of GRNMS that NOAA is mandated to protect. Therefore, NOAA is satisfied with the level of information on natural marine resources as well as socioeconomic impact used as a basis for this action.

V. References for Citations

All references that NOAA used as a basis for this rule may be found in the environmental assessment (EA), which is available as specified in the ADDRESSES section.

List of Subjects in 15 CFR Part 922

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

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: February 2, 2010.

Holly Bamford,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

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

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

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

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

■ 2. Amend § 922.92:

■ a. By revising paragraph (a)(5)(i);

■ b. By revising paragraph (a)(6);

■ c. And by adding a new paragraph (a)(11).

The revisions and addition read as follows:

§ 922.92 Prohibited or otherwise regulated activities.

(a) * * *

(5) * * *

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

* * * * *

(6) Using any fishing gear within the Sanctuary except rod and reel, and handline gear, or for law enforcement purposes.

* * * * *

(11) Possessing or carrying any fishing gear within the Sanctuary except:

(i) Rod and reel, and handline gear;

(ii) Fishing gear other than rod and reel, handline gear, and spearfishing gear, provided that it is stowed on a vessel and not available for immediate use;

(iii) Spearfishing gear provided that it is stowed on a vessel, not available for immediate use, and the vessel is passing through the Sanctuary without interruption; and

(iv) For law enforcement purposes.

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[FR Doc. 2010-2808 Filed 2-18-10; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 501

Announcement of Public Briefings on the Changes to the Labor Certification Process for the Temporary Agricultural Employment of H-2A Aliens in the United States

AGENCIES: Employment and Training Administration and Wage and Hour Division; Department of Labor.

ACTION: Notice of meeting.

SUMMARY: On February 12, 2010, the Department of Labor (the Department or DOL) amended the H-2A regulations at 20 CFR part 655 governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment. *See*, Temporary Agricultural Employment of H-2A Aliens in the United States, Final Rule, 75 FR 6884, Feb. 12, 2010 (the Final Rule). The Department's Final Rule also amended the regulations at 29 CFR part 501 to provide for enhanced enforcement when employers fail to meet their obligations under the H-2A program. The Department has also made changes to the *Application for Temporary Employment Certification*, ETA Form 9142.

The Final Rule will become effective on March 15, 2010. All H-2A program users will be required to file their applications under the new regulations, and to comply with all applicable program requirements.

The Department is issuing this notice to announce that it has scheduled three public briefings to educate stakeholders, program users, and other interested members of the public on changes to the H-2A program made by the Final Rule and on applying for H-2A temporary labor certifications under the new regulations using the ETA Form 9142.

As currently planned, the three briefings will take place in late February and early March of 2010 in San Diego, California; Dallas, Texas; and Raleigh, North Carolina. This notice provides the public with locations, dates, and registration information regarding the briefings. These briefings are subject to change and/or cancellation without further notice in the **Federal Register**. However, the Department will notify