

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17****Endangered and Threatened Wildlife and Plants; Notice Describing Fish and Wildlife Service Priority Listing Activities From October 1, 1995 Through November 13, 1995**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of priority listing activities.

SUMMARY: In this notice the Fish and Wildlife Service (Service) describes those activities that it believes may be lawfully conducted pursuant to section 4 of the Endangered Species Act while operating under the continuing resolution from October 1, 1995 through November 13, 1995. The Service interprets the provisions of the continuing resolution to prohibit the issuance of final rules adding species to the list of endangered or threatened wildlife and plants. Emergency listing and designation of critical habitat are also prohibited. Activities the Service believes are authorized include—review and issuance of findings on petitions; conducting public hearings and accepting public comments on proposed listings and critical habitat designations; and preparing, publishing, or withdrawing proposed rules to list, delist, or reclassify species. Highest priority listing activities during the period covered by the continuing resolution will include—completing ongoing public comment periods and conducting scheduled or requested public hearings; completing review and publishing findings on petitions received prior to July 15, 1995; and processing listing actions that would delist species or reclassify endangered species to threatened species.

DATES: This notice governs Service priorities and policies from October 1, 1995 through November 13, 1995.

ADDRESSES: Interested persons or organizations should submit comments to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Mailstop ARLSQ-452, Washington, D.C. 20240 (703-358-2171 voice, 703-358-1735 facsimile).

FOR FURTHER INFORMATION CONTACT: Chief, Division of Endangered Species (see **ADDRESSES** section).

SUPPLEMENTARY INFORMATION: Public Law 104-6, enacted April 10, 1995, amended Public Law 103-332 (the Interior appropriations act for fiscal year 1995) by placing a moratorium on

certain activities conducted pursuant to section 4 of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*). The moratorium prohibited the Service from adding species to the lists of endangered or threatened wildlife and plants, including emergency listings, and also prohibited the Service from designating critical habitat for listed species. These moratorium provisions were to lapse on October 1, 1995.

Language included in section 101(a) of the continuing resolution (H.J. Res. 108) specifies that activities conducted in fiscal year 1995 continue in the first six weeks of fiscal year 1996 under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995. The Service interprets this language to extend the moratorium provisions of Public Law 104-6 until the expiration of the continuing resolution on November 13, 1995. Therefore, the Service believes that it is expressly prohibited from adding species to the lists of endangered or threatened wildlife and plants, and from designating critical habitat, during the period October 1, 1995 through November 13, 1995.

Actions that the Service believes are permitted under the authority of section 4 of the Act while operating under the continuing resolution include—review and publication of findings on petitions to list, reclassify, delist, or designate critical habitat; review of candidate species status; production of proposals to add species to the lists of endangered or threatened wildlife and plants; and conducting public hearings on proposed listings.

The Service is also experiencing funding constraints under the continuing resolution and foresees a significant decrease in the funds available for listing activities in fiscal year 1996. The limited amount of resources means that the Service must carefully prioritize its listing activities. To most effectively use the available funds, the Service will limit listing activities from October 1, 1995 through November 13, 1995 to the following:

Completing ongoing comment periods and conducting scheduled or requested public hearings for proposed listings.

Completing review and findings on petitions received prior to July 15, 1995.

Completing review of actions that would delist, reclassify, or withdraw proposed listing for a variety of species.

The Service intends to discontinue work on preparation of proposed listings and critical habitat designations because completion of such actions prior to November 13, 1995 would be unlikely. The Department of Justice has

been requested to seek appropriate relief from pending court orders and settlement agreements. Action on proposed listings issued in fiscal year 1995 will cease once the public comment period closes (generally 60 days after publication of the proposed rule in the Federal Register).

Authority

This notice is published under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: November 3, 1995.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 638**

[Docket No. 950725190-5257-02; I.D. 070395A]

RIN 0648-AH71

Coral and Coral Reefs of the Gulf of Mexico; Amendment 3

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 3 to the Fishery Management Plan for Coral and Coral Reefs of the Gulf of Mexico (FMP). Amendment 3 prohibits the taking of wild live rock in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf) off Florida north and west of the Levy/Dixie County line; removes the prohibition on taking wild live rock by chipping between the Pasco/Hernando County and Levy/Dixie County, FL lines; establishes annual quotas for wild live rock harvesting for 1995 and 1996 in the Gulf EEZ; and reduces the amount of substrate that may be taken with allowable octocorals in the Gulf EEZ. The intended effect is to protect the live rock resource and fishery habitat in the Gulf EEZ and to simplify the regulations.

EFFECTIVE DATE: November 13, 1995.

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

SUPPLEMENTARY INFORMATION: The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented through regulations

at 50 CFR part 638 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Detailed descriptions, backgrounds, and rationale for the management measures in Amendment 3 were included in the preamble to the proposed rule (60 FR 40150, August 7, 1995) and are not repeated here.

Comments and Responses

A minority report was submitted by two Council members in opposition to Amendment 3. In addition, public comments on the proposed rule were accepted through September 18, 1995. One hundred and nine identical letters opposing the rule were forwarded by the American Aquarist Society (AAS). Also commenting against the rule were a representative of the Marine Aquarium Societies of North America (MASNA), a live rock harvester from Florida who also forwarded 14 identical letters from his supporters, 2 other live rock harvesters, and 2 additional individuals.

The U.S. Fish and Wildlife Service, the Center for Marine Conservation (CMC), and 28 individuals supported the proposed measures. The Professional Association of Diving Instructors (PADI) and several local governments and other organizations support an immediate and permanent ban on live rock harvesting. Specific comments are summarized below followed by NMFS' response.

Florida Panhandle Closure

Comment: The minority report claims that the Council's decision to close the EEZ off Florida's Panhandle area to live rock harvesting "was made without a shred of new data or evidence to justify the action." AAS members believe that the proposed closure has no scientific basis and appears to be "a blatant effort to accommodate the political interests of the State of Florida." MASNA and the live rock harvesters who commented also oppose the closure because of a perceived lack of scientific evidence to support it. In addition, one live rock harvester believes that the Council's decision in approving Amendment 3 was based on "false testimony," and that the decision violates national standard 2 of the Magnuson Act.

Response: There exists a considerable amount of scientific literature regarding the habitat value of reefs and rubble zones for a variety of commercial and recreational fish species. A list of references is included in Amendments 2 and 3 to the FMP. In addition, testimony was received by the Council documenting damage to recreational diving areas and reductions in availability of reef fish as a result of live

rock harvesting. Impacts were said to be greatest in the areas of lowest abundance of hard bottom habitats, such as the northern Gulf. The NMFS Southeast Fisheries Science Center has certified that the management measures contained in Amendment 3 are based on the best scientific information available, as required by national standard 2.

The State of Florida banned harvest of live rock from State waters in 1989. Florida representatives have maintained opposition to continued live rock harvesting in the EEZ off Florida, in part because of the difficulty of enforcing the State prohibition when Federal waters remain open. Thus, Florida has a legitimate interest in ending the EEZ live rock harvest off Florida.

Comment: The minority report suggests that mitigation by replacement of wild live rock with quarried rocks is a viable alternative to the closure. A wild live rock harvester, who also holds an aquacultured live rock permit for a site in the Panhandle area, believes that the rock he has deposited for aquaculture purposes will mitigate impacts on naturally occurring substrate and that there has been a net gain of habitat off the Panhandle.

Response: NMFS concurs with the Council's opinion that the deposition of quarried rocks for the purpose of live rock aquaculture does not mitigate the continued taking of wild live rock. Although aquacultured live rock has been shown to serve some of the purposes of wild live rock when placed in marine aquariums, it is not comparable in terms of the complexity of its species composition to naturally occurring substrate that may have been in place for centuries. Since aquacultured rock has been deposited at the site for the purpose of eventual retrieval and sale, it cannot result in a net gain in fishery habitat.

Comment: The minority report and one live rock harvester claim that the closure of the Panhandle area to live rock harvesting is a violation of the Magnuson Act's national standard 4, which addresses fair and equitable allocation of fishing privileges.

Response: For purposes of national standard 4, allocation means a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete groups of fishermen. Area closures, however, only indirectly and incidentally result in allocation of fishing privileges by requiring individuals in certain areas to travel to other areas to fish. In the case of the closure of the Florida Panhandle area for conservation purposes, it will be necessary for certain fishermen in this area to relocate live rock harvesting

operations to an area off the west central coast of Florida. The Council's action has no discriminatory intent and does not violate national standard 4. Additional discussion of national standard 4 requirements may be found at 50 CFR 602.14 and 50 CFR 602, Subpt. B, App. A.

Comment: CMC commented on the value of the resource to fishery habitat, the relative scarcity of reef areas in the northern Gulf, and the adverse impacts on recreational divers and reef fishermen from continued harvests of wild live rock. PADI believes that a direct degradation of the environment is being allowed in order to satisfy the narrow economic interests of a small group of individuals. One commenter sent copies of resolutions passed by local groups opposing live rock harvesting: Okaloosa and Walton County Board of Commissioners, the City of Destin, FL, Okaloosa County Economic Development Council, the Emerald Coast Convention and Visitors Bureau, the Elgin Yacht and Diving Club, the Destin Fishing Fleet, Inc., the Destin Fishermen's Cooperative Association, the Destin Charter Boat Association, and the South Walton Tourist Development Council.

Response: NMFS agrees with the concerns expressed by the CMC regarding the environmental impacts of a continuing live rock harvest. Amendment 3 is designed to eliminate impacts on hard bottom habitats that may affect the value of recreational diving and commercial and recreational fishing in the Gulf of Mexico.

Live Rock Quota

Comment: A live rock harvester and 14 of his supporters oppose the establishment of a quota for live rock taken south of the Panhandle area off Florida because of the financial hardship that this might place on aquaculturalists. He believes that the closure of wild live rock harvests by 1997 and the daily trip limit established under Amendment 2 to the FMP sufficiently limit the amount of live rock collected. Another live rock harvester also opposes this provision because he believes the daily vessel limit, inclement weather, and dangerous effects of nitrogen buildup in the deep waters of the Gulf already limit the amount of harvest.

Response: Live rock landings from the Gulf EEZ off Florida reported to Florida's Department of Environmental Protection increased from nearly 200,000 lb (90,718 kg) in 1991 to over 600,000 lb (272,155 kg) in 1994. During 1994, the landings nearly doubled. NMFS concurs with the Council's

decision to place a cap on the harvest during the phaseout period to prevent further increases. The intent of the phaseout established under Amendment 2 was to maintain approximately current levels of harvest to allow those fishermen dependent on live rock harvesting some time for a transition to other activities.

Allowable Octocoral Definition

Comment: AAS, MASNA, and two live rock harvesters oppose the reduction in the amount of substrate that may be taken with an allowable octocoral. These commenters indicated that attached substrate up to 3 inches (7.6 cm) from a holdfast is necessary to ensure that an octocoral survives transport.

Response: Amendment 2 redefined allowable octocorals to close a potential loophole that could allow harvest of live rock as part of the 50,000 colony annual quota for allowable octocorals. The revised definition included as allowable octocoral only a limited amount of attached substrate: 1 inch (2.5 cm) in the EEZ off the southern Atlantic states and 3 inches (7.6 cm) in the Gulf EEZ.

However, Florida recently implemented a rule allowing only 1 inch (2.5 cm) of substrate from the attachment of the octocoral. In accordance with 50 CFR 638.3(c), if a state has a landing regulation that is more restrictive than a Federal landing restriction for octocorals, a person landing in that state must comply with the more restrictive state regulation. There are no reported landings of octocorals outside Florida. Therefore, under § 638.3(c), the 1-inch (2.5-cm) rule will apply to the Gulf EEZ off Florida, whether or not Amendment 3 is implemented. Further, the Council and NMFS agreed with Florida's finding that a 3-inch (7.6-cm) rule would allow the continued taking of excessive amounts of live rock as bycatch under the octocoral quota and that a 1-inch (2.5 cm) limit is sufficient to allow proper anchoring of the octocoral in an aquarium.

Recreational Harvests

Comment: One of the form letters recommends that a recreational harvest of live rock be allowed as long as the commercial wild harvest remains open. MASNA and AAS strongly support a recreational harvest. MASNA believes that recreational use is allowed in all other fisheries and they see no reason for an exception in this case.

Response: NMFS believes that the harvest of wild live rock is a take of an essentially nonrenewable resource and results in a net loss of fishery habitat. In developing Amendments 2 and 3,

NMFS and the Council rejected a recreational harvest that could result in a total of up to 1,825 gal (6,908 L) of live rock per person per year. While NMFS agreed with the Councils' final recommendation in Amendment 2 to delay the ban on commercial harvests in order to mitigate adverse economic impacts on the industry and allow a transition to live rock aquaculture, this justification is not applicable to the recreational sector.

Further, live rock is likely to contain prohibited corals. Commercial harvesters testified that they must carefully choose pieces to avoid taking prohibited corals. Occasional recreational divers may be less likely to be able to make these distinctions. As such, any allowable recreational take of live rock could result in increased takes of prohibited corals. Finally, the State of Florida banned both commercial and recreational harvest of live rock from State waters in 1989.

A recreational harvest in the EEZ off Florida could seriously complicate State enforcement efforts.

Economic Impacts

Comment: The minority report states that "Amendment 3 reneges on the Council's earlier commitment to allow investors currently in the Panhandle fishery sufficient time to convert their business investments to aquaculture." One live rock harvester who will be affected by the closure of the Panhandle area provided a videotape of his aquaculture site and asked for more time to continue his aquaculture operations: "Amendment 3 will stop this venture dead in its tracks as the revenue is needed from the wild harvest to fund the continued deployments." He stated that he has already placed over 30,000 lb (13,608 kg) of rock on his permitted site, has another 170,000 lb (77,111 kg) ready to deposit, and employs over 25 people. One employee commented that more time is needed to achieve a marketable live rock product and that Amendment 3 would "drive some people from this billion dollar a year industry" because the only live rock available would be imported. Another live rock harvester included copies of recent advertisements to demonstrate the availability of imported live rock, especially from the Marshall Islands, Tonga, and other areas of the Pacific. He believes that more time is needed to develop aquaculture products to compete with these imports.

Response: Florida live rock harvesters have had several years to begin the transition to live rock aquaculture. Beginning in 1991, the State of Florida held a series of public hearings and

technical workshops on live rock aquaculture options. The Council began its deliberations with a series of public hearings in 1993, culminating in passage of Amendment 2 in 1994. Amendment 2 provided for an additional 2 years of live rock harvesting, until 1997, to allow time for this transition to aquaculture. Some businesses began aquaculture operations over 2 years ago on Florida lease sites or in the EEZ off Florida under permits issued by the U.S. Army Corps of Engineers. At least one company is already offering Gulf EEZ aquacultured live rock for sale. NMFS concurs with the Council's view that sufficient time has been made available under Amendments 2 and 3 for possible transitions from wild live rock harvesting to aquaculture operations.

Contrary to the views expressed in the minority report, regulatory actions are based on the best available science, particularly in a highly regulated industry such as commercial fishing. The Council is required to design, apply, and adjust management measures in an ongoing manner. However, the impacts of the management measures must be considered and balanced pursuant to various legal requirements. In this case, the impacts of the measures are not unreasonable, given that the wild live rock fishery does in fact remain open until 1997, albeit with a closed area resulting from the Council's consideration of information indicating the necessity of that adjustment. In addition, Amendment 3 will have no effect on authorized live rock aquaculture operations in the Gulf EEZ.

Comment: One commenter indicated that he thought the drafting of Amendment 3 was a violation of national standard 7 of the Magnuson Act, because there was no demonstrated impact to the EEZ of continued harvesting and the amendment is a waste of taxpayers' money. This commenter also asked why the economic impact analysis prepared by the Council changed from the draft to the final amendment.

Response: NMFS believes that Amendment 3 is needed to address continuing loss of fishery habitat. Also, public testimony on the draft amendment indicated that the harvests were having an adverse impact on recreational enjoyment of reef areas in the Gulf EEZ. Thus, the benefits of preventing a decrease in non-consumptive values were factored into the Council's economic analysis and Amendment 3 includes a conclusion that the benefits from the Panhandle closure may outweigh the costs to the affected producers.

Effective Dates

Comment: Two live rock harvesters asked NMFS and the Council not to waive the 30-day period of delayed effectiveness under the Administrative Procedure Act (APA) to allow an additional 30 days of live rock harvesting under the 1995 quota. These commenters indicated that "red tide" has damaged their aquaculture sites, and they need additional income from a continued harvest of wild live rock.

Response: A 30-day delay in effectiveness is likely to result in a quota overrun and possible habitat degradation contrary to the intent of the Council. Accordingly, as discussed below, good cause exists under the APA to waive the 30-day delay in effective date of this final rule. However, to provide time for notice to fishermen, the effective date is delayed for 3 days from its date of publication.

Changes from the Proposed Rule

In § 638.2, the definition of "allowable octocoral" is revised to clarify when nonencrusting species of the subclass Octocorallia, except the seafans *Gorgonia flabellum* and *G. ventalina*, are "live rock" rather than "allowable octocoral."

In § 638.26(d)(2), the language regarding a closure when the quota for wild live rock in the Gulf EEZ is reached is revised to conform to standard language for such closures, as contained in the current coral regulations at 50 CFR 638.24(b) and 50 CFR 638.25(c)(2).

Classification

The Regional Director has determined that Amendment 3 is necessary for the conservation and management of the coral and coral reef resources of the Gulf of Mexico 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 40152, August 7, 1995). As a result, a regulatory flexibility analysis was not prepared.

The conservation and management concerns, i.e., possible degradation of

habitat and quota overruns, that lead the Council and NMFS to prohibit the taking of wild live rock in the EEZ of the Gulf off Florida north and west of the Levy/Dixie County line and to establish an annual quota for wild live rock in the Gulf EEZ makes a delay in effective date for these measures contrary to the public interest. Accordingly, 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 these measures. Removal of the prohibition on taking wild live rock in the EEZ by chipping between the Pasco/Hernando County and Dixie County, FL lines relieves a restriction. Thus, pursuant to 5 U.S.C. 553(d)(1), there is no need to delay the effective date of this provision. As explained in the proposed rule, reduction from 3 inches to 1 inch (7.6 cm to 2.5 cm) of the amount of substrate that may be taken with allowable octocoral in the Gulf EEZ is not a substantive change because all harvesters in the Gulf EEZ have been limited to 1 inch (2.5 cm) by Florida's rules. However, to provide time for notice to fishermen, NMFS is delaying the effective date of this final rule for 3 days from the date of its publication.

List of Subjects in 50 CFR Part 638

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 2, 1995.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 638 is amended as follows:

PART 638—CORAL AND CORAL REEFS OF THE GULF OF MEXICO AND THE SOUTH ATLANTIC

1. The authority citation for part 638 continues to read as follows:

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

2. In § 638.2, the definition for "Allowable octocoral" is revised to read as follows:

§ 638.2 Definitions.

* * * * *

Allowable octocoral means an erect, nonencrusting species of the subclass Octocorallia, except the seafans *Gorgonia flabellum* and *G. ventalina*, plus the attached substrate within 1 inch (2.54 cm) of an allowable octocoral. Note: An erect, nonencrusting species of the subclass Octocorallia, except the seafans *Gorgonia flabellum* and *G. ventalina*, with attached substrate

exceeding 1 inch (2.54 cm) is considered to be live rock and not allowable octocoral.

* * * * *

3. In § 638.7, paragraphs (m), (n), and (p) are revised to read as follows:

§ 638.7 Prohibitions.

* * * * *

(m) Harvest or possess wild live rock in the EEZ off the southern Atlantic states north of 25°58.5' N. lat., as specified in § 638.25(a), or in the Gulf of Mexico EEZ north and west of a line extending in a direction of 235° from true north from the Levy/Dixie County, FL boundary or south of 25°20.4' N. lat., as specified in § 638.26(a).

(n) Harvest wild live rock by chipping, or possess wild live rock taken by chipping, in the EEZ off the southern Atlantic states south of 25°58.5' N. lat., as specified in § 638.25(b).

* * * * *

(p) Harvest or possess in the Gulf of Mexico EEZ, from a line extending in a direction of 235° from true north from the Levy/Dixie County, FL boundary to 25°20.4' N. lat., wild live rock taken other than by hand or by chipping with a nonpower-assisted, hand-held hammer and chisel, as specified in § 638.26(b).

* * * * *

4. Section 638.26 is revised to read as follows:

§ 638.26 Wild live rock in the Gulf of Mexico.

(a) *Closed areas.* No person may harvest or possess wild live rock in the Gulf of Mexico EEZ—

(1) North and west of a line extending in a direction of 235° from true north from the Levy/Dixie County, Florida boundary, that is, from a point at the mouth of the Suwannee River at 29°17.25' N. lat., 83°09.9' W. long.; or

(2) South of 25°20.4' N. lat. (extension of the Monroe/Collier County, Florida boundary).

(b) *Gear limitations.* In the Gulf of Mexico EEZ, from the line described in paragraph (a)(1) of this section to 25°20.4' N. lat., wild live rock may be harvested only by hand, without tools, or by chipping with a nonpower-assisted, hand-held hammer and chisel, and no person may possess in that area wild live rock taken other than by hand, without tools, or by chipping with a nonpower-assisted, hand-held hammer and chisel.

(c) *Harvest and possession limits.* Through December 31, 1996, a daily vessel limit of twenty-five 5-gallon (19-L) buckets, or volume equivalent (16.88 ft (478.0 L)), applies to the harvest or possession of wild live rock in or from

the Gulf of Mexico EEZ from the line described in paragraph (a)(1) of this section south to 25°20.4' N. lat., regardless of the number or duration of trips. Commencing January 1, 1997, the daily vessel limit is zero.

(d) *Quota and closure.* (1) The annual quota for wild live rock from the EEZ, from the line described in paragraph (a)(1) of this section south to 25°20.4' N. lat., is 500,000 lb (226,796 kg) for the fishing years that begin January 1, 1995,

and January 1, 1996. Commencing with the fishing year that begins January 1, 1997, the quota is zero.

(2) When the quota specified in paragraph (d)(1) of this section is reached, or is projected to be reached, the Assistant Administrator will file notification to that effect with the Office of the Federal Register. On and after the effective date of such notification, for the remainder of the fishing year, wild live rock may not be harvested or

possessed in the EEZ of the Gulf of Mexico and the purchase, barter, trade, or sale, or attempted purchase, barter, trade, or sale, of wild live rock in or from the EEZ of the Gulf of Mexico is prohibited. The latter prohibition does not apply to wild live rock that was harvested and landed prior to the effective date of the notification in the Federal Register.

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