

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 622

[Docket No. 020325070-2102-02; I.D. 031202B]

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fishery of the Gulf of Mexico; Suspension of the 2002 Texas Closure**

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

**ACTION:** Notice of agency action; withdrawal of proposed rule.

**SUMMARY:** In light of NMFS economic analysis and public comments received about the proposed rule, NMFS is withdrawing the proposed rule that, if implemented, would have suspended, for the 2002 season, regulations that close the exclusive economic zone (EEZ) off Texas to shrimp trawling from 30 minutes after official sunset on May 15 to 30 minutes after official sunset on July 15, each year (i.e., the Texas closure). The withdrawal is discussed further below. In withdrawing the proposed rule, NMFS hereby notifies the public that the Texas closure regulations will remain in effect for the 2002 fishing year.

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**SUPPLEMENTARY INFORMATION:** The fishery for shrimp in the Gulf of Mexico EEZ is managed under the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council), 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.

Amendment 5 to the FMP provides the NMFS Southeast Regional Administrator (RA) with the opportunity, after determining that benefits may be increased or adverse impacts be decreased, to either: (1) modify the geographical scope of the extent of the Texas closure, or (2) eliminate the Texas closure for one season.

Based on public testimony at its January 21-24, 2002, meeting, the Council voted to recommend that NMFS

suspend regulations at 50 CFR 622.34(h) implementing the Texas closure for one season. A proposed rule describing the action was published in the **Federal Register** on April 5, 2002 (67 FR 16359), with comments accepted from the public through April 22, 2002.

An environmental assessment (EA), including an informal section 7 Consultation under the Endangered Species Act, concluded that total shrimp fishing effort does not change substantially because of the Texas closure. During the closure, vessels shift their effort to adjacent Federal waters off Louisiana, and when Texas waters (both territorial and Federal) re-open, those vessels move back to Texas waters. Given that the catch and bycatch species in this fishery have wide-ranging distributions, those species continue to be impacted at a relatively constant rate. Therefore, NMFS concluded that the proposed action to suspend the Texas closure would not alter the impacts on the stocks of target and non-target species, and would not have a significant impact on the human environment.

Using data through 2001, and assuming similar conditions would persist during 2002, NMFS' Regulatory Impact Review (RIR) of the proposed action forecasted that a suspension of the Texas closure for the 2002 fishing season would increase total producer surplus (total revenue-total variable cost, i.e., a proxy for profit) by approximately \$15-\$19 million. Nevertheless, total harvest and revenues were forecasted to decline if the closure were suspended.

Substantial public comment was received during the comment period on the proposed rule, and given that the Council's intent behind the regulations is based on the economic conditions facing the industry, the position of the industry itself regarding the value of the Texas closure weighed heavily in the final determination. Substantial numbers of industry comments opposing the suspension were received, which indicated to NMFS that there is no uniform industry position regarding the proposed action. Therefore, given that the RIR indicated that the average producer surplus for large vessels (those most likely to fish in the EEZ) was projected to decline by 30 percent or more, NMFS determined that, over the entire year, it is unlikely that there is any substantial economic benefit or decrease in adverse economic impacts to the fishery as a whole associated with the suspension of the Texas closure. NMFS also considered several problems identified by the U.S. Coast Guard during the Council's deliberations on

the proposed action. It would be difficult for the state of Texas to enforce its 9-nautical mile (nm) closure if NMFS were to suspend the closure of Federal waters. Vessels would be able to enter the closed area and fish and quickly return to open Federal waters.

**Withdrawal of Notice of Proposed Rulemaking**

For reasons stated in the preamble, the notice of proposed rulemaking that was published in the **Federal Register** on April 5, 2002 (67 FR 16359), is withdrawn. Regulations implementing the Texas closure will remain in effect.

**Comments and Responses**

A wide range of opinions were expressed by the public regarding the proposed rule. Two Texas-based shrimp associations, and 29 individuals associated with the Texas shrimp industry, submitted either individual letters or multiple-signature petitions indicating their preference to suspend the Texas closure. By contrast, a total of 158 Texas-based members of the shrimp industry submitted individual letters or multiple-signature petitions opposing the proposed rule. Individuals submitted 232 individual letters and one petition containing 39 signatures opposing the proposed rule. Additionally, three environmental organizations and the Fish and Wildlife Service of the Department of Interior commented in opposition to the proposed rule. The Texas Parks and Wildlife Department commented regarding the content of the preamble of the proposed rule. Several hundred form letters stating opposition to the proposed rule were also received following the closure of the comment period.

*Comment 1:* Industry comments received in support of the proposed rule noted that recent economic downturns, stemming from additional closures of Texas territorial waters, an overabundance of a variety of sizes of imported shrimp, and a general downward trend in the U.S. economy following the events of September 11, 2001, have resulted in economic hardship for several shrimp vessel owners, vessel crews, shoreside processing facilities and shoreside support facilities such as dry docks and supply houses. Comments in support of the suspension specifically focused on the recent actions by Texas Parks and Wildlife Department to extend, from February 15 to May 15, the closed season in Texas territorial waters of the Southern Shrimp Zone (from Corpus Christi Pass (27°40'34" N. lat.) south to the Mexican border and within 5 nm of

the coastline). Commenters indicated that this extension of the state closed period had severely impacted the economics of vessels homeported in southern Texas areas. The commenters indicated that suspension of the Texas closure would enable shrimp fishermen to continue harvesting marketable-sized shrimp, thus providing income and employment during a period when Texas ports are normally void of activity. They stated that suspension of the closure would also reduce the pulse fishing and concentration of Texas and out-of-state vessels that occurs on the reopening of Texas waters and that these reductions of concentrated effort would be less damaging to habitat and have a lesser impact on bycatch species.

In contrast, over 150 comments from shrimp vessel owners, crews, and support personnel, who are based in southern Texas ports, opposed the suspension of the closure. These industry participants stated that prices for small shrimp are at their lowest in recent history because of an overabundance of small-sized imported and farm-raised shrimp in cold storage. Additionally, fuel prices are rising. Maintaining the Texas closure would allow the shrimp a chance to grow and provide better revenues to the shrimp industry for the 2002 season.

*Response:* The Texas closure, as established by the Council, is intended to increase yield to the fishery by deferring the harvest of shrimp until they reach a larger, more valuable size. NMFS has determined that the Texas closure does not have a direct biological effect on the stocks; its impacts and its intended effect are to produce economic benefits to the shrimp industry. In accordance with the FMP, the RA may, after determining that benefits may be increased or adverse impacts be decreased, adjust the timing or extent of the Texas closure.

The RIR projected that, if the closure were suspended, the average per-vessel producer surplus for the small vessel fleet would have increased by 86 percent, while that of large vessels would have declined by 30 percent. Even with a redistribution of benefits, total harvest and revenues were forecast to decline if the closure were suspended.

Public comment from shrimp industry participants was strongly divided as to the potential benefits and impacts of suspending the Texas closure for the 2002 season. Because large vessels are more likely to fish in the EEZ, and are forecast to have a decline of producer surplus of as much as 30 percent (or more), NMFS has determined that it is unlikely that there are substantial

economic benefits, or a decrease in adverse economic impacts, associated with the suspension of the Texas closure. Given that fact, along with issues of enforceability of a 9-nm closure of Texas territorial waters (see Comment 3), NMFS has decided to withdraw the proposed rule.

*Comment 2:* There is no concrete information that suspending the closure would increase revenues to the shrimping industry. The model was not capable of allowing shrimp prices to change with harvest quantities so the forecasts were based on an unrealistic restriction compared to the real world.

*Response:* All models require assumptions to accommodate data gaps or logistic issues associated with matching the model to the data. The economic model used to forecast the predicted responses cannot guarantee that the predictions will be met. Nevertheless, the model and the RIR were based on the best scientific information available to NMFS at the time.

*Comment 3:* With only a 9-nm closure, enforcement will be difficult and poaching (fishing inside the closed territorial waters) will increase. The 15-nm closures of the late 1980's led to numerous violations where vessels would enter the closed area from the EEZ to fish illegally with the opportunity to quickly return to open Federal waters. Enforcement of the limited closure was difficult. Under a full 200-nm closure, any vessel found fishing off Texas would be in violation of the closure. Under a limited closure such as the proposed suspension of the EEZ closure, it would be difficult to determine if a vessel had been fishing inside the 9-nm closure limit.

*Response:* NMFS agrees, and this was a contributing factor in making a determination to withdraw the proposed rule. NMFS recognizes that maintaining the status quo of a 200-nm closure will ease enforcement issues.

*Comment 4:* There was limited public notice regarding the Council's intent to consider suspending the Texas closure at its January 2002 meeting. The Council's decision to seek suspension of the Texas closure was made with no proposal document and no review and analysis by the scientific and socio-economic committees charged to advise the Council on its management decisions. A total of 172 comments were received stating that there had not been sufficient time to allow adequate public input to the process. One environmental group that testified before the Council in January 2002, commented that the proposed rule may not have adequately met the requirements of the Magnuson-

Stevens Act regarding adequate public notice.

*Response:* The Magnuson-Stevens Act, in section 302(i), requires that Councils provide timely public notice of each regular meeting, including the time, place and agenda of the meeting. The Council annually reviews the results of the previous year's Texas closure at its January meeting and then votes on whether or not to continue the closure for the upcoming year. The Council publicly announced a tentative agenda, including consideration of this action, for its upcoming January 2002 meeting in its September-December 2001 newsletter. A final meeting announcement, including an agenda, was distributed to the general public in a news bulletin dated December 26, 2001. A meeting notice, including an agenda, was additionally published in the **Federal Register** (67 FR 717, January 7, 2002).

Based on the framework established in the FMP and its amendments, the Council may use its Scientific and Statistical Committee and Advisory Panel (AP) to review and advise on the findings of the NMFS assessment. For the proposed action, the Council considered the review and position of the AP in its deliberations, along with public testimony. The framework establishes that the RA shall have the authority, after consultation with the Council, to implement action to revise the existing management measure through the regulatory amendment process.

The Magnuson-Stevens Act requires (section 304(b)(1)(A)) that NMFS announce the availability of all proposed actions with a comment period of 15 days to 60 days. NMFS believes that the substantial number of comments received, from a diverse cross-section of interests, indicates that adequate time was allowed for public input regarding the proposed action. All totaled, 462 comments were received during the 15-day comment period on the proposed rule, and several hundred form letters were received during the few days immediately following the closure of the comment period.

*Comment 5:* The State of Texas and two environmental groups noted that in contrast to statements in the preamble of the proposed rule, the regulations limiting shrimping in Texas territorial waters are not recent actions. Territorial closures have been in effect since 1959. The only recent change in the regulations was an extension of the night-time closure in the Southern Shrimp Zone from December 15 February 15 to December 15 to May 15 each year.

*Response:* NMFS is aware of the long-standing regulations regarding shrimp fishing in the territorial waters of Texas. The preamble of the proposed rule attempted to reflect the positions put forth by public testimony at the January 2002 Council meeting that provided the impetus for the Council's action. The rationale for the proposed rule was prefaced with this background material: "However, over time, several other regulations have been implemented that, according to the shrimp industry, have reduced the benefits (and need for) the Texas closure." (67 FR 16359, April 5, 2002). The preamble later stated in the introduction to the Analysis and Justification section (67 FR 16359–60, April 5, 2002) "Participants in the shrimp fishery indicated that the economic impacts imposed by other state-mandated closures off Texas would be exacerbated by an additional closure of the EEZ off Texas, which would result in the capture of even more large shrimp. Therefore, the industry would prefer to suspend the Texas closure for 2002 and have the opportunity to harvest smaller shrimp."

Nevertheless, public comment on the proposed rule from shrimp industry participants was strongly divided as to the potential benefits and impacts of suspending the Texas closure for the 2002 season. The conclusions of the RIR also suggested that rather than alleviating adverse economic conditions in the fishery, suspending the closure would perpetuate and probably exacerbate them.

*Comment 6:* The proposed rule states the suspension is necessary to mitigate adverse impacts of the closures in the territorial waters off Texas, as proposed by the shrimp industry. In proposing to suspend the Texas closure, based on the request of some regulated parties, NMFS has abdicated its responsibilities under the Magnuson-Stevens Act to manage the shrimp fishery for conservation purposes. The proposal appears to violate national standard (NS) 1, to achieve optimum yield, NS 2, that actions be based on the best available scientific information, NS 5, prohibiting measures that have economic allocation as their sole purpose, and NS 9, which requires minimization of bycatch and bycatch mortality to the extent practicable.

Two comments suggested that the proposed rule and supporting EA and RIR did not provide required analysis needed under the Endangered Species Act (ESA), the Magnuson-Stevens Act, and the National Environmental Policy Act. The informal section 7 of the ESA consultation is inadequate and inconsistent with NMFS' previous

findings that indicate the need for a formal Section 7 consultation regarding adjustments to the Texas closure.

Finally, one commenter noted that the existing March 24, 1998, Biological Opinion concluded that strandings of sea turtle species in Texas continue to drop during the period that offshore waters are closed to shrimping and therefore mortalities in nearshore waters remain closely associated with the shrimp fishery.

*Response:* The impacts identified by the public at its January 2002 meeting were the impetus for the Council's decision to request that NMFS suspend the Texas closure regulations. In reviewing the Council's request, NMFS carefully analyzed the request and associated impacts and determined that the proposed rule was sufficiently in conformance with the FMP, the FMP amendments, the Magnuson-Stevens Act, and other applicable laws to be published for public comment.

The previous ESA section 7 consultations considered the effect of shrimp fishing in the EEZ off Texas in a time period before turtle excluder devices (TEDs) were mandated for use. Reasonable and prudent alternatives were proposed in the 1986 Biological Opinion to mitigate the impacts of the limited closed area. Those findings have since been updated for the current fishery, in which TEDs are mandated for use.

The 1998 Biological Opinion is not inconsistent with NMFS current findings on the proposed action. For most of the Texas coast, the 10-fathom (18.3-meter) contour roughly approximates the 9-nm territorial sea; thus, the statement of the relationship of turtle mortalities and nearshore waters is consistent with NMFS current determination that continued protection of sea turtles would be afforded from the closure of Texas territorial waters.

The informal section 7 consultation is based on adequate consideration of relevant information. That review, completed on March 8, 2002, concluded the following points:

Although the Texas closure provides a documented reduction in turtle strandings, the pulse fishing that occurs with the re-opening in July subjects turtles to an even greater fishing pressure and potential for fishing related mortalities.

NMFS data indicate that the Texas closure does not reduce overall fishing effort, but displaces that effort to other areas, most notably to Louisiana offshore waters. Stranding data imply that turtle mortalities do transfer to the Louisiana coast after the normal May 15 closure.

Previous studies on sea turtle catch per unit effort is essentially the same between the western Gulf (Texas) and north-central Gulf (Louisiana through the Florida Panhandle). Therefore, the level of trawler-turtle interactions that occur should be a function of total shrimping effort and would not be affected by a shift in that effort away from the Texas coast to other parts of the northern Gulf.

*Comment 7:* The proposed rule states that the majority of turtle interactions occur in state waters off Texas. The TPWD letter suggested that loggerhead turtles, a species which occurs more frequently further offshore, are the most common turtle recorded in the Strandings Network. The U.S. Fish and Wildlife Service noted that turtles are found in offshore waters during May through July and that a suspension of the closure would increase the probability of a turtle-trawler interaction in the offshore waters off Texas.

*Response:* NMFS recognizes that turtles are widely distributed, but two studies, one by NMFS in 1987 and one by the Gulf and South Atlantic Fisheries Foundation, Inc. in 1998, using shrimp trawls without turtle excluder devices, indicated that the majority of turtle interactions occurred in waters less than 10 fathoms (18.3 m) deep. For much of the Texas coast, the 10-fathom (18.3 m) contour approximates the 9-nm closure of Texas territorial waters. In combination, those two studies captured 45 turtles in waters less than 10 fathoms (18.3 m) deep, and 22 of those were loggerhead turtles. Therefore, the occurrence of loggerhead turtles in the strandings data does not necessarily indicate an offshore interaction.

*Comment 8:* NMFS failed to adequately assess the impact of the proposed action on essential fish habitat. Common sense would suggest that allowing trawling to occur where it had not occurred before would result in some adverse habitat effects and increase bycatch.

*Response:* NMFS presented information in the EA summarizing the results of previous studies regarding shrimp effort and the effect of seasonal and area closures on that effort. Those studies concluded that the seasonal or area closures do not reduce overall fishing effort, but displace that effort to other areas. The EA (see Section 2.2) noted that during the Texas closure, shrimp effort noticeably shifts to Louisiana offshore waters. That effort then shifts back to the Texas EEZ with the re-opening of Texas waters. This is not habitat that is normally closed. Shrimping occurs throughout the EEZ off Texas except for the time of the

Texas closure. Thus, no additional impacts to essential fish habitat were expected to occur had NMFS suspended the regulations to close the EEZ.

*Comment 9:* Allowing the harvest of smaller shrimp could lead to growth overfishing of penaeid shrimp stocks. One comment included detailed discussions regarding data limitations that impact NMFS' assessments on the status of the penaeid shrimp stocks that would restrict NMFS in its ability to determine whether the shrimp stocks are currently overfished or undergoing overfishing. Ignoring evidence that growth overfishing was occurring could lead to recruitment overfishing. The commenter provided several suggestions, and an alternative

methodology, to estimate shrimp mortality, fishing effort, and reduce errors in future assessments.

*Response:* NMFS agrees that there are uncertainties surrounding any fishery-dependent data, and has made efforts to reduce any potential bias in the data. For any analysis, there are alternative methodologies that may have equal scientific validity. NMFS analyses are tailored to match the existing, and admittedly sometimes limited, database. All assessments of the status of the various penaeid shrimp stocks have produced results that indicate the stocks to be above the established recruitment overfishing index levels (i.e., no recruitment overfishing has occurred). The Council recently submitted

Amendment 11 to the FMP, which included a proposed action to permit shrimp vessels that intend to fish in the EEZ of the Gulf of Mexico. If this proposed action is approved by NMFS, it will provide a mechanism by which to achieve a more accurate and precise estimate of shrimp effort, shrimp fishing mortality, and the status of the stocks.

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

Dated: May 3, 2002.

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