

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 910650-1218]

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: The Secretary of Commerce changes the total allowable catch (TAC), allocations, quotas, and bag limits for the Atlantic and Gulf of Mexico migratory groups of king and Spanish mackerel in accordance with the framework procedure of the Fishery Management Plan for the Coastal Migratory Pelagic Resources (FMP). This notice: (1) For the Atlantic and Gulf migratory groups of king and Spanish mackerel, increases TAC and allocations; (2) for the Gulf migratory group of king mackerel in the eastern area (off Florida), removes the three-fish alternative bag limit available for persons fishing from charter vessels so that a bag limit of two per person per day applies throughout the eastern area without regard to the type of vessel; (3) for the Atlantic migratory group of king mackerel, removes the differential bag limits for northern and southern areas and increases the bag limit to five per person per day; and (4) for cobia, clarifies that the existing recreational/commercial daily bag limit of two per person applies regardless of the number of trips or the duration of a trip. The intended effects are to protect the coastal migratory pelagic resources from overfishing, continue stock rebuilding programs while still allowing catches by important recreational and commercial fisheries dependent on these resources, and clarify the regulations.

EFFECTIVE DATE: September 4, 1991.

FOR FURTHER INFORMATION CONTACT: Mark F. Godcharles, 813-893-3161.

SUPPLEMENTARY INFORMATION: The mackerel fisheries are regulated under the FMP, as amended, which was prepared jointly by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR part 642.

In accordance with the FMP and its implementing regulations, the Councils recommended, and NOAA published, a proposed rule containing changes in TACs, allocations, quotas, and bag

limits for king and Spanish mackerel (56 FR 29920, July 1, 1991). That notice: (1) Described the framework procedures of the FMP through which the Councils recommended changes in TACs, allocations, quotas, and bag limits; (2) specified the recommended changes; and (3) described the need and rationale for the recommended changes. Those descriptions are not repeated here; the specifications implemented by this final rule are the same as those in the proposed rule.

Comments and Responses

One letter commenting on the proposed changes was received during the comment period from the Florida Marine Fisheries Commission (Commission).

Comment

For the reasons listed below, the Commission opposes increasing the daily bag limit from two to five per person for Atlantic group king mackerel in the exclusive economic zone (EEZ) in the southern area off Florida. First, the higher bag limit will increase fishing mortality not only on the Atlantic group king mackerel but also on the overfished Gulf group king mackerel that may occur in the southeast Florida mixing zone during April-October. (During this period all king mackerel caught off the Florida east coast are considered to be Atlantic group king mackerel; during the remainder of the fishing year, November-March, they are considered Gulf group king mackerel.)

Second, the five-fish bag limit in the EEZ will increase confusion for Florida anglers and law enforcement officials. Initially, they experience a uniform two-fish king mackerel bag limit state-wide in Florida and adjacent Federal waters at the beginning of the fishing year. However, in recent years when the recreational allocation has been reached, the two-fish bag limit for the Gulf group has been reduced to zero in Federal waters and to one in State waters. These changing bag limits are especially confusing for Floridians who, as a result of the seasonal boundaries, can fish for both Atlantic and Gulf king mackerel groups during the year. To simplify the regulations, the Commission prefers retention of the two-fish bag limit within and without State waters for both Atlantic and Gulf groups of king mackerel until improved Gulf king mackerel stock conditions and subsequent increased allocations can support uninterrupted year-round harvest State-wide.

Third, if implemented, the five-fish bag limit for Atlantic group king

mackerel would impel Florida recreational interests to urge state and Federal managers to increase the bag limit for the overfished Gulf group king mackerel. Previous pressure from this group has been formidable. In 1988, their strong opposition to zero bag limits for the Gulf group king mackerel dissuaded the Commission from pursuing its preferred option. During the previous 1987/88 fishing year, the Commission implemented zero bag limits in state waters when the Federal quota for this group was reached, and bag limits were reduced to zero in Federal waters for the remainder of the season (December 16, 1987-July 31, 1988). For the 1988/89 fishing year, however, the Commission did not implement zero bag limits when the quota was reached mid-season, and bag limits again reverted to zero in Federal waters for the remainder of the fishing year (December 17, 1988-July 31, 1989). In response to the demands of recreational fishing interests, the Commission reduced the daily bag limit only to one per person in Florida waters for the remainder of the 1988/89 fishing year and subsequent fishing years (1989/90 and 1990/91) in response to the implementation of zero bag limits in the EEZ (May 21, 1990; December 20, 1991). The Commission asserts its preference to implement regulations compatible with Federal regulations and to continue rebuilding the Gulf group king mackerel. It suggests that realization of this endeavor would be achieved more readily through implementation of Federal regulations in the EEZ off Florida that do not conflict with State law.

Fourth, the Commission does not believe that the condition of the Atlantic group king mackerel is as healthy as the stock assessment panel has concluded. It fears that the present stock condition may not support the higher bag limit, even though stock assessments indicate that spawning biomass appears to be adequate and the Atlantic group king mackerel is not overfished. The Commission contends that catch indices for the past decade suggest a declining trend and that certain inherent biases (e.g., reliance on fishery-dependent data) in the stock assessment process may artificially inflate stock abundance. Furthermore, previous and recent testimony from Florida fishermen depicts a resource that is not as abundant as it was 10 years ago, although slight improvements have been noted following the prohibition of driftnet harvest under Amendment 3 (April 1990).

Finally, the Commission contends that Federal policy and law under E.O. 12612

and the Coastal Zone Management Act compel retention of the current two-fish bag limit in the southern area off Florida. Specifically, the Commission contends that an increase in the bag limit (1) interferes with the ability of Florida to develop its own policies to achieve program objectives, contrary to E.O. 12612; and (2) is not consistent to the maximum extent practicable with Florida's approved coastal zone management plan.

Response

NOAA supports the five-fish bag limit for Atlantic group king mackerel throughout the management area. Although, in the past, the Councils and NOAA have honored Florida's and other states' requests to establish in the EEZ bag limits for overfished mackerel groups that were compatible with state law, available scientific information and Federal law and policy do not support a continuation of the two-fish bag limit in the EEZ in the southern area off Florida. Rather, the data support the recommendation of the Councils to increase the bag limit to five throughout the management area. The Councils' recommendation was based mostly on information in the 1991 stock assessment and information received in public testimony.

The Commission's perception of a threat of increased fishing mortality on the overfished Gulf group king mackerel is unsupported by recent tagging information reviewed during the 1991 Stock Assessment. These data indicate that the proportion of Gulf group king mackerel in the Florida mixing zone has decreased, and the panel concluded that the current seasonal boundary, designed specifically to protect the Gulf group, should remain unchanged. The Panel will reconsider the boundary as new stock identification information from ongoing scientific studies (e.g., genetics and tagging) becomes available.

The threat of increased fishing mortality on the overfished Gulf group king mackerel resulting from public pressure to increase bag limits to levels set for the Atlantic group king mackerel could be detrimental only if concessions are granted that would undermine the rebuilding goals for the Gulf group. Increased bag limits for the Gulf group are inappropriate at this time. Such increases would be incongruent with the stock rebuilding program established in the FMP and would promote earlier filling of the quota and subsequent implementation of zero bag limits that would foster even greater negative impacts Gulfwide on the recreational fishing community.

NOAA disagrees that the recommended bag limit change for Atlantic group king mackerel will create confusion and bring about significant harm in terms of "voluntary compliance and effective law enforcement." NOAA believes that implementation of a uniform five-fish bag limit throughout the EEZ management area from New York through Florida would simplify the regulations. To reduce complexity and confusion even further, NMFS will request affected States to adjust their mackerel regulations to conform to the FMP. This endeavor is undertaken yearly to afford simplicity and compatibility between State/Federal regulations, thereby promoting compliance and enforceability. This initiative and the uniform bag limit for the Atlantic group king mackerel are consistent with national standard 3 requiring that an individual stock (group) be managed as a unit to the extent practicable.

The Councils' and NOAA's decision to establish a five-fish bag limit region-wide for Atlantic group king mackerel is based on the best available scientific information. As outlined in the FMP, the annual adjustment of mackerel specifications (TACs, commercial/recreational allocations, bag limits, etc.) is principally guided by the biological information in the annual stock assessment that is conducted and approved by State/Federal fishery scientists. From this year's report (1991), the Councils were apprised that Atlantic group king mackerel are not overfished. Spawning potential ratio is estimated at 48 percent, well above the recommended 30 percent level below which a stock is considered to be overfished. An improved condition and reduced uncertainty in the estimate of the stock were indicated by this year's reported modal value (11.5 million pounds, M) and range (9.6-15.5 M) of the acceptable biological catch (ABC). That modal value of ABC is almost 40 percent above last year's value of 8.3 M (1990 ABC range was 6.5-15.7 M). This 8.3 M level was recommended by the Councils and implemented by NOAA as the 1990/91 TAC. The Councils approved the 1991 report of the mackerel stock assessment panel and subsequently recommended an increase in TAC to 10.5 M for this 1991/92 fishing year. This TAC represents a 27 percent increase above last year's TAC. Nevertheless, it is conservatively set one million pounds below the modal ABC estimate and 5.2 million pounds below the upper ABC range.

The Councils also considered other information in formulating the five-fish

region-wide bag limit. In addition to recognizing that the Atlantic king mackerel group is not overfished, the Councils realized that the proposed 1991/92 TAC would increase the recreational allocation by 25 percent, and that last year's recreational catch reached only 57 percent of its allocation. The Councils and NOAA believe that the five-fish bag limit is a requisite for the achievement of optimum yield (OY) while preventing overfishing for this fishery, as mandated by national standard one of the Magnuson Fishery Conservation and Management Act (Magnuson Act) and objective one of the FMP. Denying Florida fishermen an opportunity to participate in the Councils' recommended allocation and bag limit increases for the 1991/92 fishing year would be inconsistent with these standards and also with national standard four that mandates fair and equitable allocation to all resource users. The Councils also believe that the increased bag limit may reverse economic declines in the charter vessel industry that have been attributed to the lower bag limits.

Catch information offered by the Commission concerning the health of Atlantic group king mackerel was considered by the Stock Assessment Panel. Although certain catch indices for the past 10 years show an apparent downward trend, they did not suggest a resource decline to the Panel. The 1991 stock assessment report concluded that "catches have remained stable since 1981." In offering this conclusion the Panel advised that a downward trend is not apparent under close examination of annual landings data. The report explained and warned that "comparisons of annual landings are confounded by regulations implemented which restricted landings." This statement also indicates that the state/Federal management regime is effectively regulating and reducing fishing effort and mortality.

NOAA believes that the rationale offered by the Councils in support of the five-fish bag limit for the Atlantic group king mackerel is consistent with Federal law and policy. The Councils' intent that the FMP supersede state law by increasing this bag limit is clear; that is, the state cannot limit the landing of Atlantic group king mackerel to two per person per day for fish caught in the EEZ. The increase is consistent with the Magnuson Act and other Federal law and not in contradiction to the Coastal Zone Management Act and E.O. 12612, as contended by the Commission. These two Federal directives are designed to guide the decision process to consider

state programs and policies; they do not dictate unilateral inflexibility.

In the recent implementation of Amendment 5 to the FMP (55 FR 29370), and as concluded in all past amendments and with the implementation of the FMP itself, the Councils determined that the FMP-related rules have been implemented "to the maximum extent practicable" with Florida's approved Coastal Zone Management Program. Clearly, the FMP as amended contemplates that Federal management plays a leading role in establishing bag limits, with states adjusting their limits in conformance with the Federal limit, not vice versa. Florida has previously adjusted its limit to accommodate the FMP and has never construed the FMP as inconsistent with Florida's coastal zone program.

Further, previous FMP actions that reduced bag limits in Federal waters to lower state levels were mainly resource based, i.e., Federal bag limits were lowered on overfished mackerel stocks to reduce mortality, prolong the harvest season, and rebuild spawning stock biomass. Similar rationale supported the 1988 establishment of a two-fish bag limit for the Atlantic group king mackerel in Federal waters off Florida, when lower catch limits were implemented in response to the stock assessment report that catches were near or slightly above full utilization. Consequently, NOAA perceives no disruption of previous consistency determinations resulting from the implementation of the five-fish bag limit for Atlantic group king mackerel in the EEZ off Florida.

This Federal action does not diminish the authority or jurisdiction of the state within its boundaries; the Federal bag limit supersedes state limits only with respect to what may be landed. NOAA believes the increase is necessary and appropriate for the conservation and management of king mackerel, and is necessary to carry out the FMP. NOAA acknowledges the desirability of compatible Federal/State regulations. However, the record clearly reflects the Councils' intent to establish a different measure in this instance.

The Regional Director concurs that the Councils' recommendations are necessary to protect the stocks and prevent overfishing and that they are consistent with the goals and objectives of the FMP, the Magnuson Act, and other applicable law. Accordingly, the Councils' recommended changes are implemented.

The changes in allocations and quotas are effective for the Atlantic migratory groups of king and Spanish mackerel

and the Gulf group of Spanish mackerel for the fishing year that began on April 1, 1991, and for the Gulf migratory group of king mackerel for the fishing year that began July 1, 1991. The Councils submitted this action to the Southeast Regional Director on May 17, 1991. The proposed rule was published on July 1, 1991, and the 15-day public comment period ended on July 16, 1991. Because the changes herein for mackerel allocations, quotas, and bag limits are established for fishing years that have already commenced, the Assistant Administrator for Fisheries, NOAA, finds for good cause, namely, to provide effective conservation and management of the coastal migratory pelagic resources, that it is impracticable and contrary to the public interest to delay for 30 days the effective date of this rule under the provisions of section 553(d)(3) of the Administrative Procedure Act.

Other Matters

This action is authorized by 50 CFR 642.27 and complies with E.O. 12291.

List of Subjects in 50 CFR Part 642

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 3, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 642 is amended as follows:

PART 642—COASTAL MIGRATORY PELAGIC RESOURCES OF THE GULF OF MEXICO AND SOUTH ATLANTIC

1. The authority citation for part 642 continues to read as follows:

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

§ 642.21 [Amended]

2. In § 642.21, the numbers are revised in the following places to read as follows:

Paragraph	Re- moved	Added
(a)(1), first sentence	1.36	1.84
(a)(1)(i)	0.94	1.27
(a)(1)(ii)	0.42	0.57
(a)(2), first sentence	3.08	3.90
(b)(1)	2.89	3.91
(b)(2)	5.22	6.60
(c)(1)	2.99	4.90
(c)(2)	3.14	3.50
(d)(1)	2.26	3.70
(d)(2)	1.86	3.50

3. In § 642.28, paragraphs (a)(1), (a)(3)(i), (a)(3)(ii) introductory text, and (b) are revised to read as follows:

§ 642.28 Bag and possession limits.

(a) * * *

(1) *Bag limits.* A person who fishes for king or Spanish mackerel from the Gulf or Atlantic migratory group in the EEZ, except a person fishing under a permit specified in § 642.4(a)(1) and an allocation specified in § 642.21 (a) or (c), or possessing the purse seine incidental catch allowance specified in § 642.24(d), is limited to the following:

(i) *King mackerel Gulf migratory group.*

(A) *Eastern area.* Possessing two king mackerel per person per day.

(B) *Central and western areas.*

(1) Possessing three king mackerel per person per day, excluding the operator and crew, or possessing two king mackerel per person per day, including the operator and crew, whichever is the greater, when fishing from a charter vessel.

(2) Possessing two king mackerel per person per day when fishing from other vessels.

(ii) *King mackerel Atlantic migratory group.* Possessing five king mackerel per person per day.

(iii) *Spanish mackerel Gulf migratory group.*

(A) *Eastern area.* Possessing five Spanish mackerel per person per day.

(B) *Central area.* Possessing ten Spanish mackerel per person per day.

(C) *Western area.* Possessing three Spanish mackerel per person per day.

(iv) *Spanish mackerel Atlantic migratory group.*

(A) *Northern area.* Possessing ten Spanish mackerel per person per day.

(B) *Southern area.* Possessing five Spanish mackerel per person per day.

* * *

(3) * * *

(i) For the purpose of paragraph (a)(1)(iv) of this section, the boundary between the northern and southern areas is a line extending directly east from the Georgia/Florida boundary (30°42'45.6"N. latitude) to the outer limit of the EEZ.

(ii) For the purposes of paragraphs (a)(1)(i) and (a)(1)(iii) of this section.

* * *

(b) *Cobia.* The daily bag and possession limit for cobia in or from the EEZ of the Gulf of Mexico and the Atlantic Ocean south of the Virginia/North Carolina border is two fish per person, regardless of the number of trips or duration of a trip and without regard to whether the cobia are taken aboard a vessel with a commercial permit.

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