

**ADDRESSES:** Copies of the final regulatory flexibility analysis (FRFA) may be obtained from the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Comments on the collection-of-information requirements contained in this rule should be sent to Robert Sadler, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (Attention: NOAA Desk Officer).

**FOR FURTHER INFORMATION CONTACT:** Phil Steele, telephone: 727-570-5305, fax: 727-570-5583, e-mail: Phil.Steele@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The fishery for reef fish is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP) that was prepared by the Council. The fisheries for coastal migratory pelagic resources are managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (Coastal Migratory Pelagics FMP) that was prepared jointly by the Council and the South Atlantic Fishery Management Council. These FMPs were approved by NMFS and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

NMFS approved the corrected Amendment on May 6, 2003. NMFS published a proposed rule on March 12, 2003, to implement the corrected Amendment and requested comments on the proposed rule through March 27, 2003 (68 FR 11794, March 12, 2003). The rationale for the measures in the corrected Amendment was provided in the proposed rule and is not repeated here.

#### Comments and Responses

NMFS received a September 2002 minority report signed by two Council members, a November 2002 minority report signed by one Council member, and nine letters opposing aspects of the corrected amendment and/or the proposed rule. Twelve letters in support of the proposed rule were received. Neither minority report was filed specifically in response to the proposed rule or the corrected amendment, but both reports addressed prior Council requests that are related to the proposed rule. Therefore, responses to the minority reports are also provided here.

#### September 2002 Minority Report

A minority report was submitted by two Council members that contained objections to the Council's action at its September 2002 meeting regarding a letter to NMFS which modified a final Council motion adopted in March 2001. The September 2002 Council motion stated, "To write a letter to NMFS stating that it was the intent of the Council under C-1. Eligibility - to provide for fully transferable reef fish or coastal migratory pelagic charter/headboat permits to individuals/charter vessels who held valid permits on March 29, 2001, or who had applied for such permits received in NMFS' office by March 29, 2001. The intent of the Council was to cap the effort and passenger capacity of vessels as of March 29, 2001." Following are the minority report comments related to this action.

*Comment 1:* The action clearly violates the basic rules of statutory construction to the detriment of persons who have taken or may take actions based on the language of the original Council motion.

*Response:* In determining the scope of the measures proposed by the Council, NMFS promulgates appropriate regulations in light of the entire administrative record. The final rule is the result of a detailed review of such record, and the eligibility requirements are consistent with Council discussions on the issue. Further, NMFS is not construing a statute, but rather a motion made by a Council member, and the agency has a duty to examine the record developed by the Council in order to clarify ambiguities and resolve inconsistencies in the language used. The Council assisted in this endeavor by providing clarification of its intent.

*Comment 2:* Some remarks from the minutes of the '01 Mobile meeting contradict the newly construed meaning of the eligibility provisions of the Amendment as stated in the action contested herein. Therefore, the present action is not fully supported even on its merits.

*Response:* With the exception of the single eligibility criterion, which Council staff acknowledged was included in the amendment erroneously, and is being removed in this final rule, the record supports NMFS' current interpretation of the Mobile motion. The fact that some members held different views does not mean that the action is not supported by the record. Unanimous votes are fairly uncommon, and a majority of the Council concurred with the action.

*Comment 3:* Action taken at this meeting was not properly noticed to the affected public. Therefore, it will be a surprise move to affected parties, many of whom participated in the negotiations relating to passage of the original language, and many of whom can be substantially adversely impacted by this new move, clearly contrary to the principles of public notice contained in the M-S Act [sic] (Magnuson-Stevens Act) and other applicable law.

*Response:* The published agenda indicated that on Tuesday, September 10, 2002, the Mackerel Management Committee would hear a "Status Report on the Charter Vessel/Headboat Moratorium Amendment." NMFS presented this status report, which included a discussion of the fact that one of the eligibility requirements included in the amendment prepared by staff was not supported elsewhere in the administrative record. The Council agreed that NMFS' review was correct and that such criterion was in error. As a result, the Council voted to acknowledge in writing to the Secretary, its concurrence with this determination, along with another suggested clarification which is not part of this final rule. No new action was taken by the Council at the September 2002 meeting for which further public notice was required. Those members of the public who had participated throughout the process were aware of the inclusion of the erroneous criterion in the final rule, and first indicated the possibility of error to NMFS just prior to the effective date of the final rule.

*Comment 4:* Five Council members who participated in the original vote in Mobile were not at this Metairie meeting to tell what they thought or knew of the original adopted language.

*Response:* It is true that the membership of the Council had changed, and all new members abstained from discussing the issue and voting on the letter to the Secretary.

*Comment 5:* The original action in Mobile was taken as a joint effort of the Reef Fish and Coastal Migratory Pelagic Fisheries Committees. The charterboat moratorium affects both fisheries. The present action at the Metairie meeting seeking to modify the results of the joint effort passed through only the Reef Fish Committee, and did not pass through a joint committee, nor was the joint committee convened for this purpose.

*Response:* See the response to comment 3 as to the "action" taken by the Council. The only committee to hear the update at the September 2002 meeting was the Coastal Migratory Pelagic committee, but the topic was