



**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 665**

**[Docket No. 210701-0142]**

**RIN 0648-BK28**

**Pacific Island 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:** NMFS implements a regulatory exemption that allows certain U.S. longline vessels 50 ft (15.2 m) and larger ("large longline vessels") to fish in portions of the American Samoa Large Vessel Prohibited Area (LVPA). The intent is to comply with a U.S. Ninth Circuit Court of Appeals decision and Order that reversed a district court ruling that had vacated and set aside the exemption.

**DATES:** Effective [*insert date of filing for public inspection 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. In 2016, NMFS published a final rule (81 FR 5619, February 3, 2016) that allowed U.S. longline vessels greater than 50 feet that hold a Federal American Samoa longline limited entry permit to fish within the LVPA to within about 12-17 nm (22-31 km) from shore around Swains Island, Tutuila, and the Manua Islands. Large longline 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). Additional information about the LVPA exemptions is available in the proposed rule (80 FR 51527, August 25, 2015) and final rule.

In July 2016, the Territory of American Samoa sued NMFS 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 Cessions with respect to the protection of 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 the 2016 final rule was arbitrary and capricious because NMFS did not consider

whether the rule and its impacts on cultural fishing were consistent with the Cessions. On August 10, 2017, the U.S. District Court denied Defendants' Motion for Reconsideration of this decision. Accordingly, NMFS published a final rule (82 FR 43908, September 20, 2017) that removed the regulatory exemption that allowed large vessels to fish within certain areas of the LVPA.

NMFS appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit (*Territory of American Samoa v. NMFS et al.*, No. 17-17081 (9th Cir.)). On September 25, 2020, a 9th Circuit Court panel unanimously held that NMFS had properly considered the impact of the 2016 LVPA rule on cultural fishing and fishing communities, regardless of whether it specifically considered the Cessions. American Samoa subsequently filed a petition for a writ of certiorari, which on June 21, 2021, the Supreme Court denied. Pursuant to the 9th Circuit Court mandate on November 17, 2020, this final rule reinstates the LVPA exemptions established in the 2016 final rule (81 FR 5619, and codified at 50 CFR 665.818(b)). This rule allows U.S. large longline vessels that hold a Federal American Samoa longline limited entry permit to fish within the LVPA to approximately 12-17 nm from the shoreline around Swains Island, Tutuila, and the Manua Islands. All other provisions applicable to the fishery remain unchanged.

## **Classification**

NMFS is issuing this rule pursuant to 305(d) of the Magnuson-Stevens Act because this action is necessary to carry out the Ninth Circuit Order. The Assistant Administrator for Fisheries has determined that this final rule is consistent with the Ninth Circuit Order, the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific, and other applicable law.

The Assistant Administrator for Fisheries 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 reinstates an exemption that was implemented by prior rulemaking, including the opportunity for notice and comment, and that was set aside by a district court. That district court decision has been reversed by the Ninth Circuit Court of Appeals. NMFS does not have discretion to take other action, as there is no alternative to complying with the requirements of the Ninth Circuit 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 the Ninth Circuit Order.

Because this rulemaking is required by a Ninth Circuit 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 Ninth Circuit Order identified in this rule are non-discretionary, the National Environmental Policy Act does not apply to this rule.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

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

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

Dated: July 6, 2021.

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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.

2. In § 665.818, add paragraph (b) to read as follows:

**§ 665.818 Exemptions for American Samoa large vessel prohibited areas.**

\* \* \* \* \*

(b) *Exemption for vessel size.* Except as otherwise prohibited in subpart I of this part, a vessel of any size that is registered for use with a valid American Samoa longline limited access permit is authorized to fish for western Pacific pelagic MUS within the American Samoa large vessel prohibited areas as defined in § 665.806(b), except that no large vessel as defined in § 665.12 may be used to fish for western Pacific pelagic MUS in the portions of the American Samoa large vessel prohibited areas, as follows:

(1) EEZ waters around Tutuila Island enclosed by straight lines connecting the following coordinates (the datum for these coordinates is World Geodetic System 1984 (WGS84)):

Point	S. lat.	W. long.
TU-1	14° 01' 42"	171° 02' 36"
TU-2	14° 01' 42"	170° 20' 22"
TU-3	14° 34' 31"	170° 20' 22"
TU-4	14° 34' 31"	171° 03' 10"
TU-5	14° 02' 47"	171° 03' 10"
TU-1	14° 01' 42"	171° 02' 36"

(2) EEZ waters around the Manua Islands enclosed by straight lines connecting the following coordinates (WGS84):

Point	S. lat.	W. long.
MA-1	13° 57' 16"	169° 53' 37"
MA-2	13° 57' 16"	169° 12' 45"
MA-3	14° 28' 28"	169° 12' 45"
MA-4	14° 28' 28"	169° 53' 37"
MA-1	13° 57' 16"	169° 53' 37"

(3) EEZ waters around Swains Island enclosed by straight lines connecting the following coordinates (WGS84):

Point	S. lat.	W. long.
SW-1	10° 50' 42"	171° 17' 42"
SW-2	10° 50' 42"	170° 51' 39"
SW-3	11° 16' 08"	170° 51' 39"
SW-4	11° 16' 08"	171° 17' 42"
SW-1	10° 50' 42"	171° 17' 42"

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