
DEPARTMENT OF COMMERCE

**National Oceanic and Atmospheric
Administration**

50 CFR Part 640

[Docket No. 950424112-6201-02; LD.
0320958]

RIN 0648-AF37

**Spiny Lobster Fishery of the Gulf of
Mexico and South Atlantic;
Amendment 4**

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to
implement Amendment 4 to the Fishery
Management Plan for the Spiny Lobster
Fishery of the Gulf of Mexico and South
Atlantic (FMP). Amendment 4 allows
the harvest of spiny lobster year-round
and establishes a daily bag or possession
limit of two spiny lobster per person in
the exclusive economic zone off North
Carolina, South Carolina, and Georgia.

EFFECTIVE DATES: September 13, 1995,
except for § 640.23(a) and (b) which will
be effective [September 21, 1995. The
incorporations by reference of certain
sections of the Florida Administrative
Code and Florida Statutes are approved
by the Director of the Office of the
Federal Register as of September 13,
1995.

FOR FURTHER INFORMATION CONTACT:
Georgia Cranmore, 813-570-5305.

SUPPLEMENTARY INFORMATION: The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils). The FMP is implemented through regulations at 50 CFR part 640 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Detailed descriptions, backgrounds, and rationales for the management measures in Amendment 4 and the additional measures proposed by NMFS were included in the preamble to the proposed rule (60 FR 21493, May 2, 1995) and are not repeated here.

Comments and Responses

Four written comments were received on the proposed rule. One of the Councils' advisory panel members strongly supported this action.

Three recreational divers opposed Amendment 4 because of a perceived risk to lobster stocks from the elimination of the spawning season closure. These three commenters also believe that this action will seriously increase recreational taking of lobsters off North Carolina. Two of the three commenters recommended a monitoring system to determine the number of recreational divers, catch, and size of lobsters before taking this action. One of those commenters opposed to Amendment 4 questioned the data contained in the amendment regarding the depth at which the fishery is prosecuted and the size of available lobsters. This commenter submitted a videotape to the South Atlantic Fishery Management Council office that purports to show lobsters common at depths from 45 to 100 ft (13.7 to 30.5 m) and significant populations of small lobsters in these waters, e.g., carapace lengths less than 1 inch (2.54 cm).

NMFS notes that there is scientific debate regarding the biological status and population dynamics of spiny lobsters in waters north of Florida, including the issue of recruitment and the fate of larvae from the adult population in this area. However, based on the best available scientific information, NMFS and the Councils believe that allowing a limited year-round harvest in the subject area will have no adverse biological impacts on the lobster stocks.

Some divers believe that the spawning season off North Carolina does not begin until July, due to the colder water temperatures. They reported seeing egg-bearing lobsters as late as early October. Thus, the current spawning season closure from April through July, based on data from Florida, may not be particularly relevant to the area north of Florida. Amendment

4 would not change the current prohibition on taking egg-bearing female lobsters.

NMFS believes that a monitoring system for this fishery would not be cost-effective. Our surveys indicate that there are only a small number of participants in the spiny lobster fishery north of Florida. The South Atlantic Council intends to monitor the fishery to determine the need for further management actions, including a possible reduction in the bag limit.

According to testimony at public hearings on Amendment 4, the fishery takes place about 30 nautical miles (55.6 km) offshore in at least 100 ft (30.5 m) of water. A typical dive at these depths lasts less than 30 minutes. Lobsters harvested ranged from 2 to 16 lb (0.9 to 7.3 kg). Comments on the proposed rule contradicted this testimony and raised questions about the potential for significant increases in recreational take and the availability of undersized lobster in the area.

If lobsters are found in relatively shallow water that is accessible to most recreational divers, there is a possibility of an increase in participation due to the year-round harvest. However, a recent NMFS survey indicated that only a small number of recreational divers harvested spiny lobster north of Florida. Comments on the proposed rule also indicate the possible presence of significant numbers of undersized lobsters, i.e., with carapace lengths less than 3 inches (7.62 cm), increasing the possibility of taking undersized lobsters in this fishery. The presence of subadult lobsters was not reported during public hearings on Amendment 4.

NMFS is concerned about the new information that arose during the public comment period on the proposed rule, since this information was not available to the Councils when they approved Amendment 4. However, NMFS has reviewed the administrative record on the Councils' decision and has determined that this new information does not outweigh the record underlying the Councils' decision. Consequently, NMFS approved Amendment 4 with the expectation that the Councils will consider this new information during development of a subsequent FMP amendment.

Incorporation by Reference of Florida Statutes and Regulations

As explained in the proposed rule, NMFS is adding language to the regulatory text of the regulations implementing the FMP to ensure that the incorporations by reference of certain portions of the Florida Statutes (FS) and Florida Administrative Code

(FAC) meet procedural specifications of the Office of the Federal Register. NMFS has determined that the references at 50 CFR 640.6(a)(1) to sections 370.14 and 370.142, FS, are unnecessarily broad. The references are in the context of vessel and gear identification requirements applicable to the harvesting of spiny lobsters by traps in Florida's waters. However, such requirements are contained in only three paragraphs of those sections. Accordingly, in this final rule, the references are changed to sections 370.14(2)(a) and (3) and 370.142(2)(b), FS.

The current references are to the portions of the FS and FAC as specified on November 30, 1992. In the proposed rule and this final rule the references are to the FS in effect as of July 1, 1994, and FAC in effect as of June 1, 1994, the dates of the currently effective referenced portions. This change is necessary in order for fishermen to have access to the referenced portions—earlier versions are not readily available. The following changes, none of which are substantive, have been made to the referenced FS and FAC since November 30, 1992:

Section 370.142, FS - paragraph (2)(c) has been removed. The paragraph contained identification requirements for recreational spiny lobster traps. However, those requirements were duplicative of requirements for all traps, as contained in FS 370.14(2)(a) and 370.142(2)(b).

Rule 46-24.002(2), FAC - As of November 30, 1992, this rule specified August 1, 1993, as the beginning date that a restricted species endorsement would be required on the Florida saltwater products license in order to be a commercial harvester of spiny lobsters. That date was changed to August 1, 1994. However, since the reference to this rule was not included in the Federal Register until October 21, 1994, the change in date is inconsequential.

In several paragraphs of the referenced FS and FAC "Department of Natural Resources" was changed to "Department of Environmental Protection."

Changes from the Proposed Rule

As discussed above, the references to sections 370.14 and 370.142, FS, have been changed.

Classification

The Director, Southeast Region, NMFS, determined that Amendment 4 is necessary for the conservation and management of the spiny lobster fishery of the Gulf of Mexico and South

Atlantic and that it is consistent with the Magnuson Act and other applicable law.

This action has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when the proposed rule was published that it would not have a significant economic impact on a substantial number of small entities. The reasons for this certification were published in the preamble to the proposed rule (60 FR 21493, May 2, 1995). As a result, a regulatory flexibility analysis was not prepared.

The incorporation by reference of certain sections of the Florida Administrative Code and Florida Statutes does not constitute a substantive rule, as they are not changing the regulation, but, rather, are correcting the process by which those sections were previously incorporated. Thus, pursuant to 5 U.S.C. 553(d) there is no need to delay the effective date of those provisions. Additionally, due to the fact that the fishery for spiny lobster opened on August 6, 1995, the Assistant Administrator for Fisheries, NOAA, finds that good cause exists, under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date with respect to the provisions of this rule that specify the daily bag or possession limit of spiny lobster. The conservation and management needs that lead NMFS to impose the limit, as described in the proposed rule, along with the fact that it takes little, if any, time to come into compliance with such a limit make a delay in effective date contrary to the public interest and unnecessary, respectively. However, in order to provide time for notice of the bag limit to be provided to fishermen, NMFS will delay the effective date of this provision for 7 days.

List of Subjects in 50 CFR Part 640

Fisheries, Fishing, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: August 9, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 640 is amended as follows:

PART 640—SPINY LOBSTER FISHERY OF THE GULF OF MEXICO AND SOUTH ATLANTIC

1. The authority citation for part 640 continues to read as follows:

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

2. In § 640.2, definitions for "Off the Gulf states, other than Florida" and "Off the southern Atlantic states, other than Florida" are added, in alphabetical order, to read as follows:

§ 640.2 Definitions.

Off the Gulf states, other than Florida means the area from the coast to the outer limit of the EEZ between the Texas/Mexico border to the Alabama/Florida boundary (87°31'06" W. long.).

Off the southern Atlantic states, other than Florida means the area from the coast to the outer limit of the EEZ between the Virginia/North Carolina boundary (36°34'55" N. lat.) to the Georgia/Florida boundary (30°42'45.6" N. lat.).

3. In § 640.4, paragraph (a)(1) is revised to read as follows:

§ 640.4 Permits and fees.

(a) * * *

(1) *Licenses, certificates, and permits*—(i) *EEZ off Florida and spiny lobster landed in Florida*. For a person to sell, trade, or barter, or attempt to sell, trade, or barter, a spiny lobster harvested or possessed in the EEZ off Florida, or harvested in the EEZ other than off Florida and landed from a fishing vessel in Florida, or for a person to be exempt from the daily bag and possession limit specified in § 640.23(b)(1) for such spiny lobster, such person must have the licenses and certificates specified to be a "commercial harvester," as defined in Rule 46-24.002(2), Florida Administrative Code, in effect as of June 1, 1994. This incorporation by reference was approved by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Florida Marine Fisheries Commission, 2540 Executive Center Circle West, Suite 106, Tallahassee, FL 32301; telephone: 904-487-0554. Copies may be inspected at the Office of the Regional Director; the Office of Fisheries Conservation and Management, NMFS, 1315 East-West Highway, Silver Spring, MD; or the Office of the Federal Register, 800 North Capitol Street NW, Suite 700, Washington, DC.

(ii) *EEZ other than off Florida*. For a person to sell, trade, or barter, or

attempt to sell, trade, or barter, a spiny lobster harvested in the EEZ other than off Florida or for a person to be exempt from the daily bag and possession limit specified in § 640.23(b)(1) for such spiny lobster, a Federal vessel permit must be issued to the harvesting vessel and must be on board. However, see paragraph (a)(1)(i) of this section for the licenses and certificates required for a person to possess or land spiny lobster harvested in the EEZ other than off Florida and subsequently possessed in the EEZ off Florida or landed from a fishing vessel in Florida.

4. In § 640.6, in paragraph (c), the word "Secretary" is revised to read "Assistant Administrator" and paragraph (a) is revised to read as follows:

§ 640.6 Vessel and gear identification.

(a) *EEZ off Florida*. (1) An owner or operator of a vessel that is used to harvest spiny lobsters by traps in the EEZ off Florida must comply with the vessel and gear identification requirements applicable to the harvesting of spiny lobsters by traps in Florida's waters in sections 370.14(2)(a) and (3) and 370.142(2)(b), Florida Statutes, in effect as of July 1, 1994, and in Rule 46-24.006(3), (4), and (5), Florida Administrative Code, in effect as of June 1, 1994.

(2) An owner or operator of a vessel that is used to harvest spiny lobsters by diving in the EEZ off Florida must comply with the vessel identification requirements applicable to the harvesting of spiny lobsters by diving in Florida's waters in Rule 46-24.006(6), Florida Administrative Code, in effect as of June 1, 1994.

(3) The incorporation by reference in paragraphs (a)(1) and (a)(2) of this section of sections 370.14(2)(a) and (3) and 370.142(2)(b), Florida Statutes, and Rule 46-24.006(3), (4), (5), and (6), Florida Administrative Code, was approved by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Florida Marine Fisheries Commission, 2540 Executive Center Circle West, Suite 106, Tallahassee, FL 32301; telephone: 904-487-0554. Copies may be inspected at the Office of the Regional Director; the Office of Fisheries Conservation and Management, NMFS, 1315 East-West Highway, Silver Spring, MD; or the Office of the Federal Register, 800 North Capitol Street NW, Suite 700, Washington, DC.

§ 640.7 [Amended]

5. In § 640.7, in paragraph (e), the reference to "§ 640.20 (c)(1) and (c)(2)" is revised to read "§ 640.20(b)(3)(i) and (b)(3)(ii)"; in paragraph (f), the reference to "§ 640.20(d)" is revised to read "§ 640.20(b)(4)"; in paragraph (p), the reference to "§ 640.23(a) or (b)" is revised to read "§ 640.23(a), (b)(1), or (b)(2)" and the reference to "§ 640.23(c) and (d)" is revised to read "§ 640.23(b)(3) and (b)(4)"; in paragraph (q), the reference to "§ 640.23(d)" is revised to read "§ 640.23(b)(4)"; in paragraph (r), the reference to "§ 640.23(g)" is revised to read "§ 640.23(d)"; and in paragraph (s), the reference to "§ 640.23(h)" is revised to read "§ 640.23(e)".

6. Section 640.20 is revised to read as follows:

§ 640.20 Seasons.

(a) *EEZ off the southern Atlantic states, other than Florida.* In the EEZ off the southern Atlantic states, other than Florida, there are no seasonal restrictions on the harvest of spiny lobster or on the possession of traps.

(b) *EEZ off Florida and off the Gulf states, other than Florida—(1) Commercial and recreational fishing season.* The commercial and recreational fishing season for spiny lobster in the EEZ off Florida and the EEZ off the Gulf states, other than Florida, begins on August 6 and ends on March 31.

(2) *Special recreational fishing seasons—(i) EEZ off Florida.* There is a 2-day special recreational fishing season in the EEZ off Florida on the last Wednesday and successive Thursday of July each year during which fishing for spiny lobster is limited to diving or use of a bully net or hoop net. (See § 640.22(a) for general prohibitions on gear and methods.) In the EEZ off Monroe County, Florida, no person may harvest spiny lobster by diving at night, that is, from 1 hour after official sunset to 1 hour before official sunrise, during this 2-day special recreational fishing season.

(ii) *EEZ off the Gulf states, other than Florida.* There is a 2-day special recreational fishing season in the EEZ off the Gulf states, other than Florida, during the last Saturday and successive Sunday of July each year during which fishing for spiny lobster may be conducted by authorized gear and methods other than traps. (See § 640.22(a) for general prohibitions on gear and methods.)

(3) *Possession of traps.* (i) In the EEZ off Florida, the rules and regulations applicable to the possession of spiny lobster traps in Florida's waters in Rule

46-24.005(3), (4), and (5), Florida Administrative Code, in effect as of June 1, 1994, apply in their entirety to the possession of spiny lobster traps in the EEZ off Florida. This incorporation by reference was approved by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Florida Marine Fisheries Commission, 2540 Executive Center Circle West, Suite 106, Tallahassee, FL 32301; telephone: 904-487-0554. Copies may be inspected at the Office of the Regional Director; the Office of Fisheries Conservation and Management, NMFS, 1315 East-West Highway, Silver Spring, MD; or the Office of the Federal Register, 800 North Capitol Street NW, Suite 700, Washington, DC.

(ii) In the EEZ off the Gulf states, other than Florida, a spiny lobster trap may be placed in the water prior to the commercial and recreational fishing season, which is specified in paragraph (b)(1) of this section beginning on August 1 and must be removed from the water after such season not later than April 5.

(iii) A spiny lobster trap, buoy, or rope in the EEZ off Florida or in the EEZ off the Gulf states, other than Florida, during periods not authorized in paragraphs (b)(3)(i) and (b)(3)(ii) of this section will be considered unclaimed or abandoned property and may be disposed of in any manner considered appropriate by the Assistant Administrator or an authorized officer. An owner of such trap, buoy, or rope remains subject to appropriate civil penalties.

(4) *Possession of spiny lobsters.* In the EEZ off Florida and the Gulf states, a whole or a part of a spiny lobster subject to these regulations may only be possessed during the commercial and recreational fishing season and the special recreational fishing season specified in § 640.20, unless accompanied by proof of lawful harvest in the waters of a foreign nation. Consistent with the provisions of paragraphs (b)(3)(i) and (ii) of this section, a spiny lobster in a trap in this area will not be deemed to be possessed provided such spiny lobster is returned immediately to the water unharmed when a trap is removed from the water between March 31 and April 15.

(c) *Primacy of seasonal restrictions in the EEZ off Florida.* The seasonal restrictions applicable in the EEZ off Florida apply to all spiny lobsters and traps in the EEZ off Florida, without regard to harvest or use elsewhere, unless accompanied by proof of lawful harvest elsewhere.

7. In § 640.22, a sentence is added to the end of paragraph (a)(1) and paragraph (b)(3)(i) is revised to read as follows:

§ 640.22 Gear and diving restrictions.

(a) * * *

(1) * * * Hook, as used in this paragraph (a)(1), does not include a hook in a hook-and-line fishery for species other than spiny lobster; and possession of a spiny lobster that has been speared, pierced, or punctured by such hook is not considered evidence that prohibited gear was used to take the spiny lobster, provided no prohibited gear is on board the vessel.

(b) * * *

(3) * * *

(i) For traps in the EEZ off Florida, by the Florida Division of Law Enforcement, Department of Environmental Protection, in accordance with the procedures in Rule 46-24.006(7), Florida Administrative Code, in effect as of June 1, 1994. This incorporation by reference was approved by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Florida Marine Fisheries Commission, 2540 Executive Center Circle West, Suite 106, Tallahassee, FL 32301; telephone: 904-487-0554. Copies may be inspected at the Office of the Regional Director; the Office of Fisheries Conservation and Management, NMFS, 1315 East-West Highway, Silver Spring, MD; or the Office of the Federal Register, 800 North Capitol Street NW, Suite 700, Washington, DC.

8. Section 640.23 is revised to read as follows:

§ 640.23 Bag/possession limits.

(a) *EEZ off the southern Atlantic states, other than Florida.* The daily bag or possession limit for spiny lobster in or from the EEZ off the southern Atlantic states, other than Florida, is two per person for commercial and recreational fishing, year-round.

(b) *EEZ off Florida and off the Gulf states, other than Florida—(1) Commercial and recreational fishing season.* Except as specified in paragraphs (b)(3) and (b)(4) of this section, during the commercial and recreational fishing season specified in § 640.20(b)(1), the daily bag or possession limit of spiny lobster in or from the EEZ off Florida and off the Gulf states, other than Florida, is six per person.

(2) *Special recreational fishing seasons.* During the special recreational

fishing seasons specified in § 640.20(b)(2), the daily bag or possession limit of spiny lobster—

(i) In or from the EEZ off the Gulf states, other than Florida, is six per person;

(ii) In or from the EEZ off Florida other than off Monroe County, Florida, is twelve per person; and

(iii) In or from the EEZ off Monroe County, Florida, is six per person.

(3) *Exemption from the bag/possession limit.* During the commercial and recreational fishing season specified in § 640.20(b)(1), a person is exempt from the bag and possession limit specified in paragraph (a) of this section, provided—

(i) The harvest of spiny lobsters is by diving, or by the use of a bully net, hoop net, or spiny lobster trap; and

(ii) The vessel from which the person is operating has on board the required licenses, certificates, or permits, as specified in § 640.4(a)(1).

(4) *Harvest by net or trawl.* During the commercial and recreational fishing season specified in § 640.20(b)(1), aboard a vessel with the required licenses, certificates, or permits specified in § 640.4(a)(1) that harvests spiny lobster by net or trawl or has on board a net or trawl, the possession of

spiny lobster in or from the EEZ off Florida and off the Gulf states, other than Florida, may not exceed at any time 5 percent, whole weight, of the total whole weight of all fish lawfully in possession on board such vessel. If such vessel lawfully possesses a separated spiny lobster tail, the possession of spiny lobster in or from the EEZ may not exceed at any time 1.6 percent, by weight of the spiny lobster or parts thereof, of the total whole weight of all fish lawfully in possession on board such vessel. For the purposes of this paragraph (b)(4), the term "net or trawl" does not include a hand-held net, a loading or dip net, a bully net, or a hoop net.

(5) *Diving at night.* The provisions of paragraph (b)(3) of this section notwithstanding, a person who harvests spiny lobster in the EEZ by diving at night, that is, from 1 hour after official sunset to 1 hour before official sunrise, is limited to the bag limit specified in paragraph (b)(1) of this section, whether or not a Federal vessel permit specified in § 640.4(a)(1) has been issued to and is on board the vessel from which the diver is operating.

(c) *Combination of bag/possession limits.* A person who fishes for or

possesses spiny lobster in or from the EEZ under a bag or possession limit specified in paragraph (a) or (b) of this section may not combine the bag or possession limits of those paragraphs or combine such bag or possession limit with a bag or possession limit applicable to state waters.

(d) *Responsibility for bag/possession limits.* The operator of a vessel that fishes for or possesses spiny lobster in or from the EEZ is responsible for the cumulative bag or possession limit specified in paragraphs (a) and (b) of this section applicable to that vessel, based on the number of persons aboard.

(e) *Transfer at sea.* A person who fishes for or possesses spiny lobster in or from the EEZ under a bag or possession limit specified in paragraph (a) or (b) of this section may not transfer a spiny lobster at sea from a fishing vessel to any other vessel, and no person may receive at sea such spiny lobster.

§ 640.24 [Amended]

9. In § 640.24, the word "Secretary" is revised to read "Assistant Administrator".

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