

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**36 CFR Part 7.27**

**RIN 1024-AD45**

**Dry Tortugas National Park-Special Regulations**

**AGENCY:** National Park Service, Interior

**ACTION:** Final Rule

**SUMMARY:** This rule will delete obsolete regulations; limit the area, extent and methods of recreational fishing within portions of the park's boundaries; implement a Research Natural Area (RNA); clarify the Superintendent's authority to regulate fishing, boating, and permitted activities; regulate vessel operation, anchoring and human activity; provide enhanced protection for shipwrecks consistent with State and Federal law; and restrict discharges into park waters. Definitions have also been added to clarify terminology.

**EFFECTIVE DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:**

**Background**

On April 7, 2006, the NPS published in the Federal Register proposed special regulations for Dry Tortugas National Park. (71 FR 17785). Previous regulations

pertained to Fort Jefferson National Monument. The Monument was established by a presidential proclamation in 1935 for the purpose of preserving the Dry Tortugas group of islands within the original 1845 federal military reservation of islands, keys, and banks. In 1980, Congress legislatively affirmed the Fort Jefferson National Monument.

In 1992, Congress enacted Public Law 102-525 (16 U.S.C. sec. 410xx et seq.) abolishing the Fort Jefferson National Monument and establishing Dry Tortugas National Park in its place. Congress established the park “to preserve and protect for the education, inspiration and enjoyment of present and future generations nationally significant natural, historic, scenic, marine, and scientific values in South Florida.” In addition, Congress directed the Secretary of the Interior to manage the park for the following specific purposes, including:

- (1) To protect and interpret a pristine subtropical marine ecosystem, including an intact coral reef community.
- (2) To protect populations of fish and wildlife, including (but not limited to) loggerhead and green sea turtles, sooty terns, frigate birds, and numerous migratory bird species.
- (3) To protect the pristine natural environment of the Dry Tortugas group of islands.
- (4) To protect, stabilize, restore and interpret Fort Jefferson, an outstanding example of nineteenth century masonry fortification.
- (5) To preserve and protect submerged cultural resources.
- (6) In a manner consistent with paragraphs (1) through (5) above to provide

opportunities for scientific research. (16 U.S.C. § 410xx-1(b)).

The NPS developed the Final General Management Plan Amendment/Environmental Impact Statement (FGMPA/EIS), approved through a Record of Decision (ROD) in July 2001, to comply with its statutory mandate to manage and protect Dry Tortugas National Park, and to respond to pressures from increased visitation and over-utilization of park resources.

As described in the FGMPA/EIS, there were indications that, despite the park's remote location approximately 70 miles west of Key West, Florida, rapidly increasing visitor use was negatively impacting the resources and values that make Dry Tortugas National Park unique. Visitation to Dry Tortugas National Park increased 400 percent from 1994 through 2000, going from 23,000 to 95,000 annual visitors. The resources and infrastructure at the park could not sustain a growth rate of this magnitude while ensuring protection of park resources consistent with the park's legislative mandate.

Scientific studies documented significant declines in the size and abundance of commercially and recreationally important fish species, particularly snapper, grouper, and grunts in Dry Tortugas National Park. These declines threaten the sustainability of reef fish communities both within the park and throughout the Florida Keys. Studies demonstrate that both fish size and abundance in the Tortugas area, including Dry Tortugas National Park, are essential to spawning and recruitment for regional fish stocks and the multi-billion dollar fishing and tourism industry in the Florida Keys.

The population of South Florida is projected to increase from its current

level of 6.3 million people to more than 12 million by 2050. With continued technological innovations such as global positioning systems and larger, faster vessels, the increase in population and recreational tourism will result in more pressure on the resources in the Tortugas area. In recent years, interest has grown in the commercial sector to provide increased transportation to the park and to conduct additional activities in the park, which would bring many more visitors and greater impacts to park resources.

A plan was started in 1998 to address pressures and update the 1983 Fort Jefferson National Monument General Management Plan. At that time, park managers placed a moratorium on the authorization of any new commercial activity in the park until an FGMPA/EIS could be completed and implemented that would adequately protect park resources.

The FGMPA/EIS addressed specific issues including: 1) protection of near-pristine resources such as coral reefs and sea grasses; 2) protection of fisheries and submerged cultural resources; 3) management of commercial services; and 4) determination of appropriate levels and types of visitor use.

After extensive public involvement and collaboration with state and federal agencies, the NPS selected a management alternative that affords a high level of protection to park resources as well as providing for appropriate types and levels of high quality visitor experiences. This will be accomplished by establishing management zones and visitor carrying capacity limits for specific locations in the park, using commercial services to direct and structure visitor use, and instituting a permit system for private as well as commercial boats. A research natural area (RNA)

will encompass a 46 square-mile area protecting a representative range of terrestrial and marine resources that will ensure protection of spawning fish and fish diversity and protect near-pristine habitats and processes to ensure high quality research opportunities. This rule prohibits extractive activities in the RNA, including fishing. A range of recreational and educational opportunities will be available for visitors as long as appropriate resource conditions are maintained. The quality of visitor experiences will be enhanced by maintaining the quality of resources while expanding visitor access throughout the park.

**Summary of Public and Agency Involvement for the Final General Management Plan Amendment and the Proposed Rule.**

This rule is the culmination of an extensive general management planning process for Dry Tortugas National Park that began in 1998. NPS planning was undertaken concurrently and collaboratively with planning by the National Oceanic and Atmospheric Administration (NOAA), the Florida Fish and Wildlife Conservation Commission (FWC), and the Gulf of Mexico Fisheries Management Council (GMFMC), leading to establishment of the Tortugas Ecological Reserve (TER) in the Florida Keys National Marine Sanctuary (FKNMS) adjoining the park.

To assist in developing alternatives for the TER, NOAA established a 25-member Working Group composed of commercial and recreational fishermen, divers, scientists, non-governmental organizations and other concerned citizens, stakeholder representatives, FKNMS Advisory Council members, and federal and state government representatives charged with resource management authority in the Tortugas area. The Working Group used an “ecosystem approach,” recommending

alternatives based on natural resources rather than jurisdictional boundaries. The NPS and FWC participated in the Working Group that gathered ecological and socio-economic information through two public meetings, a site characterization document, and the firsthand experiences of commercial and recreational fishermen and others.

To maximize public participation in the park and the sanctuary planning, the NPS and FKNMS held 5 joint scoping meetings in the fall of 1998. To gain additional information, in 1999, the NPS and NOAA asked the National Research Council of the National Academy of Sciences to examine the utility of marine reserves and protected areas for conserving fisheries, habitats, and biological diversity. The Council's report, *Marine Protected Areas: Tools for Sustaining Ocean Ecosystems*, endorsed the increased use of "no-take" reserves, in concert with conventional management approaches, as a tool for managing ocean resources. In May 1999, the Working Group reached consensus on proposed boundaries for the TER and a proposed no-fishing zone inside Dry Tortugas National Park. All public and agency comments were considered by the NPS and incorporated into the issues and alternatives evaluated in the draft GMPA and EIS.

In June 2000, the NPS and FKNMS released their draft management plans for public review and held 6 joint public hearings with the FWC and the GMFMC. Comments on the draft GMPA were overwhelmingly supportive of establishing the RNA. Out of 6,104 comments received, 97% supported the prohibition of extractive activities in this area. All public and agency comments were carefully considered by the NPS and the proposed action was modified in several areas in response to the comments.

In January 2001, the Dry Tortugas National Park FGMPA was made available to the public. The NPS received several hundred letters from citizens and organizations reflecting a variety of viewpoints about the FGMPA. The NPS carefully considered all comments including those for and against prohibiting recreational fishing in the proposed RNA. On July 27, 2001, the Secretary of the Interior approved the FGMPA, and the Record of Decision was signed. In announcing approval of the plan, the Secretary stated, “This plan has been developed with broad public outreach and a great deal of participation with the State of Florida, fishing organizations and interest groups....My goal for this plan in the future is that recreational and commercial fishermen will see more and bigger fish, more conch and lobster in Florida Bay and the Straits of Florida, as a result of the critical spawning and marine nurseries we are protecting in the park.” Additional details on public involvement for the FGMPA are included in the ROD which may be viewed or downloaded from the park’s website at <http://www.nps.gov/drto/parkmgmt/index.htm>

During the preparation of the FGMPA, the State of Florida indicated to the NPS and DOI that it claimed title to submerged lands located within Dry Tortugas National Park. These lands are also claimed by the United States. Rulemaking to implement the FGMPA was delayed pending resolution of this issue. Rather than addressing this issue through potentially protracted litigation, the State and DOI entered into a “Management Agreement for Certain Submerged Lands in Monroe County, Florida, Located within Dry Tortugas National Park” that was approved by the Florida Governor and Cabinet on August 9, 2005 and by the Secretary of the Interior on December 20, 2005. This rule is consistent with the requirements of that

agreement which stipulates that the NPS shall submit proposed regulations to the FWC for review and obtain the concurrence of the Board of Trustees of the Internal Improvement Trust Fund (Governor and Cabinet) regarding that portion of the regulations pertaining to the management of submerged lands within the park. The Governor and Cabinet received comments from a variety of recreational fishing organizations, conservation groups, elected officials, state and federal agencies, and interested parties prior to approving the agreement. The August 9<sup>th</sup> meeting was publicly noticed and received statewide media coverage. The management agreement may be viewed or downloaded from the park's website at

<http://www.nps.gov/drto/parkmgmt/index.htm>. A Florida Department of Environmental Protection (FDEP) statement on the approval of the management agreement is available on its website at

[http://www.dep.state.fl.us/secretary/news/2005/08/0809\\_01.htm](http://www.dep.state.fl.us/secretary/news/2005/08/0809_01.htm)

The FWC reviewed the proposed regulations at public meetings in Key Largo, Florida on December 1, 2005 and in Gainesville, Florida on February 2, 2006. The FWC received comments from a variety of recreational fishing organizations, conservation groups, elected officials, state and federal agencies, and interested parties at these meetings. The FWC approved the proposed regulations at its February 2, 2006 meeting and described the rationale for this action on its website at

<http://myfwc.com/whatsnew/06/statewide/tortugas.html>.

The FWC meetings were announced in advance and received statewide media coverage.

On April 5, 2006, the DOI announced publication of the NPS draft special

regulations in the Federal Register and the initiation of a 60-day public comment period. The press release and the April 7, 2006 Federal Register notice invited public comments by mail, email, fax, or in person at a May 17, 2006, public meeting in Key Largo, Florida. On May 11, 2006, the NPS issued a press release seeking comments at the May 17, 2006, meeting. The release was also distributed by electronic mail to more than 500 individuals and organizations on the park's mailing list. Articles announcing the meeting date, location, and how to submit comments were published in the Miami Herald and Florida Keys Keynoter. Forty-three (43) people attended the meeting. The NPS received 5,238 responses, including letters, e-mails, and verbal comments during the comment period that closed on June 6, 2006. Ninety-nine percent of the respondents supported NPS implementation of the proposed RNA.

The FWC has reviewed and approved this final rule, and the NPS obtained the concurrence of the Governor and Cabinet on **[insert date before publishing in the Federal Register]** 2006. The Governor and Cabinet received public comments prior to taking final action on the final regulations. The management agreement also provides that the NPS and the State will work together to implement a research and monitoring program for the park's marine ecosystem, to coordinate this work with similar efforts by the FKNMS, and to provide a status report on the fisheries and activities at least every five years to the Board of Trustees.

Once final, the regulations shall be reviewed at least every five years, and as appropriate, revised and reissued based upon the results of the research program and information contained in the status report. Information and data collected regarding

the effectiveness and performance of the RNA will also be reviewed and evaluated, and adjustments to the RNA will be undertaken, as appropriate. Any future revisions to these regulations will include opportunities for public review and comment during the rulemaking process.

### **Summary of Comments - Introduction**

The proposed rule was published for public comment on April 7, 2006, with the comment period lasting until June 6, 2006. The NPS received 5,238 comments regarding the proposed rule, including letters, e-mails, and verbal comments given at a May 17, 2006 public meeting in Key Largo, FL. Of the total, 63 are original comments and 5175 were form letters supporting implementation of the regulations and the RNA. These comments have been analyzed using a process called “content analysis.” Content analysis is a systematic process of compiling and categorizing public viewpoints and concerns. A goal of the process is to identify all relevant issues, not just those represented by the majority of respondents.

The NPS has carefully considered all comments received and in some cases adopted suggestions made. The comments and reasons for accepting or rejecting them are included below.

### **General Overview of Public Comments**

#### Research Natural Area (RNA)

- Ninety-nine percent of all commenters supported NPS implementation of a RNA zone. Reasons cited were:
  - to protect nationally significant corals and benthic habitats
  - to protect habitats for endangered sea turtles, birds and other species

- to replenish depleted fish stocks and protect biological diversity
- to achieve park purpose to protect a pristine, intact marine ecosystem
- to allow comparative studies in a non-manipulated marine ecosystem
- population pressure and threats to the ecosystem are increasing
- the science used in RNA decision making was sound
- the RNA will help support fishing/tourism economy of the Florida Keys
- public involvement for the FGMPA and proposed regulations was inclusive, collaborative and adequate
- One percent of respondents opposed NPS implementation of the RNA.  
Reasons cited were:
  - the science used in RNA decision-making was inadequate
  - the resources in the Tortugas area (corals and fish stocks) are in good condition
  - commercial fishing in the Tortugas area causes far more damage to fish stocks than recreational fishing
  - commercial fishing in the Tortugas area should be banned if NPS wants to improve fish stocks
  - existing regulations, size and bag limits will adequately protect fish stocks
  - the RNA will increase fishing pressure on areas remaining open to fishing
  - the RNA will unnecessarily restrict public access and fishing opportunities in the park
  - public involvement for the proposed regulations was inadequate

## **Response to Specific Comments**

Comment #1: The NPS does not have the authority and jurisdiction to issue regulations for Dry Tortugas National Park marine resources because the United States does not have jurisdiction of the submerged lands and waters beyond Duck Key.

NPS Response: The NPS disagrees. Congress established the present boundary of Dry Tortugas National Park in 1992 (P.L. 102-525). The NPS Organic Act (16 USC 1) authorizes the “NPS to promote and regulate the use of the Federal area know as national parks.....which purpose is to preserve the scenery and the natural and historic objects and the wildlife therein....and to leave unimpaired for the enjoyment of future generations.” Further, 16 USC 3 authorizes the Secretary of the Interior to make and publish rules and regulations deemed necessary or proper for the use and management of the parks; and 16 USC 1a-2(h) specifically authorizes the Secretary to promulgate and enforce regulations concerning boating and other activities on or relating to waters within park boundaries. With respect to submerged lands, in August 2005, the U.S. Department of the Interior and the State of Florida entered into a management agreement acknowledging each other’s claim to ownership of certain submerged lands within the park. The State and the DOI mutually agreed that the submerged lands will be managed by the NPS consistent with the authorized purpose of the park in the 2001 GMPA. Finally, NPS regulations expressly apply to waters within park boundaries subject to the jurisdiction of the United States without regard to the ownership of submerged lands.

Comment #2: The NPS should eliminate the rule that states that all fishing

gear must be stowed and unavailable when traveling within the RNA zone. This is an impractical rule for most open fishing boats.

NPS Response: The regulation assures consistency with the immediately adjacent FKNMS Tortugas Ecological Reserve and maintains the integrity of the purpose of the RNA. The NPS agrees that for smaller boats with limited space that the removal of hooks and lures is impractical. The NPS therefore adopts verbatim the FKNMS's definition of "not available for immediate use." The definition allows for the stowage of unbaited fishing rods in rod holders.

Comment #3: The science used in the RNA decision-making is inadequate because the methodology, assumptions, and data are flawed and the scientists who did the studies are biased and inexperienced in fishing and fish habits.

NPS Response: The NPS disagrees with these views. The original scientific studies that support the habitat protection and fisheries management recommendations for the Tortugas region are described in a detailed 1999 report entitled *Site Characterization for the Dry Tortugas Region* that was jointly commissioned by the NPS and the FKNMS. This report included extensive information on oceanography/water currents, coral reefs/benthic communities, as well as the fisheries essential habitats of the Tortugas region. (An extensive discussion was also included in the NPS 2001 ROD.) The specific studies of Tortugas reef fish communities and their associated benthic habitats were initially compiled in 1999 and 2000 by an inter-disciplinary team of scientists from the National Undersea Research Center (UNC), the University of Miami's Rosenstiel School of Marine and Atmospheric Sciences, the National Marine Fisheries Service (NMFS), and the

Florida Wildlife Research Institute (FWRI). This team of federal, state, and university scientists have extensive experience in marine ecology/oceanography, fisheries management, and coral reef ecosystems based on their work throughout Florida and the Caribbean, and their site-specific studies over the last 2-3 decades in the Florida Keys and Tortugas region. The methodology and results of these scientific studies have been published in numerous scientific journals and have undergone independent scientific peer review.

The fish survey methodology (underwater direct visual fish counts) that has been used is designed specifically for assessing coral reef fish stocks (Bohnsack and Bannerot 1986). The Dry Tortugas National Park field sampling plan was devised specifically for the park (Ault et al 2003). This methodology has undergone extensive design analysis and has been shown to be highly effective and is used around the world. The data analyses and fish stock assessments use standard statistical methods and well-accepted scientific methodologies. All of these methodologies have undergone multiple independent expert scientific reviews through publications in scientific journals. The NPS intends to continue its collaboration with NOAA, FWC, and the other federal and state agencies working in the FKNMS, and to specifically have the Dry Tortugas science program included in the planned independent scientific peer review efforts of the FKNMS Science Program.

The lead scientists who designed and conducted the Dry Tortugas National Park coral reef fishery assessment studies are PhD.-level senior marine scientists from the University of Miami and the NMFS. They worked with a broad team of scientists

from the FWC, the FKNMS, and many other agencies and universities. This team of scientists has many years of experience in coral reef ecology and fishery biology and have worked on fisheries projects throughout the Florida Keys and Tortugas region. The methodology and results have been presented in numerous peer reviewed scientific publications on south Florida coral reef ecology and fishery biology. Most of these scientists also live in the south Florida area and have been engaged in recreational fishing in the Florida Keys for decades. The two lead NPS marine scientists working on the Dry Tortugas National Park science programs also have advanced degrees in marine science and extensive work experience (i.e., M.S. in fishery biology, and Ph.D. in coral reef fish ecology along with 25-30 years experience working in Florida and Caribbean marine ecosystems).

Comment #4: The science used in RNA decision-making is inadequate because the NPS does not conduct fish counts at Dry Tortugas National Park.

NPS Response: The NPS does conduct fish counts at Dry Tortugas National Park, using a combination of fishery dependent surveys (angler interviews) and fishery independent surveys (direct visual fish counts). The NPS periodically interviews anglers at the dock on Garden Key, recording catch information (called creel or fishery [angler] dependent surveys). As part of these creel surveys, the NPS asks where anglers caught their fish, the number of people involved, and the duration of their fishing activities. This information allows NPS to estimate the fishing catch per unit effort (CPUE) for a series of spatially distributed fishing zones across the park. The Dry Tortugas creel survey data collected between 1980-1984 and 2000-2004 were analyzed and compared by Ault and Smith in 2006 to determine any trends

over time. This analysis found that gray snapper and grunt catch per unit effort (CPUE) declined between the two periods, suggesting that these species may have experienced long term decline in abundance in the park. The NPS acknowledges that the Dry Tortugas National Park creel survey is not as extensive as that in Everglades National Park because of the logistical problems of collecting such data in the Tortugas region. The NPS is addressing these limitations by designing a more effective Dry Tortugas National Park creel survey. The NPS also has had extensive park-wide underwater visual direct counts of the important game fish species and other coral reef fishes done regularly since 1999 (including the years 1999, 2000, 2002, 2004, and 2006). This method has been analyzed by marine fisheries experts and was determined to be a more effective method of defining reef fish abundance than a creel survey. The results of these counts and other fish data are used by fisheries managers to calculate indices to gauge the health of a fishery. One index is a spawning potential ratio (SPR) for each harvested species. The SPR is a fishery index, developed by NMFS, and is used to estimate the overall reproductive health of fish species and to estimate the impacts of overfishing. A historical study of the SPR of 35 commercially and recreationally important fish species found in the Tortugas region indicates that 13 of 16 grouper species, 7 of 13 snapper species, one wrasse, and 2 of 5 grunt species were found to be below the 30 percent SPR threshold, and are considered overfished by federal standards (Ault, Bohnsack, and Meester, 1998). The overall health of the Tortugas fishery as well as the health of its associated coral reefs and other benthic communities formed the primary basis of the scientific recommendation to implement the RNA within Dry Tortugas National Park.

Comment #5: The Research Natural Area is not needed because resources in the Dry Tortugas area (coral reefs, fisheries) are in good shape. Fish stocks are not overfished.

NPS Response: The NPS believes that the marine ecological resources (i.e., coral reefs and fisheries) within Dry Tortugas National Park are not “in good shape.” The coral reef fish stocks are well documented and are considered to be overfished based on U.S. government standards (Ault et al 2002, Ault and Smith 2006). The most recent reef game fish stock assessment, using data collected from the park in 1999-2004, concluded that 17 of 18 grouper and snapper species are overfished, based on their spawning potential ratio (Ault and Smith 2006).

The park’s coral reefs, which are an essential habitat for reef game fish, have similarly experienced substantial declines in the last 30 years. The substantial decline in stony corals, highlighted by the recent listing of the major reef forming *Acropora* spp. as a threatened species, is one of the most ecologically significant resource stewardship challenges in the park. For example, there were 1180 acres of staghorn coral dominating reefs in the park in 1976 (Davis 1982); however, it is estimated that there are currently, at most, only a few acres of live staghorn thickets left at Dry Tortugas National Park, a greater than 99% loss. The largest acreage of staghorn loss has occurred inside the proposed RNA. The stony coral cover on Bird Key Reef has decreased by over 75% from 1975 to 2005 (FWC pers. comm.; Beaver et al 2006). From 1999 to 2004, there was a greater loss in stony coral cover in the Tortugas region than in the rest of the Florida Keys (FWC 2005).

When implemented, the Dry Tortugas RNA will allow NPS to better

understand the linkages between recreational fishing and stock depletion, as well as fishery productivity and the coral reef environment. The combination of deep-water habitats in the TER and the shallow water habitats in the RNA should provide for long-term sustainability and productivity of the important game fish species as well as their associated coral reef environments. This was the major justification that the FWC and the Florida Department of Environmental Protection identified when they stated their support for implementing the Dry Tortugas RNA.

Comment #6: Commercial fishing in the Tortugas area causes far more damage to fish stocks than recreational fishing and should be prohibited around DRTO, if the NPS wants to improve fish stocks.

NPS Response: Commercial fishing within Dry Tortugas National Park has been prohibited since the original Fort Jefferson National Monument was created in 1935. Since the NPS does not have jurisdiction in the rest of the Tortugas region, this is an issue that NOAA, NMFS, and FWC would need to evaluate. There have been a number of federal and state actions to limit the impact of commercial fishing in the Tortugas region. In 2001, NOAA prohibited commercial fishing in the TER. However, the TER does not include the important shallow reef habitats critical to many reef gamefishes, which would be protected by the proposed RNA. The State of Florida has also outlawed fish traps, and NOAA does not allow fish traps in the Tortugas region. NOAA began a 10-year phase out of fish traps in the Gulf of Mexico in 1997 which will prohibit the use of fish traps throughout the Gulf in 2007. Shrimp trawls are also prohibited in coral reef areas. There are several lines of evidence indicating that recreational fishing does impact fishery stocks in the

Tortugas and Florida Keys. A Tortugas coral reef fish stock assessment (Ault et al 2002) concluded that “The Dry Tortugas National Park fishery for many reef fish stocks is in worse shape than the surrounding broader Tortugas region.” This suggests that recreational fishing is a factor because there has been no commercial fishing in the park since 1935. NMFS has conducted stock assessments for several reef gamefishes distinguishing between commercial and recreational effects of landings and bycatch mortality based on landings statistics (<http://www.sefsc.noaa.gov/sedar/>). These assessments found that for many reef species in the Florida Keys, recreational anglers extract more fish than commercial fishers. Recreational fishing in the park for spiny lobster in the 1960’s and early 1970’s caused a documented depletion in lobster abundance and a 58% decline in catch rates in the park (Davis 1977, Davis and Dodrill 1980). In response, the NPS closed the park to lobster harvesting in 1974.

Finally, the NPS believes that additional protection from increased recreational fishing activities in the Tortugas region is needed because the fishery pressure is expected to greatly increase, because the south Florida population is projected to nearly double by 2050. Studies have shown that the number of registered boat owners in south Florida has grown at a very high rate over the last two decades, while commercial fishing pressures have remained relatively flat during this same period. This again suggests that increased pressure from recreational fishing is a significant factor in the sustainability of the Tortugas fishery.

Comment #7: Existing regulations and size and bag limits will adequately protect

fish stocks.

NPS Response: Although current recreational fishing regulations are beneficial, they have not been sufficient to sustain this important fishery or to achieve the high standards of ecosystem protection required by the NPS Organic Act and the Dry Tortugas National Park enabling legislation. The well-documented condition of the Tortugas fishery and associated coral reef habitats indicates that additional protective actions are required. No-take marine reserves are commonly implemented for fishery and ecosystem protection and recovery, in addition to ongoing measures including bag limits, size limits, quotas, and gear restrictions. The U.S. Coral Reef Task Force (USCRTF) states that marine reserves are the most powerful tool for conservation of coral reef ecosystems (USCRTF 2002). Similarly, the National Research Council's 2000 review of marine protected areas endorsed the increased use of no-take marine reserves in concert with conventional management approaches.

Comment #8: The no-take RNA will increase fishing pressure on areas remaining open to fishing.

NPS Response: The NPS disagrees with this assumption and believes that the focus should be more on the overall condition of reef gamefish stocks and the health of the fishery in areas remaining open to recreational or commercial fishing. A growing number of scientific studies suggest that the ecological effect of implementing no-take marine reserves results in an increase in the abundance and size of target fishery species within areas adjacent to reserves, and thus helps sustain adjacent fisheries, due to a net export of these species from the reserve (also known as "spillover effects"). A 2001 "Scientific Consensus Statement On Marine Reserves

And Marine Protected Areas” signed by 161 marine scientists states, “In the few studies that have examined spillover effects, the size and abundance of exploited species increase in areas adjacent to reserves.”

<http://www.nceas.ucsb.edu/consensus>).

More recent scientific studies on coral reef fisheries have shown that marine reserves have enhanced adjacent fisheries, including greater fish biomass (i.e., more and/or larger fish), higher catch, increased catch rate, and reduced fishing effort (McClanahan and Mangi 2000, Roberts et al 2001, Galal et al 2002, Russ et al 2003, Russ et al 2004). DRTO plans to conduct similar scientific studies to assess the spillover effects of the RNA.

Even with RNA implementation, the vast majority of the Tortugas area, and 54% of the park will remain open to recreational fishing.

Comment #9: The RNA will unnecessarily restrict public access and fishing opportunities in the park.

NPS Response: The NPS disagrees. A variety of recreational and educational opportunities will be available to visitors in the RNA including boating, swimming, snorkeling, scuba diving, wildlife viewing, and scientific research. Fishing will not be allowed in the RNA in order to protect important nursery areas that will help produce greater abundance and diversity of fish. Mooring buoys will be installed to provide private and tour boat access to snorkel and dive sites while protecting corals, shipwrecks, and other sensitive resources from anchor damage. Allowing non-consumptive uses in the RNA, with careful monitoring of impacts of these activities, will provide exceptional resource appreciation and public education benefits. It will

also enable the NPS to meet its statutory obligation to “protect and interpret a pristine subtropical marine ecosystem, including an intact coral reef community.”

Fifty-four percent of park waters will remain open for recreational fishing including the natural/cultural zone (50 square miles), five of the park's seven islands, and the historic/adaptive use zone surrounding Garden Key and Fort Jefferson (4 square miles). This includes the overnight anchorage and shallows around Garden, Bush, and Long Keys where angling for permit and tarpon is popular. Visitor studies conducted by the NPS in 1995 and 2002 found that while the majority of visitors (78%) did not fish on their visit to the park, it is an important activity for those who do. The areas most heavily fished were a circular area extending 1 mile in radius outwards from Garden Key (64% of all trips) and the southwestern quarter of the park (57%), and these areas will remain open to recreational fishing. Private boaters often fish the anchorage adjacent to Fort Jefferson and the flats surrounding the nearby keys. Fishing from the dock and shoreline of Garden Key is popular with visitors arriving by ferry or seaplane. The areas open for fishing includes 56% of the park's seagrass meadows and 28% of park waters less than 6 feet deep.

Significant large areas adjacent to the park also remain open for recreational fishing. They include the southern half of the Tortugas Banks (west of the park), the waters south and east of the park, and the popular king-fishing area northeast of the park. These areas were excluded from the FKNMS TER in order to protect fishing interests in the region.

NPS recognizes that some of the private and charter recreational fishing that formerly occurred in the RNA will relocate to other areas within and outside the park.

The scientific literature and FKNMS experience with no-take zones strongly suggests that the fishing experience outside the RNA will be enhanced in the future as fish populations increase in size and number as a result of establishing zones dedicated to improving the spawning and juvenile populations. The presence of substantially larger fish should benefit trophy fishing in park waters adjacent to the RNA. These larger fish could also leave the RNA and be caught by recreational or commercial fishermen outside the park.

Comment #10: Public involvement for the proposed regulations was inadequate.

NPS Response: Public involvement in the Dry Tortugas National Park GMPA and the proposed regulations has been both extensive and inclusive as described in the background section above.

Comment #11: To better protect elkhorn coral (*Acropora palmate*) and staghorn coral (*Acropora prolifera*) patches special protection zones, the NPS should:

A: Close the 5 Foot Channel and install closure/marker buoys a sufficient distance inshore (toward the Fort) in 5 Foot Channel and on Long Key - Bird Key forereef near the entrance of 5 Foot Channel.

NPS response: NPS agrees, and this closure will be implemented.

B: Delineate the zones with marker buoys rather than rely on boaters to determine if they are 100 yards away from the patches.

NPS response: NPS agrees, and the zones will be appropriately marked.

C: Prohibit aircraft from taxiing, landing, or taking off within the special

protection zones.

NPS response: NPS agrees. This rule has been revised to read “a landing or takeoff may not be made ... within five hundred (500) feet of any closed area.” This includes all special protection zones.

D: Include information on threatened status of elkhorn and staghorn corals in the Section by Section analysis paragraph (c).

NPS response: NPS agrees and has modified the Section-by-Section Analysis to include this information.

Comment #12: NPS should prohibit anchoring in rubble bottom anywhere in the park because of potential negative impacts to corals, especially elkhorn and staghorn corals recently listed as threatened species under the Endangered Species Act, and to other ecological resources. Only anchoring in sand bottom should be permitted. Mooring buoys should be installed to facilitate access to coral areas without damage.

NPS response: This rule has been revised deleting any reference to anchoring on rubble bottom. More specifically, the definition of the “designated anchorage” has been revised to read: “Designated anchorage means any area of sand within one nautical mile of the Fort Jefferson Harbor Light.” The rule is now consistent with the anchoring provisions applicable in the FKNMS.

NPS will make installation of mooring buoys on the Long Key - Bird Key Reef a priority. However, boats will still be able to anchor on sand bottom on the portion of this reef that is in the designated anchorage around Garden Key. NPS will

provide educational material to inform boaters of anchoring locations on the reef so as to minimize the ecological effects of anchoring damage and identify reef areas to avoid. NPS will monitor and assess the ecological effects of anchoring on the Long Key - Bird Key Reef and adaptively manage visitor use to minimize ecological impacts.

Comment #13: The nurse shark mating area between Long Key and the elkhorn coral (*Acropora palmata*) patch should be a seasonally closed special protection zone.

NPS Response: Since this closure is based on a seasonal need that can vary from year-to-year, the NPS will address this closure using authority delegated to the Superintendent by NPS regulations.

Comment #14: The National Oceanic and Atmospheric Administration noted that the draft regulation and section-by-section discussion regarding discharges into park waters (paragraph (g), while similar to FKNMS regulations at 15 CFR 922.163, are inconsistent with FKNMS regulations for discharges within the Tortugas Ecological Reserve at 15 CFR 922.164(d)(1)(i). NOAA's discharge regulations for the TER only allow for the discharge of cooling water and engine exhaust. As a result, the draft NPS regulations would allow for certain types of discharges in the Research Natural Area zone that are not allowed in the adjacent TER (i.e., fish parts, bilge water, and gray water).

NPS Response: NPS appreciates the identification of this discrepancy and has revised the rule and section-by-section discussion to make discharge regulations within the Research Natural Area identical to those for the TER. The NPS intends for the RNA regulations to be consistent or "seamless" with FKNMS regulations for the TER as both

agencies share identical resource protection goals and wish to maximize public understanding and minimize confusion regarding allowable activities in these zones.

Complete citations to publications referenced in the Response to Specific Comments section may be viewed on the park's website at:

<http://www.nps.gov/drto/parkmgmt/index.htm>

### **Changes to the Final Rule**

Based on the preceding comments and responses, the NPS has made four substantive changes to the proposed rule language.

1. The definition of “designated anchorage” (a)(3) was modified by removing the reference to “rubble bottom.” The definition now reads, “any area of sand within one nautical mile of the Fort Jefferson Harbor Light.”

2. The definition of “not available for immediate use” (a)(11) was modified to delete the reference to requiring the removal of hooks and lures from fishing rods. The definition now reads, “not readily accessible for immediate use, e.g., by being stowed unbaited in a cabin, locker, rod holder, or similar storage area, or being securely covered and lashed to a deck or bulkhead.”

3. (k)(2)(a) The landing and takeoff of aircraft was modified to include all closed areas within the designated landing zone (within a radius of one mile of Garden Key). The proposed regulations restricted aircraft landings and takeoffs to within 500 feet of Bush Key when that island was closed for wildlife nesting. Other sensitive areas within the vicinity have been identified as needing the 500 foot buffer from aircraft landings and takeoffs. These include the staghorn coral (*Acropora*

*prolifera*) and elkhorn coral (*Acropora palmata*) patches and the nurse shark mating area. The regulation has been modified to read, “Aircraft may be landed on the waters within a radius of one (1) mile of Garden Key, but a landing or takeoff may not be made within five hundred (500) feet of any closed area.”

4. Paragraph (g), regulations for discharges into park waters, was modified to prohibit vessel discharges in the Research Natural Area, with the exception of engine cooling water and exhaust. The draft regulation would have allowed for other discharges in the RNA (i.e., fish parts, bilge water, and gray water) that are inconsistent with the goal of maintaining the highest possible water quality in this zone. The revised regulation will enhance resource protection in the RNA and is consistent with NOAA discharge regulations for the adjacent Tortugas Ecological Reserve.

### **Section-by-Section Analysis**

#### (a) What terms do I need to know?

In order to provide clarity and reduce possible confusion, 15 definitions have been included in this paragraph. They include: baitfish, cast net, designated anchorage, dip net, finfish, flat wake, guide fishing, live rock, lobster, marine life, not available for immediate use, ornamental tropical fish, permits, research natural area, and shrimp. Common fish names referred to in the regulations are further clarified by including scientific names.

#### (b) Are there recreational fishing restrictions that I need to know?

Section 2.3(a) of this chapter adopts non-conflicting state fishing laws as part of the general NPS regulations applicable to all units of the National Park System unless regulations for particular park areas specify otherwise. For Dry Tortugas

National Park, additional requirements relating to fishing are included to achieve the park's purposes and implement planning decisions. Recreational fishing activities must comply with the state regulations unless those activities are otherwise restricted or prohibited in this section. Any reference to fishing in § 7.27 refers to recreational fishing, which is the taking, attempting to take, or possessing of fish for personal use. This is the same definition used by the State of Florida. All references to commercial fishing have been removed since this activity is already prohibited by 36 CFR § 2.3(d)(4).

The intent of paragraph (b)(1) allows the Superintendent to impose restrictions or closures to protect fish species within the park. After consulting with and obtaining the concurrence of the FWC, the Superintendent may impose closures and establish conditions or restrictions necessary pertaining to fishing, including but not limited to species of fish that may be taken, seasons and hours during which fishing may take place, methods of taking, and size, bag and possession limits. In emergency situations, after consulting with the FWC, the Superintendent may impose temporary closures and establish conditions or restrictions for up to two thirty-day periods.

In emergency situations where consultation in advance is not possible, the Superintendent will consult with the FWC within 24-hours of the initiation of closures or restrictions. This provision of such closures and restrictions is in furtherance of the park's enabling legislation, which identifies protection of fish and wildlife as a purpose of its establishment. The public will receive notice of such closures or restrictions by one or more of the methods listed in § 1.7 of this chapter.

Paragraph (b)(2) identifies which fish can be taken and the legal methods for

taking these fish. Fishing is limited to fin fish caught by a closely attended hook-and-line, bait fish caught by hook-and-line, cast nets or dip nets, and shrimp caught by dip nets or cast nets. For the last 10 years, these restrictions have been enforced through the Superintendent's Compendium, which serves as a local management guide authorized by 36 CFR 1.5. The previous restriction in 36 CFR 7.27(a)(5)(i), that limits cast nets to 12 feet in diameter, has been deleted. There appears to be no compelling ecological or environmental reason to restrict the size of the cast nets. This change would make the park's regulations consistent with state regulations.

Paragraph (b)(3) identifies areas that are closed to fishing, including the RNA. Note, however, that paragraph (b)(3)(i) includes provisions that allow vessels to transit the RNA with legally harvested fish and fishing gear onboard. The provisions of paragraph (b)(3) are consistent with the regulations applicable to the adjacent TER within the FKNMS (15 CFR 922.164; Florida Administrative Code 68B-6.003). The other closed areas are the waters inside the Garden Key moat that surrounds Fort Jefferson and those within the designated swimming and snorkeling area. Fishing in these areas has been found to be incompatible with the identified visitor activities of boating, swimming and snorkeling, and for safety reasons in the helicopter-landing zone.

Paragraph (b)(4) identifies specific prohibitions on fishing within the park. This paragraph lists certain fishing practices that differ from those allowed under State of Florida regulations because these practices are incompatible with the goals and management direction of the park.

Paragraph (b)(4)(i) provides for complete protection of lobster within the

park. All existing regulations found in 36 CFR 7.27 (a)(2) related to recreational fishing catch limits for lobster, have been deleted. Prohibiting individuals from being in the water when they have lobster onboard their vessel will further enhance the protection of park resources. This “prima facie” (at first view) evidence of violation is similar to the state of Florida regulations for the Biscayne Bay/Card Sound Spiny Lobster Sanctuary (FAC 68B-11.004), and for John Pennecamp Coral Reef State Park (FAC 68B-24.005). In Dry Tortugas National Park, the harvesting of lobster has been previously prohibited through the use of the Superintendent's authority to regulate public use under 36 CFR 1.5. This prohibition was based on data collected by NPS biologists in a 1975 study, which indicated that legal harvesting was removing almost 90% of the lobster within the park. The Gulf of Mexico Fisheries Management Council concurred with this finding and recommended that the park be established as a sanctuary for lobster to assist in maintaining a population for dispersal to areas outside the park.

The proposed regulations in paragraph (b)(4)(ii), concerning possession and use of spearguns and other weapons are similar to regulations for the ecological reserves and sanctuary preservation areas found within the FKNMS (15 CFR 922.164). The State of Florida has similar regulations restricting spearfishing activities found in FS 370.172. This proposed regulation expands on the current regulation, 36 CFR 7.27(a)(7), to include guns, bows and other similarly powered weapons. Paragraph (b)(4)(iii) recognizes that a gaff is a common fishing device used to retrieve legally taken fish from the water, while identifying other prohibited fishing devices.

Although all natural resources within a national park area are protected from removal, disturbance, injury, or destruction by the general regulations found at 36 CFR 2.1, the provision at paragraph (b)(4)(iv) clarifies that ornamental tropical fish as well as all other forms of marine life within Dry Tortugas National Park are specifically protected. This additional level of protection will help achieve the congressional direction to protect a pristine subtropical marine ecosystem, including an intact coral reef community.

The intent of (b)(4)(v) is to protect coral and other submerged resources from damage or injury by prohibiting the dragging or trawling of nets that are otherwise allowed to be used in the park.

Paragraph (b)(4)(vi) prohibits the use of nets, other than dip or cast nets. The State of Florida general recreational fishing regulations allow other nets (bully nets, frame and push nets, beach or haul seines) which are inappropriate and harmful to various submerged resources in the park.

Current regulations pertaining to sea turtles and conch found in 36 CFR 7.27(a)(1) and (3) have been deleted as unnecessary. The State of Florida has prohibited the taking of conch since 1985 and the general NPS regulations already adopt all non-conflicting state laws. Because all sea turtles are currently listed as endangered or threatened species under the Endangered Species Act (16 USC 1538), it is unnecessary to duplicate prohibitions on their taking in these regulations.

Consistent with 36 CFR 5.3, paragraph (b)(4)(vii) requires that all fee-for-service guides (including guides for fishing and diving) obtain a permit or other NPS approved commercial use authorization. This permit system allows the park to better

manage the fisheries and other park resources. The Superintendent may limit the number of permitted guides within the park in order to conserve park resources and enhance the visitor experience.

(c) Are there any areas of the park closed to the public?

Yes. Paragraph (c) identifies areas that will be closed to public access. The Long/Bush Keys coral patch has been identified by biologists as “fused” staghorn (*Acropora prolifera*), a very rare hybrid of staghorn and elkhorn corals. This coral patch is threatened by a disease that is devastating staghorn and elkhorn coral in Biscayne National Park and the FKNMS. The elkhorn coral (*Acropora palmata*) patch also located in this area is the only remaining community of elkhorn coral found in the park. Elkhorn coral assemblages were once very abundant in the park, occupying about 440,000 square meters in 1881. Today this only known remaining elkhorn stand covers only a few hundred square meters. The NMFS has recently designated elkhorn and staghorn coral as “threatened species” under the Endangered Species Act. (May 9, 2006, 71 FR 26852).

Hospital and Long Keys have been closed for the last 10 years pursuant to the Superintendent’s compendium authority under 36 CFR 1.5. The largest remaining breeding colony of Magnificent Frigate birds in the United States lives on Long Key. The threatened Masked Booby and other sea birds live and breed on Hospital Key. Seasonal closures of Bush Key, East Key and portions of Loggerhead Key for turtle and bird nesting may continue to be designated through the Superintendent’s compendium pursuant to 36 CFR §§1.5, 1.7.

(d) Is Loggerhead Key open to the public?

Loggerhead Key will be open to the public subject to closures in certain areas and restrictions on certain activities. Loggerhead Key is the largest key in the park and contains an operating 150-foot lighthouse and other structures. Most of the island falls within the RNA; however, the center portion, containing the lighthouse and the other structures, falls within a historic preservation/adaptive use zone. Paragraph (d) is consistent with the FGMPA ROD provision to manage access and recreational activities on Loggerhead Key. To protect the natural and cultural resources of the island, as well as providing appropriate visitor experiences, the Superintendent may impose terms and conditions on activities as necessary. The public will be notified of any such requirements through one or more of the methods listed in § 1.7 of this chapter. Such terms and conditions include, but are not limited to: docking, hiking restrictions, beach and swimming access, and other restrictions or closures necessary to conserve the natural and cultural resources of the island.

(e) Are there restrictions that apply to anchoring a vessel in the park?

Paragraph (e) addresses anchoring locations in general and anchoring prohibitions in the RNA. In the past, boaters have commonly anchored in sea grass beds and rubble bottom, which has resulted in unacceptable impacts to park resources. By restricting anchoring to authorized locations and prohibiting anchoring in all other areas, except in emergencies, degradation to coral reefs and seagrass meadows will be significantly reduced. Paragraph (e)(2) requires vessels to use mooring buoys in the RNA. The RNA requires a higher level of protection for the marine ecosystem; thus the use of anchors in this area is prohibited.

Paragraph (e)(3) specifies where vessels can anchor. The “designated

anchorage” identified in the existing 36 CFR 7.27(b) is also revised to reflect the GMPA’s management zone which calls for limiting anchorage of vessels from sunset to sunrise to the historic preservation/adaptive use zone around Garden Key. This “designated anchorage” is any sand bottom within one nautical mile of the Fort Jefferson Harbor Light.

Paragraph (e)(4) imposes restrictions on anchoring by commercial fishing and shrimping vessels consistent with U.S. Coast Guard regulations found in 33 CFR 110.190.

(f) What vessel operations are prohibited?

This paragraph addresses several issues of unsafe or otherwise prohibited vessel operations. The Fort Jefferson moat is closed to vessels to preserve and protect the historic scene and prevent damage to the structures. Vessel use in the moat could damage the walls of the fort and the integrity of the moat wall. Because of the large volume of vessel traffic in and around the Garden Key and Bird Key harbors, vessels are required to operate at a flat wake speed to prevent injury and damage resulting from boat wakes.

(g) What are the regulations regarding the discharge of materials in park waters?

Paragraph (g) provides additional protection for water quality within the park by generally prohibiting the discharge or deposit of any material or substance in park waters. The NPS wishes to maintain the highest possible water quality, free of bacterial and chemical contamination, for health and safety reasons as well as to maintain the park's environment. Paragraph (g)(1)(i) prohibits the discharge of any materials or other matter within the Research Natural Area with the only exception being for cooling water or

engine exhaust. This regulation is identical to NOAA discharge regulations for the adjacent Tortugas Ecological Reserve at 15 CFR 922.164(d)(1)(i).

Paragraph (g)(1)(ii) allows for limited discharges from vessels, (gray water, deck wash water, cooling water, engine exhaust and oil-free bilge water), and some natural substances (fish parts) in park waters outside the Research Natural Area. The NPS recognizes that these discharges would have minimal impact on water quality and are consistent with the recreational fishing and anchoring activities authorized in these zones. These regulations are similar to NOAA discharge regulations for the FKNMS at 15 CFR 922.163.

To address future issues regarding the discharge of materials or substances in park waters, paragraph (g)(2) authorizes the Superintendent to impose further restrictions as necessary to protect park resources, visitors, or employees. The public will be notified of any changes through one or more methods listed in § 1.7 of this chapter.

(h) What are the permit requirements in the park?

Paragraph (h) requires that individuals obtain a permit to take part in any recreational activity occurring from a vessel within park boundaries. Permits may be issued in writing or be provided by oral (radio or telephone) authorization. Permitted activities may include snorkeling, diving, wildlife viewing, photography, and the use of mooring buoys. In the RNA, no permits will be issued for anchoring or fishing both which are expressly prohibited in this zone. However, a permit is not required for vessels merely transiting the park without stopping to engage in research or recreational activities. All research conducted in the park requires a permit. In the

RNA, permits will only be issued for non-manipulative research (i.e., that which does not alter the existing condition).

(i) How are coral and other underwater features protected in the park?

The coral formations within the park are internationally recognized as unique and significant. Public Law 102-525 requires protection of the “pristine subtropical marine ecosystems, including an intact coral reef community.” Accordingly, this rule provides new provisions for the protection of corals. Significant damage to coral can be caused by divers or snorkelers handling or standing on coral, especially in areas of heavy use. In this rule, the NPS hopes to better protect the resources by specifically prohibiting these actions, thereby resulting in persons being responsible for any damage that occurs to coral through contact with their body or their equipment, such as fins, SCUBA tanks, gauges, or cameras. Language is also included to prohibit taking or removing corals and live rock. Coral damage caused by vessels is often attributed to carelessness of vessel operators but can be avoided through more careful vessel operation. This rule makes vessel operators responsible for preventing damage to corals by their vessels. These last two provisions are similar to regulations in the adjacent FKNMS (15 CFR 922.163).

Paragraph (i)(3) makes vessel operators responsible for any damage to coral, seagrass or any other underwater feature caused by their anchors or anchor parts. This is to prevent damage to fragile resources and assure the highest level of resource protection.

(j) What restrictions do I need to know when on or near shipwrecks found in the park?

Paragraph (j) provides specific protection for wrecked or abandoned craft and their cargo. Dry Tortugas National Park possesses one of the greatest concentrations of historically significant shipwrecks in North America, with some dating back to the 1600's. Within the park boundary, there have been more than 275 documented maritime casualties (shipwrecks, groundings, strandings), and human activity has left a significant historical record. Protection of submerged cultural resources is a park priority, as well as a management purpose identified in Public Law 102-525. Consistent with the park's statutory mandate, this rule will provide specific protection for these cultural resources in addition to protections provided by applicable law.

(k) Can aircraft land in the park?

Paragraph (k) requires the Superintendent to manage aircraft operations by requiring users to obtain a permit to land seaplanes in the park. Seaplanes provide transportation for a significant number of park visitors. The NPS's general regulation at 36 CFR 2.17 authorizes the Superintendent to designate, through a special regulation, operating/landing locations within the park. It also prohibits aircraft from operating under power within 500 feet of swimming beaches, boat docks, or piers unless designated through a special regulation. In order to reach the designated ramp for discharging passengers, seaplanes must taxi within 500 feet of dock areas. This paragraph specifies that a landing or takeoff may not be made within 500 feet of Garden Key or 500 feet of any area designated as closed (e.g., Bush Key when it is closed for wildlife nesting), but taxiing is allowed when seaplane use is permitted. The existing regulations use a 300 yard limit for approaches, landings and takeoffs. The new limit of 500 feet will also bring these regulations in line with the general

aircraft regulations provision of 500 feet.

## **Compliance With Other Laws**

### Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget has determined that this document is a significant rule and has reviewed this rule under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The NPS has completed the report “Cost-Benefit Analysis: Proposed Regulations Implementing the Final General Management Plan Amendment/Environmental Impact Statement for Dry Tortugas National Park.” (August 15, 2005) This document may be viewed on the park’s website at: <http://www.nps.gov/drto/parkmgmt/index.htm>

This conclusion is based on the fact that the proposed regulations would not impose significant impacts on any business. The regulations are based on the FGMPA/EIS or are restatements, clarifications, and definitions of previously established policies and regulations resulting in no change or effects on the economy.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies, or controls. This rule is an agency specific rule.

(3) This rule will not materially affect budgetary effects of entitlements,

grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) OMB has determined that this rule raises novel legal or policy issues and OMB has reviewed the rule under Executive Order 12866.

#### Regulatory Flexibility Act

The Department of the Interior certifies that this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on a report entitled "Regulatory Flexibility Threshold Analysis: Proposed Regulations Implementing the Final General Management Plan Amendment/Environmental Impact Statement for Dry Tortugas National Park." (January 27, 2005). This document may be viewed on the park's website at:

<http://www.nps.gov/drto/parkmgmt/index.htm>

#### Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

- a. does not have an annual effect on the economy of \$100 million or more.
- b. will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule will not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and does not impose any other requirements on other agencies, governments, or the private sector.

#### Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

#### Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This proposed rule only applies to the use of NPS administered lands and waters.

Both the State of Florida and the United States claim title to submerged lands located within the boundaries of the park established by Congress. Rather than addressing this issue through potentially protracted litigation, the State and the Department have entered into the “Management Agreement for Certain Submerged Lands in Monroe County, Florida, Located within Dry Tortugas National Park” approved by the Florida Governor and Cabinet on August 9, 2005 and by the Secretary of the Interior on December 20, 2005. This document may be viewed on the park’s website at

<http://www.nps.gov/drto/parkmgmt/index.htm>

This rule is consistent with the requirements of the management agreement. Once final, the regulations will be reviewed by the NPS at least every five years, and

as appropriate, revised, and reissued, based upon the results of the research program conducted pursuant to the management agreement as well as the information contained in the management plan status report prepared by the NPS detailing the status and activities of the implementation of the FGMPA/EIS. Information and data collected regarding the effectiveness and performance of the RNA will also be reviewed and evaluated. Under adaptive management, NPS may consider changes in the RNA, including boundary adjustments and modifications to the protection and conservation management strategies applicable to the RNA.

Consistent with the management agreement, the NPS has obtained the concurrence of the Board of Trustees of the Internal Improvement Trust Fund regarding that portion of the regulations pertaining to the management of submerged lands within the park. Further, the NPS will submit for review to the FWC any proposed revisions or amendments thereto.

#### Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB Form 83-I is not required.

#### National Environmental Policy Act

The Department of the Interior, National Park Service prepared a Final

General Management Plan Amendment/Environmental Impact Statement (FGMPA/EIS) for Dry Tortugas National Park, Monroe County, Florida. Five alternatives were evaluated for guiding the management of the park over the next 15 to 20 years. The alternatives incorporate various zoning applications and other management provisions to ensure resource protection and quality visitor experience conditions. The environmental consequences anticipated from implementation of each alternative are addressed in the FGMPA/EIS. Impacts to natural and cultural resources, visitor experience, socioeconomic environment, and park operations/facilities are analyzed. The FGMPA/EIS was prepared in conjunction with planning by the FKNMS, the FWC, and the GMFMC to establish the TER in state and federal waters adjacent to Dry Tortugas National Park. State and federal approvals for the TER are complete and implementation of the ecological reserve is underway.

After careful consideration of legislative mandates, visitation trends, environmental impacts, relevant scientific studies, and comments from the public and agencies, the NPS chose to implement Alternative C as described in the Final GMPA/EIS issued in January 2001 (with some minor clarifications, as listed in Appendix A, Errata). This alternative best accomplishes the legislated purposes of DRTO and the statutory mission of the NPS to provide long-term protection of park resources and values while allowing for visitor use and enjoyment. It also furthers the objectives of Executive Order 13089, Coral Reef Protection.

The goal of the selected action is to afford a high level of protection to park resources and provide for appropriate types and levels of high quality visitor

experiences. This will be accomplished through management zoning, establishing visitor carrying capacity for specific locations in the park, using commercial services to direct and structure visitor use, and instituting a permit system for private boaters. A wide range of recreational and educational opportunities will be available to visitors provided that appropriate resource conditions are maintained. Visitor experiences will be enhanced due to expanded access throughout the park and higher quality resources to enjoy.

Multiple consultations took place with government agencies during the EIS process, including the FKNMS, the FWC, and the GMFMC. The NPS Southeast Regional Director signed the Record of Decision (ROD) on July 27, 2001. In reaching a decision, NPS carefully considered the comments and concerns expressed by the public throughout the EIS process. The EIS and ROD are available online at: <http://www.nps.gov/drto/parkmgmt/index.htm> or at Everglades National Park, as indicated above under the heading “**FOR FURTHER INFORMATION CONTACT**”.

Pursuant to section 7 of the Endangered Species Act, the NPS has consulted with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) regarding potential effects of the proposed regulations on federally listed species. On December 15, 2005, the FWS determined that the proposed rule would have no effect on the Bald eagle and would not likely adversely affect nesting marine turtles, the American crocodile, West Indian manatee or the Roseate tern.

On June 7, 2006, the NMFS issued a Biological Opinion on the proposed rule. NMFS determined that the continuation of hook and line fishing in the park may

result in the lethal take of one sea turtle annually. NMFS concluded that this level of take is not likely to jeopardize the continued existence of green, hawksbill, leatherback, or loggerhead sea turtles. The Biological Opinion authorizes lethal take of one sea turtle per year and determined that the following Reasonable and Prudent Measures (RPM) are necessary and appropriate to minimize impacts of incidental take of sea turtles.

1. NPS must ensure that the Dry Tortugas National Park Sea Turtle Monitoring Program is maintained and capable of both detecting any adverse effects resulting from recreational fishing inside the park and assessing the actual level of incidental take in comparison with the anticipated incidental take documented in this opinion.

2. NPS must implement outreach programs seeking to increase awareness among park anglers and visitors of protected species within the park and ways to reduce encounters with those species.

3. NPS must provide NMFS' Southeast Regional Office of Protected Resources Division (F/SER3) with sufficient information to monitor this Incidental Take Statement.

To be exempt from liability for take prohibited by section 9 of the ESA, NPS must comply with the following terms and conditions, which implement the RPMs described above. These terms and conditions are non-discretionary.

To implement RPM No. 1:

1. NPS must increase its sea turtle stranding surveillance to at least twice weekly. This surveillance should be split equally between shore and in water surveys when feasible.

2. NPS must establish a reporting system that requires anglers or charter boat guides to report interactions between their fishing party and sea turtles.

To implement RPM No. 2:

3. NPS must develop and implement an outreach program to educate recreational fishers on sea turtle handling protocols, emphasizing release procedures that minimize stress and maximize survival potential.

4. NPS must supply recreational fishers with verbal and/or written information on fishing gear that can reduce sea turtle bycatch (i.e., circle hooks).

To implement RPM No. 3:

5. NPS must notify F/SER3 immediately if they believe a sea turtle stranding is related in any way to fishing activities within the park.

6. NPS shall monitor sea turtle strandings to ensure incidental take levels do not exceed the authorized level. If at any time, the take level stated in this opinion is exceeded, NPS must notify F/SER3 immediately. Stranding reports shall be submitted to F/SER3 annually. Submitted reports must include any information on the causes of strandings, with special attention paid to any fishing gear associated with the animal.

#### Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments"

(59 FR 22951) and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects.

### **List of Subjects in 36 CFR Part 7**

National Parks, recreation

For reasons stated in the preamble, the National Park Service amends 36 CFR Part 7 as follows:

### **PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM**

1. The authority for Part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137(1981) and D.C. Code 40–721 (1981).

2. Section 7.27 is revised as follows

#### **§ 7.27 Dry Tortugas National Park**

*(a)* What terms do I need to know? The following definitions apply to this section only:

(1) Bait fish means any of the following:

(i) Ballyhoo (family *Exocoetidae* and genus *Hemiramphus*), other genus may be included in this family;

(ii) Minnow (families *Cyprinodontidae*, *Peciliidae*, or *Atherinidae*);

(iii) Mojarra (family *Gerreidae*);

(iv) Mullet (family *Mugilidae*);

(v) Pilchard (family *Clupeidae*); or

(vi) Pinfish (family *Sparidae*, genus *Lagodon*).

(2) Cast net means a type of circular falling net, weighted on its periphery, which is thrown and retrieved by hand, measuring 14 feet or less stretched length (stretched length is defined as the distance from the horn at the center of the net with the net gathered and pulled taut, to the lead line).

(3) Designated anchorage means any area of sand within one nautical mile of the Fort Jefferson Harbor Light.

(4) Dip net means a hand held device for obtaining bait, the netting of which is fastened in a frame. A dip net may not exceed 3 feet at its widest point.

(5) Finfish means a member of subclasses Agnatha, Chondrichthyes, or Osteichthyes.

(6) Flat wake speed means the minimum required speed to leave a flat wave disturbance close astern a moving vessel yet maintain steerageway, but in no case in excess of 5 statute miles per hour.

(7) Guide operations means the activity of a person, partnership, firm, corporation, or other entity to provide services for hire to visitors of the park. This includes, but is not limited to, fishing, diving, snorkeling, and wildlife viewing.

(8) Live rock means any living marine organism or assemblage thereof attached to a hard substrate, including dead coral or rock but not individual mollusk shells.

(9) Lobster means any of the following:

(i) Shovel-nosed or Spanish Lobster (*Scyllarides aequinocti*);

(ii) Slipper lobster (*Parribacis antarcticus*);

(iii) Caribbean spiny lobster (*Panulirus argus*); or

(iv) Spotted spiny lobster (*Panulirus guttatus*).

(10) Marine life means:

(i) Sponges, sea anenomes, corals, jellyfish, sea cucumbers, starfish, sea urchins, octopus, crabs, shrimp, barnacles, worms, conch; and

(ii) Other animals belonging to the Phyla Porifera, Cnidaria, Echinodermata, Mollusca, Bryozoa, Brachiopoda, rthropoda, Platyhilmenthes, and Annelida.

(11) Not available for immediate use means not readily accessible for immediate use (e.g., by being stowed unbaited in a cabin, locker, rod holder, or similar storage area, or being securely covered and lashed to a deck or bulkhead).

(12) Ornamental tropical fish means a brightly colored fish, often used for aquarium purposes and which lives in close relationship to coral communities, belonging to the families Syngathidae, Apogonidae, Pomacentridae, Scaridae, Blennidae, Callionymidae, Gobiidae, Ostraciidae, or Diodontidae.

(13) Permit, in the case of 36 CFR Part 7.27, means an authorization in writing or orally (e.g., via radio or telephonically),

(14) Research Natural Area (RNA) at Dry Tortugas National Park means the 46-square-statute-mile area in the northwest portion of the park enclosed by connecting with straight lines the adjacent points of 82°51'W and 24° 36'N, and 82°58'W and 24°36'N west to the park boundary, but excluding:

(i) The designated anchorage;

(ii) Garden Key, Bush Key and Long Key; or

(iii) The central portion of Loggerhead key including the lighthouse and associated buildings.

(15) Shrimp means a member of the genus *Farfantepenaeus*, *Penaeus* sp.

(b) Are there recreational fishing restrictions that I need to know?

Yes. (1) After consulting with and obtaining the concurrence of the Florida Fish and Wildlife Conservation Commission, based on management objectives and the park fisheries research, the Superintendent may impose closures and establish conditions or restrictions necessary pertaining to fishing, including, but not limited to, species of fish that may be taken, seasons, and hours during which fishing may take place, methods of taking, and size, bag, and possession limits. The public will be notified of any changes through one or more methods listed in § 1.7 of this chapter. In emergency situations, after consulting with the Florida Fish and Wildlife Conservation Commission, the Superintendent may impose temporary closures and establish conditions or restrictions necessary, but not exceeding 30 days in duration which may be extended for one additional 30 day period, pertaining to fishing, including, but not limited to, species of fish that may be taken, seasons, and hours during which fishing may take place, methods of taking, and size, bag, and possession limits. In emergency situations where consultation in advance is not possible, the Superintendent will consult with the Florida Fish and Wildlife Conservation Commission within 24-hours of the initiation of the temporary closure or restriction.

(2) Only the following may be legally taken from Dry Tortugas National Park:

(i) Fin fish by closely attended hook-and-line;

(ii) Bait fish by closely attended hook and line, dip net, or cast net and limited to 5 gallons per vessel per day; and

(iii) Shrimp may be taken by dip net or cast net.

(3) The following waters and areas are closed to fishing:

(i) The Research Natural Area (RNA): Fish and fishing gear may be possessed aboard a vessel in the RNA, provided such fish can be shown not to have been harvested from within, removed from, or taken within the RNA, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through the RNA, provided further that such vessel is in continuous transit through the RNA. Gear capable of harvesting fish may be aboard a vessel in the RNA, provided such gear is not available for immediate use when entering and during transit through the RNA and no presumption of fishing activity shall be drawn therefrom;

(ii) Garden Key moat;

(iii) Within any swimming and snorkeling areas designated by buoys;

(iv) Within 50' of the historic coaling docks;

(v) Helipad areas, including the gasoline refueling dock.

(4) The following are prohibited:

(i) Possessing lobster within the boundaries of the park, unless the individual took the lobster outside park waters and has the proper State/Federal licenses and permits. Vessels with legally taken lobster aboard which was taken outside the park may not have persons overboard in park waters. The presence of lobster aboard a vessel in park waters, while one or more persons from such vessel are overboard, constitutes prima facie evidence that the lobsters were harvested from park waters in violation of this chapter.

(ii) Taking fish by pole spear, Hawaiian sling, rubber powered, pneumatic, or

spring loaded gun or similar device known as a speargun, air rifles, bows and arrows, powerheads, or explosive powered guns. Operators of vessels within the park must break down and store all weapons described in this paragraph so that they are not available for immediate use.

(iii) Use of a hand held hook, gig, gaff, or snare, except that a gaff may be used for landing a fish lawfully caught by hook and line when consistent with all requirements in this section, including size and species restrictions.

(iv) Taking, possessing, or touching any ornamental tropical fish or marine life except as expressly provided in this section.

(v) Dragging or trawling a dip net or cast net.

(vi) The use of nets except as provided in paragraphs (b)(3)(ii) and (iii) of this section.

(vii) Engaging in guide operations (fee for service), including but not limited to fishing and diving, except in accordance with the provisions of:

(A) A permit, contract, or other commercial use authorization; or

(B) Other written agreement with the United States administered under this chapter.

(c) Are any areas of the park closed to the public? Yes. The following areas are closed to the public:

(1) The elkhorn (*Acropora palmata*) and staghorn (*Acropora prolifera*) coral patches adjacent to and including the tidal channel southeast of Long and Bush Keys and extending to 100 yards from the exterior edge of either patch;

(2) Hospital and Long Keys; and

(3) Areas that the Superintendent designates in accordance with § 1.5 and noticed to the public through one or more of the methods listed in § 1.7 of this chapter.

(d) What restrictions apply on Loggerhead Key?

(1) The Superintendent will, as necessary to protect park resources, visitors, or employees:

(i) Designate areas on Loggerhead Key open for public use;

(ii) Establish closures or restrictions on and around the waters of Loggerhead Key; and

(iii) Establish conditions for docking, swimming or wading, and hiking.

(2) The Superintendent will notify the public of designations, closures or restrictions under this paragraph.

(e) What restrictions apply to anchoring a vessel in the park?

(1) Anchoring in the Research Natural Area (RNA) is prohibited.

(2) All vessels in the RNA must use designated mooring buoys.

(3) Anchoring between sunset and sunrise is limited to the designated anchorage area at Garden Key.

(4) Vessels engaged in commercial fishing or shrimping must not anchor in any of the channels, harbors, or lagoons in the vicinity of Garden Key, Bush Key, or the surrounding shoals outside of Bird Key Harbor, except in cases of emergency involving danger to life or property. (Emergencies may include, adverse weather conditions, mechanical failure, medical emergencies, or other public safety situations.)

(f) What vessel operations are prohibited? The following vessel operations are prohibited:

- (1) Operating a vessel in the Fort Jefferson Moat; and
- (2) Operating a vessel above a flat wake speed in the Garden Key and Bird

Key Harbor areas.

(g) What restrictions apply to discharging materials in park waters?

(1) Discharging or depositing materials or substances of any kind within the boundaries of the park is prohibited, except for the following:

(i) *Research Natural Area*: cooling water or engine exhaust.

(ii) *Park Waters Outside the Research Natural Area*:

(A) Fish, fish parts, chumming materials, or bait used or produced incidental to and while conducting recreational fishing activities in the park;

(B) Water generated by routine vessel operations (e.g., deck wash down and graywater from sinks, consisting of only water and food particles;

(C) Vessel cooling water, engine exhaust, or bilge water not contaminated by oil or other substances.

(2) The Superintendent may impose further restrictions as necessary to protect park resources, visitors, or employees. The Superintendent will notify the public of these requirements.

(h) What are the permit requirements in the park?

(1) A permit, issued by the Superintendent, is required for all non-commercial

vessels for which occupants are engaged in recreational activities, including all activities in the RNA. Permitted recreational activities include but are not limited to use of mooring buoys, snorkeling, diving, wildlife viewing, and photography.

(2) A permit, issued by the Superintendent, is required for a person, group, institution, or organization conducting research activities in the park.

(3) Vessels transiting the park without interruption shall not require a permit.

(i) How are corals and other underwater natural features protected in the park?

(1) Taking, possessing, removing, damaging, touching, handling, harvesting, disturbing, standing on, or otherwise injuring coral, coral formation, seagrass or other living or dead organisms, including marine invertebrates, live rock, and shells, is prohibited.

(2) Vessel operators are prohibited from allowing their vessel to strike, injure, or damage coral, seagrass, or any other immobile organism attached to the seabed.

(3) Vessel operators are prohibited from allowing an anchor, chain, rope or other mooring device to be cast, dragged, or placed so as to strike, break, abrade, or otherwise cause damage to coral formations, sea grass, or submerged cultural resources.

(j) What restrictions apply on or near shipwrecks?

(1) No person may destroy, molest, remove, deface, displace, or tamper with wrecked or abandoned vessels of any type or condition, or any cargo pertaining

thereto.

(2) Surveying, inventorying, dismantling, or recovering any wreck or cargo within the boundaries of the park is prohibited unless permitted in writing by the Superintendent.

(k) How are aircraft operations restricted?

(1) Landing an aircraft in Dry Tortugas National Park may occur only in accordance with a permit issued by the Superintendent under §1.6 of this chapter.

(2) When landing is authorized by permit, the following requirements also apply:

(i) Aircraft may be landed on the waters within a radius of 1 mile of Garden Key, but a landing or takeoff may not be made within 500 feet of Garden Key, or within 500 feet of any closed area.

(ii) Operation of aircraft is subject to § 2.17 of this chapter, except that seaplanes may be taxied closer than 500 feet to the Garden Dock while en route to or from the designated ramp, north of the dock.

(iii) Seaplanes may be moored or brought up on land only on the designated beach, north of the Garden Key dock.

Dated:

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**David M. Verhey**

*Acting Assistant Secretary for Fish and Wildlife and Parks*

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