

PAVESE LAW FIRM

CHARLES MANN
Board Certified Real Estate Attorney
Direct dial: (239) 336-6242
Email: CharlesMann@paveselaw.com

1833 Hendry Street, Fort Myers, Florida 33901 | P.O. Drawer 1507, Fort Myers, Florida 33902-1507 | (239) 334-2195 | Fax (239) 332-2243

June 6, 2011

Mr. Bud Vielhauer, General Counsel
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Email: bud.vielhauer@myfwc.com
Fax: 850-487-1790

RE: Proposed Rule 68B-14.039 – Recreational Grouper Seasons

Dear Mr. Vielhauer:

Please be advised that the undersigned represents the Fishing Rights Alliance, a Florida not-for-profit corporation that advocates for the interests of Florida anglers.

We have reviewed the above referenced proposed rule, as well as the Notice of Proposed Rule published in the April 29, 2011 edition of the Florida Administrative Weekly, as well as the Corrected Notice, and are sending this letter to provide our objection. I have attached our full objection to this letter.

If you have any questions or comments, please don't hesitate to contact me.

Very truly yours,


Charles Mann

CM/jld
Enclosures

cc: Client

THE FISHING RIGHTS ALLIANCE, INC.,

A Florida not-for-profit corporation,

In Re: Proposed Rule 68B-14.0039:

Recreational Grouper Seasons

vs.

FLORIDA FISH AND WILDLIFE

CONSERVATION COMMISSION.

OBJECTION TO PROPOSED RULE

The Fishing Rights Alliance, Inc. a Florida not for profit corporation ("FRA") hereby files this Objection to Proposed Rule with the Florida Fish and Wildlife Conservation Commission and further states as follows:

Background:

1. The FRA is a Florida corporation, not for profit, with members throughout Florida and other coastal states. Members of the FRA include recreational anglers who frequently fish and spearfish in Florida's jurisdictional waters of the Gulf of Mexico. Many of FRA's members regularly seek to catch, harvest and/or possess gag grouper within Florida's waters of the Gulf of Mexico. The FRA and its members are substantially affected by the proposed rule that is the subject of this Objection as they will be precluded from the harvest and possession of gag grouper if the proposed rule goes into effect.
2. On April 29th, 2011, the Florida Fish and Wildlife Conservation Commission ("FWC") published a Notice of Proposed Rule ("Notice") in the Florida Administrative Weekly, proposing changes to Rule No. 68B-14.0039: Recreational Grouper Seasons. On May 27, 2011 the FWC published a Notice of Correction, correcting the statutory procedure under which it was proceeding with the proposed rule. A copy of the entire Notice and the Notice of Correction are attached as Exhibit "A".
3. As set forth in its notice, FWC's rulemaking authority to regulate marine life is derived from Article IV, Section 9, of the Florida Constitution. Article IV, Section 9 also states that the FWC shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.

4. In order to comply with this constitutional requirement, the FWC follows the procedures of Ch. 120, Fla. Stat. for matters of procedural due process in its rulemaking efforts. See *Rule 68-1008, F.A.C.*

Objection as to applicability of Section 120.54(6), Fla. Stat.:

5. In its Notice, as corrected, the FWC states that this rulemaking is undertaken pursuant to Section 120.54(6) Fla. Stat.
6. Section 120.54(6) provides an expedited process for an agency to adopt rules substantively identical to regulations adopted pursuant to federal law in the pursuance of state implementation, operation or enforcement of federal programs.
7. Presumably, the only “federal program” that could even arguably be applicable here is the Magnuson Stevens Reauthorization Act of 2006. However, the FWC has never voted or taken any other formal action to evidence an intent to implement, operate or enforce the federal program. In fact, the record of the applicable FWC Commissioner meeting for gag grouper conclusively shows that by virtue of statements made on the record by commissioners of the FWC, the FWC specifically and emphatically rejects the federal program in the instant case and only voted to move forward with the proposed rule out of fear of certain reprisals to Florida anglers from the National Marine Fisheries Service if the FWC did not adopt the rule. This does not meet the requirements of Section 120.54(6) and, therefore, Section 120.54(6) cannot be used here.
8. However, even if Florida was acting in the pursuance of a federal program, the Proposed Rule and proposed federal interim rule would not implicate the expedited procedures of Section 120.54(6) because the federal program and/or regulation in and of itself does not apply to the State of Florida. The use of Section 120.54(6) in this situation would constitute a complete misapplication of the expedited procedure set forth in the statute.
9. Section 120.54(6) applies to Federal regulations being implemented in the State of Florida, it does not allow a state agency to simply copy the text of a rule being implemented elsewhere (ie. federal waters) that does not overlap the jurisdiction of the state agency.
10. The underlying rationale of the statute is one designed to effectuate due process. In the case where the federal regulation applies to areas of the State (e.g. Clean Water Act rules adopted by EPA, Endangered Species Act designations, etc.), the regulated community has an opportunity to object and be heard at the federal level. If a person could challenge the exact same state rule under Section 120.54(3), it could essentially give a person a “second bite at the apple.” Therefore, under a proper application of the statute, due process is arguably still

protected with the expedited procedures of Section 120.54(6) (although as commented on by the Joint Administrative Procedures Committee, agencies should still proceed with extreme caution in utilizing this statutory procedure).

11. In the instant case, neither the FRA nor any Florida angler has been afforded the due process protections of Section 120.54(3) or the Federal Administrative Procedures Act because there has been no adequate rulemaking procedure to determine whether overfishing is occurring in state waters or whether a state water closure is warranted. As an aside, the proposed federal interim rule itself used expedited rulemaking procedure that did not allow for any opportunity to be heard anyway, thereby further highlighting due process concerns in the instant situation. Regardless of the federal process utilized in this case, use of Section 120.54(6) to simply “parrot” the text of a federal rule for a different geographic region would clearly violate procedural due process and is not allowed by the plain language of the statute.
12. Although not necessarily determinative, the FRA has yet to see any other agency use Section 120.54(6) in this manner. The use of 120.54(6) by the FWC completely deprives the FRA and its members of procedural due process and therefore violates Article IV, Section 9 of the Florida Constitution.

Objection to Substance of Rule:

13. The FRA also specifically objects to the language of proposed sub-section (2) of the Proposed Rule in its entirety. Sub-section (2) of the Proposed Rule closes the harvest of gag grouper for various periods throughout the remainder of the 2011 calendar year. *See attached Exhibit “A”.*
14. The Notice states that the purpose of the proposed rule is to achieve consistency between the FWC’s Reef Fish Rule and interim rules that are anticipated to be implemented by “NOAA Fisheries Services” in June 2011. FRA objects to the proposed rule on the following basis:
 - a. No federal interim rule had been adopted by the National Marine Fisheries Services at the time of the Notice and it would be inappropriate for the FWC to adopt a rule based on “discussions” between the agencies. Furthermore, the proposed federal rule is an interim rule only and the National Marine Fisheries Service, through the Gulf Council, has already proposed a permanent rule through Reef Fish Amendment 32. The State of Florida should not adopt interim federal rules that will have no correlation to the final rule.
 - b. The recently proposed federal rule violates the federal Administrative Procedures Act and the Magnuson-Stevens Reauthorization Act of 2006 by exceeding the interim rulemaking powers provided by those

Acts, and given that it was not in conformance with federal law, should not form the basis for a state rule.

- c. Any decision by the NMFS to adopt the proposed federal interim rule will not be based on the best available science. The FRA believes that gag grouper is neither overfished nor currently undergoing overfishing in the Gulf of Mexico and more particularly, is neither overfished nor undergoing overfishing in Florida state waters of the Gulf of Mexico. Therefore, it would be inappropriate for the FWC to adopt a rule based on a federal agency's invalid exercise of its rulemaking authority.
- d. The NMFS has not provided any specific data or credible scientific basis for determining that gag is undergoing overfishing in state waters specifically. NMFS has simply assumed that the determination for waters of the Gulf EEZ would apply to state waters based on the general premise that fish migrate. The NMFS also did not take substantially reduced release mortality that occurs in shallower state waters in their determination of the need for state water closures nor did they consider reduced release mortality figures attributed to re-capture of gag grouper. Further, both the FWC and Gulf Council members have questioned the scientific basis for declaring gag grouper overfished and both agencies have called for full re-runs of stock assessments thereby showing a lack of confidence in the adequacy of the current science. The FWC should not adopt a proposed rule without this data or scientific evidence.
- e. The NMFS attempted to impose its will on the citizens of the State of Florida by threatening to close all federal waters to the harvest of gag unless Florida "played ball" and closed its waters too. FRA objects that this is a legitimate basis for Florida to adopt the Proposed Rule. Further, NMFS has not provided any alternatives of shorter seasons that would achieve NMFS goals without necessitating the closure of state waters. More specifically, NMFS's own models show that closing Florida waters has a minimal impact on the reduction of harvest of gag grouper and the extent of the closure set forth in the proposed rule was not even necessary to achieve the requisite harvest reductions. Florida should not adopt any propose rule until it is apprised of other alternatives. The federal rule is simply not fair or equitable to Florida's anglers.

15. Section 120.54(6)(c) states that the agency shall not proceed to adopt any portions of the proposed rule objected to, unless the agency deems the objection to be frivolous, however the agency may proceed under 120.54(3). The FRA asserts that the FWC cannot, in good faith, deem this objection frivolous.

16. Further, the FWC cannot avail itself of the provisions of Section 120.54(6)(c) as to a rule that in no material respect differs from the requirements of the federal regulation as the FWC proposed rule is substantially and materially different than the federal rule.

17. The noticed federal rule (See 76 Fed. Reg. 22345) states:

Seasonal closure of the recreational sector for gag. The recreational sector for gag, in or from the Gulf EEZ, is closed from January 1 through September 15 and November 16 through December 31 each year. During the closure, the bag and possession limit for gag in or from the Gulf EEZ is zero.

18. First, the two rules apply to different waters. On its face, the federal rule applies to the Gulf EEZ, while the state rule applies to only state waters.

19. Second, the federal proposed rule states that there is a seasonal closure for gag grouper from January 1 through September 15 and November 16 through December 31 each year. However, the state rule provides that harvest of gag grouper from June 1 through September 15, 2011 and from November 16 through December 31, 2011. On their face, the state time periods are very substantially different. Further, the federal rule applies to each year while the state rule applies only to 2011.

20. Third, the federal rule applies to waters of the Gulf adjacent to Monroe County, while the state rule specifically excludes waters adjacent to Monroe County and sets a different season for waters off of Monroe County.

21. Therefore, for these reasons, the FWC has no ability to deem this objection frivolous as the state proposed rule is not substantively identical to the federal rule and, in fact, it is materially different than the federal rule. The FWC must observe its own procedures for observing procedural due process and follow the procedures of 120.54(6) by withdrawing this rule.

Therefore, for the reasons set forth above, The Fishing Rights Alliance respectfully objects to proposed rule 68B-14.0039 and asserts that pursuant to Article IV, Section 9, Florida Constitution and pursuant to Section 120.54(6) Fla. Stat., the FWC cannot implement the proposed rule or in the alternative cannot implement the proposed rule without going through the full rulemaking procedures set forth in Section 120.54(3), Fla. Stat. Any further action on this Proposed Rule would clearly violate the constitutionally protected due process rights of the FRA and its members.

PAVESE LAW FIRM

Attorneys for The FRA
Post Office Drawer 1507
Fort Myers, Florida 33902-1507
(239) 334-2195
(239) 332-2243 facsimile

By: 

CHARLES MANN
Florida Bar No. 0310750

EXHIBIT "A"

Notice of Proposed Rule

FISH AND WILDLIFE CONSERVATION COMMISSIONMarine Fisheries

Rule No. : RULE TITLE :

68B-14.0039: Recreational Grouper Seasons

PURPOSE, EFFECT AND SUMMARY: The purpose of this draft rule amendment is to achieve consistency between the Commission's Reef Fish Rule on recreational gag grouper harvest in the Gulf of Mexico and interim rules that are anticipated to be implemented by NOAA Fisheries Service in June 2011. Gag grouper is considered to be overfished (low stock abundance) and undergoing overfishing (excessive harvesting pressure). The Gulf of Mexico Fishery Management Council developed interim regulatory actions to address overfishing of gag grouper while a long-term rebuilding plan is developed. This rule amendment will close recreational Gulf of Mexico gag grouper harvest from June 1 through September 15, 2011 and November 16, through December 31, 2011 and would be consistent with the federal interim rule. This management measure is intended to help end overfishing of gag grouper while still allowing some fishing opportunities. The effect of this rule amendment is to prohibit recreational harvest and possession of gag grouper from June 1 through September 15, 2011 and November 16 through December 31, 2011. With this rule amendment, federal and state regulations will be consistently applied. This minimizes public confusion, aids enforceability, and contributes to the overall health and status of gag grouper in the Gulf of Mexico.

SUMMARY: Rule 68B-14.0039, F.A.C., (Recreational Grouper Seasons) would be amended to close recreational Gulf of Mexico gag grouper harvest from June 1 through September 15, 2011 and November 16, through December 31, 2011. These closures would occur in 2011 only.

RULEMAKING AUTHORITY: Article IV, Section 9, Florida Constitution.

LAW IMPLEMENTED: Article IV, Section 9, Florida Constitution.

THIS RULEMAKING IS UNDERTAKEN PURSUANT TO SECTION

120.54(1)(i)5., F.S. WRITTEN COMMENTS MAY BE SUBMITTED WITHIN 14 DAYS OF THE DATE OF THIS NOTICE TO: Bud Vielhauer, General Counsel, Fish and Wildlife Conservation Commission, 620 South Meridian Street, Tallahassee, Florida 32399-1600, (850)487-1764.

SUBSTANTIALLY AFFECTED PERSONS MAY WITHIN 14 DAYS OF THE DATE OF THIS NOTICE, FILE AN OBJECTION TO THIS RULEMAKING WITH THE AGENCY. THE OBJECTION SHALL SPECIFY THE PORTIONS OF THE PROPOSED RULE TO WHICH THE PERSON OBJECTS AND THE SPECIFIC REASONS FOR THE OBJECTION.

THE FULL TEXT OF THE PROPOSED RULE IS:

68B-14.0039 Recreational Grouper Seasons.

(1) In all state waters of the Gulf of Mexico, except in all waters of Monroe County, the closed season for the recreational harvest and possession of gag grouper, red grouper, black grouper, yellowfin grouper, yellowmouth grouper, rock hind, red hind or scamp shall be from February 1 through March 31, each year.

(2) GAG GROUPE R CLOSURE FOR 2011. In all state waters of the Gulf of Mexico, except in all waters of Monroe County, recreational harvest and possession of gag grouper shall be prohibited during the following closed periods:

(a) June 1 through September 15, 2011.

(b) November 16 through December 31, 2011.

(3)(2) In all state waters of the Atlantic Ocean, including all waters of Monroe County, the closed season for the recreational harvest and possession of gag grouper, black grouper, red grouper, yellowfin grouper, yellowmouth grouper, rock hind, red hind, scamp, coney, graysby, and tiger grouper shall be from January 1 through April 30 each year.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const. History--New 1-6-09, Amended 8-27-09, 1-19-10,_____.

Notice of Change/Withdrawal

FISH AND WILDLIFE CONSERVATION COMMISSION

Marine Fisheries

Rule No. : RULE TITLE :

68B-14.0039; Recreational Grouper Seasons

NOTICE OF CORRECTION

Notice is hereby given that the following correction has been made to the proposed rule in Vol. 37 No. 17, April 29, 2011 issue of the Florida Administrative Weekly.

The above proposed rule should have stated that the rulemaking is undertaken pursuant to Section 120.54(6), F.S. Written comments may be submitted within 14 days of the date of this notice of correction to: Bud Vielhauer, General Counsel, Fish and Wildlife Conservation Commission, 620 South Meridian Street, Tallahassee, Florida 32399-1600, (850)487-1764.

Substantially affected persons may within 14 days of the date of this notice of correction, file an objection to this rulemaking with the agency. The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection.