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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 665**

**[Docket No. 170404354-7873-01]**

**RIN 0648-BG79**

**Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area; Court Order**

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

**ACTION:** Final rule.

**SUMMARY:** In this final rule, NMFS removes a regulatory exemption that allowed certain large U.S. longline vessels to fish in portions of the American Samoa Large Vessel Prohibited Area (LVPA). The intent is to comply with a U.S. District Court Final Judgment and Order that vacated and set aside that rule.

**DATES:** Effective [*insert date of publication in the FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Bob Harman, NMFS PIRO Sustainable Fisheries, 808-725-5170.

**SUPPLEMENTARY INFORMATION:** NMFS and the Western Pacific Fishery Management Council (Council) manage pelagic

fisheries in the U.S. Pacific Islands under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region, formerly the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region (FMP). In 2002, in response to a recommendation from the Council, NMFS implemented a measure under the FMP that prohibited certain vessels from fishing for Pacific pelagic management unit species in Federal waters from 3 nm to approximately 30-50 nm around the islands of American Samoa (the Large Vessel Prohibited Area, LVPA). The area prohibition applied to vessels more than 50 ft in length overall that had not landed pelagic management unit species in American Samoa under a Federal longline general permit prior to November 13, 1997. The LVPA was intended to prevent the potential for gear conflicts and catch competition between large and small vessels. At the time, the Council and NMFS felt that such conflicts and competition could have led to reduced opportunities for sustained participation by residents of American Samoa in the small-scale pelagic fishery. You may read more about the establishment of the LVPA in the 2001 proposed rule (66 FR 39475, July 31, 2001) and 2002 final rule (67 FR 4369, January 30, 2002).

Since 2002, however, the American Samoa longline fishery has been experiencing declining catch rates of

albacore, lower fish prices, and increased fuel and operating costs. In the period 2001-2009, longline incomes had decreased by 96 percent, with average revenues only half of what was necessary for profitable operations. Concerned that the LVPA might be unnecessarily reducing the efficiency of the larger American Samoa longline vessels by displacing the fleet from a part of their historical fishing grounds, in early 2014 the Council began exploring ways to assist the longline fishery, while ensuring conservation of affected stocks and minimizing impacts to other fisheries. To address current fishery conditions, the Council recommended in 2015 that NMFS provide a limited exemption from the LVPA based on vessel size, and allow federally permitted U.S. longline vessels 50 ft and longer to fish in portions of the LVPA.

Accordingly, in 2016, NMFS published a final rule that allowed large federally permitted U.S. longline vessels to fish in specific areas of the LVPA. That action allowed large U.S. vessels that hold a Federal American Samoa longline limited entry permit to fish within the LVPA to within about 12-17 nm from shore around Swains Island, Tutuila, and the Manua Islands. Large vessels continued to be restricted from fishing within the remaining portions of the LVPA. The intent of the rule was to improve the

viability of the American Samoa longline fishery and achieve optimum yield, while preventing overfishing in accordance with National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). You may read more about the large vessel exemptions to the LVPA in the 2015 proposed rule (80 FR 51527, August 25, 2015) and 2016 final rule (81 FR 5619, February 3, 2016).

In July 2016, the Territory of American Samoa sued NMFS and the Council in the U.S. District Court for the District of Hawaii (*Territory of American Samoa v. NMFS, et al. (D. HI) Civil 16-00095*), seeking to set aside the 2016 final rule. The Territory claimed that NMFS did not consider, as other applicable law, the 1900 and 1904 Deeds of Cession with respect to the protection of the cultural fishing rights of the people of American Samoa.

On March 20, 2017, the U.S. District Court for the District of Hawaii held that, because NMFS did not consider whether the 2016 rule was consistent with the Deeds of Cession, the final rule was invalid. The Court issued an Order for NMFS to vacate and set aside the LVPA exemption rule. On August 10, 2017, the U.S. District Court denied Defendants' Motion for Reconsideration of this Judgment. Pursuant to the Final Judgment, this final rule removes the

LVPA exemptions based on vessel size found at Title 50, Code of Federal Regulations, Section 665.818, paragraph (b). All other provisions applicable to the American Samoa longline fishery remain unchanged.

**Classification**

The Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Court's Final Judgment, the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause to waive notice and public comment on this action because it would be unnecessary and contrary to the public interest, as provided by 5 U.S.C. 553(b) (B). This action is limited in scope and ensures that the regulatory text provides accurate information to the regulated public that is consistent with a Federal Court Order. NMFS does not have discretion to take other action, as there is no alternative to complying with the requirements of the Court Order.

Furthermore, the Assistant Administrator for Fisheries finds good cause to waive the 30-day delayed effectiveness period, as provided by 5 U.S.C. 553(d) (3), finding that

such delay would be contrary to the public interest because the measures contained in this rule are necessary to ensure that the fishery is conducted in compliance with a Federal Court Order. On March 27, 2017, NMFS notified longline permit holders of the Court Order, that the exemption available to large longline vessels no longer applies, and that they may not fish within the boundaries of the LVPA.

Because this rulemaking is required by Court Order, and prior notice and opportunity for public comment are not required under 5 U.S.C. 553, or any other law, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act, 5 U.S.C. 603-605, do not apply to this rule. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

In addition, because the changes required by the Court Order that are identified in this rule are non-discretionary, the National Environmental Policy Act does not apply to this rule.

**List of Subjects in 50 CFR Part 665**

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 14, 2017.

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 665 as follows:

**PART 665 -- FISHERIES IN THE WESTERN PACIFIC**

1. The authority citation for 50 CFR part 665 continues to read as follows:

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

**§ 665.818 [Amended]**

2. In § 665.818, remove and reserve paragraph (b).

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