

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 200903-0232]

RIN 0648-BJ94

Pacific Island Fisheries; Interim Measures for American Samoa Bottomfish

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

ACTION: Proposed temporary rule; interim measures; request for comments.

SUMMARY: NMFS proposes this temporary rule for an interim catch limit (ICL) of 13,000 lb of American Samoa bottomfish for fishing year 2020. NMFS would monitor 2020 catches, and if the fishery reaches the ICL, we would close the fishery in Federal waters for the remainder of the calendar year. This temporary action is necessary to reduce overfishing of American Samoa bottomfish while minimizing socio-economic impacts to fishing communities. This proposed rule supports the long-term sustainability of American Samoa bottomfish.

DATES: NMFS must receive comments by September 28, 2020.

ADDRESSES: You may submit comments on this proposed temporary rule, identified by NOAA-NMFS-2020-0099, by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/docket?D=NOAA-NMFS-2020-0099, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- **Mail:** Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will

accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

The Fishery Ecosystem Plan for the American Samoa Archipelago (FEP) is available from the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808-522-8220, or www.wpcouncil.org.

NMFS prepared a draft environmental assessment (EA) that describes the potential impacts on the human environment that could result from this temporary rule. The draft EA and other supporting documents are available from www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Brett Schumacher, NMFS PIR Sustainable Fisheries, 808-725-5185.

SUPPLEMENTARY INFORMATION: NMFS and the Council manage the bottomfish fishery in the U.S. Exclusive Economic Zone (Federal waters) around American Samoa under the FEP and the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Most of the management measures for the fishery are found at 50 CFR 665.

In 2019, the NMFS Pacific Islands Fisheries Science Center (PIFSC) published a benchmark stock assessment that indicated that the multi-species bottomfish stock complex in American Samoa is overfished and experiencing overfishing. NMFS presented these findings at the October 2019 meeting of the Council's Scientific and Statistical Committee (SSC) in Honolulu, Hawaii, and at the October 2019 Council meeting in Pago Pago, American Samoa. At these meetings, the SSC and Council accepted the stock assessment as the best scientific information available for the management of bottomfish in American Samoa. In January 2020, NMFS determined that the assessment results represent the best scientific information available, consistent with National Standard 2 of the Magnuson-Stevens Act. Accordingly, NMFS determined in February 2020, that the stock is overfished and subject to overfishing, and notified the Council of this determination and the Council's obligations to end overfishing and rebuild the stock under Magnuson-Stevens Act section 304(e)(3).

Upon notification that a stock is subject to overfishing, the Council must immediately set catch at a level that would end overfishing. See 50 CFR 600.310(j)(2)(i). Upon notification that a stock is overfished, the Council must prepare and implement a fishery management plan, plan amendment, or regulation that would end overfishing and rebuild the stock. See 50 CFR

600.310(j)(2)(ii). This action must be implemented within two years of the notification.

The 2019 stock assessment indicated that the annual catch would need to be limited to no more than 8,000 lb through 2025 to end overfishing, consistent with the Magnuson-Stevens Act and National Standard 1. However, the average annual catch of American Samoa bottomfish management unit species (MUS) in the latest five years of the stock assessment (2013-2017) was 21,129 lb. The Council discussed the results of the stock assessment, including the levels of catch that would be needed to end overfishing immediately, at its 180th meeting in American Samoa in October 2019. Fishermen commented that a catch limit of 8,000 lb bottomfish that would end overfishing, or a closure of the federal fishery altogether, would result in detrimental economic, social, and cultural impacts. They indicated that bottomfish, particularly the species found in the deeper federal waters, are primarily used for cultural purposes and for subsistence, rather than for profit. In response to these concerns, the Council requested that NMFS implement an interim measure to reduce, but not necessarily end immediately, overfishing of the stock while the Council develops action required by MSA 304(e)(3), consistent with section 304(e)(6). In consideration of concerns from fishermen and the Council's request, NMFS considered catch levels greater than 8,000 lb that would mitigate effects of management on fishing communities while the Council and NMFS develop long-term management measures to end overfishing and rebuild the stock.

The regulations on emergency actions and interim measures under National Standard 1 (50 CFR 600.310(j)(4)) provide conditions that must be met to implement an interim measure under MSA 304(e)(6):

1. The interim measures are needed to address an unanticipated and significantly changed understanding of the status of the stock or stock complex;

2. Ending overfishing immediately is expected to result in severe social and/or economic impacts to a fishery; and

3. The interim measures will ensure that the stock or stock complex will increase its current biomass through the duration of the interim measures.

We evaluate whether these conditions are met in the EA and summarize as follows:

1. The overfished and overfishing conditions in the fishery were not known before the 2019 benchmark stock assessment, and the stock was believed

to be healthy according to the previous stock assessment. Thus, condition (1) has been met;

2. Catch would have to be substantially reduced from recent catches to immediately end overfishing (from over 21,000 lb to 8,000 lb), and comments from fishermen indicate that ending overfishing immediately would have negative social, economic, and cultural impacts to community members who use bottomfish resources for commercial, subsistence, religious, and cultural purposes. The Council recognized these perspectives in their request for an interim action and believes that ending overfishing immediately would have severe social and/or economic impacts to the fishery, and NMFS concurs with this conclusion. Thus, condition (2) has been met; and

3. The PIFSC completed expanded catch projections that indicated a catch of up to 13,000 lb would allow the MUS stock biomass to increase during the effective period of this interim measure. Implementing a catch limit of 13,000 lb and closing the fishery after that limit is reached would ensure biomass increases (condition 3). However, even after a closure of the fishery in Federal waters, catch is expected to continue unconstrained in American Samoa waters. Thus, catch is expected to exceed 13,000 lb notwithstanding NMFS's implementation of a catch limit of 13,000 lb. Due to unconstrained fishing of the stock in American Samoa waters, no NMFS action can ensure that biomass increases. However, a catch limit of 13,000 lb provides a conservation benefit relative to the status quo (*i.e.*, an unconstrained fishery), reduces overfishing, and contributes to rebuilding the stock.

NMFS discussed potential alternative management options for the interim measure at subsequent public Council meetings, and during meetings with managers from the American Samoa Department of Marine and Wildlife Resources (DMWR). Fishermen and Council members from American Samoa commented at public Council meetings that a catch limit of 0 lb, 8,000 lb, or even 13,000 lb would have social, cultural and economic effects. In a June 15, 2020, letter to the NMFS Pacific Islands Regional Office, the DMWR expressed concerns that the ICL of 13,000 lb is too low for their fishermen to subsist, and that a closure of offshore banks in Federal waters to bottomfish fishing would deprive fishermen of important fishing grounds for deep-water snappers that are critical for cultural ceremonies.

Based on this information and considering the best scientific information available and Federal requirements for interim management actions, NMFS proposes to implement an ICL of 13,000 lb. This ICL provides a balance between regulatory requirements to reduce overfishing, and the need to mitigate impacts of fishery management on communities in American Samoa. The best scientific information available projects that 13,000 lb is the greatest level catch that would allow stock biomass to increase during the interim measure, as required by 50 CFR 600.310(j)(4), so Federal regulations do not allow NMFS to implement a greater ICL. At the same time, 13,000 lb is 63 percent greater than the 8,000 lb level that would end overfishing. The present action therefore addresses impacts to the fishery and related communities (inclusive of cultural fishing practices) to the degree NMFS is able within regulatory constraints. Under the proposed measure, overfishing would be reduced relative to the status quo, and socioeconomic impacts to the community would be minimized relative to measures that would end overfishing immediately.

The conservation benefit achieved by this measure may be mitigated by circumstances outside NMFS authority. Specifically, catch would likely exceed the ICL because 85 percent of bottomfish habitat is located in territorial waters that are outside of NMFS authority, and American Samoa does not have regulations that would close territorial waters in the event a Federal ICL is reached. Therefore, if the ICL is reached and NMFS closes the fishery in Federal waters, fishing is expected to continue unconstrained in territorial waters. While NMFS does not have detailed spatial information to determine the amount of bottomfish caught in territorial waters versus Federal waters, we assume that bottomfish abundance and catch are distributed equally across habitat. We therefore assume that 15 percent of total catch will occur in Federal waters because 15 percent of bottomfish habitat occurs in federal waters. If the ICL is reached and NMFS closes the fishery in Federal waters catch is expected to exceed 13,000 lb, because most habitat is in territorial waters and would remain open to bottomfish fishing. However, because this action provides for the closure of offshore fishing grounds under Federal jurisdiction, we expect some conservation benefit to the stock complex. Therefore, we anticipate the proposed interim rule would provide a

conservation benefit relative to the no-action alternative.

To maintain consistency with the timeframe of catch projections and the bottomfish fishing year (January–December), under the proposed rule NMFS would monitor catches of bottomfish MUS made in both territorial and Federal waters during calendar year 2020 and count the combined 2020 catch toward the ICL. As an inseason AM, if NMFS projects that the fishery will reach the ICL, we would close the fishery in Federal waters through December 31, 2020.

NMFS will consider public comments on this proposed temporary rule, and specifically invites public comments that address the impact of this proposed action on cultural fishing in American Samoa. NMFS will announce the final rule in the **Federal Register**. We must receive any comments by the date provided in the DATES heading, not postmarked or otherwise transmitted by that date.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the FEP, the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

Administrative Procedure Act

Section 304(b) of the Magnuson-Stevens Act provides for a 15-day comment period for these types of fishery rules (See 16 U.S.C. 1854(b)). Additionally, NMFS finds good cause that a longer notice and comment period would be contrary to public interest. Specifically, the proposed action needs to be implemented immediately to establish thresholds that would minimize adverse biological effects to the stock and adverse long-term socioeconomic effects to fishermen and communities that utilize bottomfish in American Samoa.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The proposed action would specify an interim catch limit (ICL) of 13,000 lb for American Samoa bottomfish for 2020, as well as in-season accountability measure (AM). If and when the available data indicates the fishery would reach ICL, NMFS would close the fishery in

Federal waters, from the outer boundary of territorial waters at 3 miles from shore to 200 miles from shore, for the remaining time that the interim catch limit is in effect as an AM. As authorized under section 305(c) of the Magnuson-Stevens Act, the rule would be in effect for no more than 180 days, from the date of publication in the **Federal Register**, through December 31, 2020. To maintain consistency with the timeframe of the fishing year in the fishery and catch projections from NMFS, catches made after January 1, 2020, in both territorial waters and Federal waters around American Samoa would count toward the ICL for the 2020 fishing year. Provided certain conditions have been met, NMFS may extend the interim measures from January 1, 2021, to July 5, 2021, for an additional 186 days.

The fishery is likely to reach the ICL, given recent catch history, as catch of American Samoa bottomfish has exceeded the proposed ICL annually from 2013 to 2017. Catch estimates for these years are available from the stock assessment, which provides the best available estimate of total catch of BMUS. These estimates include catch of BMUS reported at the species level, plus an estimate of BMUS catch reported under general categories (e.g., snapper, emperor, deep bottomfish). Estimated total catch data for 2018 and 2019 that would be directly comparable are not available. Most catch would have been retained for personal consumption or sharing, rather than sold, as the American Samoa bottomfish fishery is predominantly non-commercial with at most 30 participants. In recent years, NMFS estimates catch sold (percent of catch sold) to be as follows: 2,047 lb (6.9 percent) in 2015, 1,131 lb (5.6 percent) in 2016, and 1,137 lb (7.1 percent) in 2017. Revenue from American Samoa bottomfish catch were an estimated \$6,075 in 2015, \$3,896 in 2016, and \$5,688 in 2017. Upon reaching the ICL, fishing for or possessing American Samoa bottomfish would be prohibited in Federal waters around American Samoa, as would sale, purchase, or possession of any American Samoa bottomfish caught in Federal waters. Because 85 percent of the bottomfish habitat is in territorial waters located closer to shore, most catch likely comes from territorial waters rather than Federal waters, although NMFS does not have quantitative information on catch by location.

For Regulatory Flexibility Act (RFA) purposes only, NMFS has established a small business size standard, including their affiliates, whose primary industry is commercial fishing (see 50 CFR

200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. Based on available information, NMFS has determined that all affected entities are small entities under the SBA definition of a small entity, *i.e.*, they are engaged in the business of fish harvesting, are independently owned or operated, are not dominant in their field of operation, and have gross receipts not in excess of \$11 million. Therefore, there would be no disproportionate economic impacts between large and small entities. Furthermore, there would be no disproportionate economic impacts among the universe of vessels based on gear, home port, or vessel length. There might be some disproportionate economic impacts on areas fished. Bottomfish fishermen in American Samoa who tend to fish for bottomfish in Federal waters rather than territorial waters, would need to modify their target catch or fishing activities, including areas fished, in the event of a closure of this fishery while the interim measure is in effect. For those who do catch some bottomfish fish for sale, this could mean an increase in costs and/or decrease in revenue.

Even though this proposed action would apply to a substantial number of vessels, this action should not result in significant adverse economic impacts to individual entities, as this is primarily a non-commercial fishery. The proposed action does not duplicate, overlap, or conflict with other Federal rules and is not expected to have significant impact on small entities (as discussed above), organizations, or government jurisdictions. The proposed action also will not place a substantial number of small entities, or any segment of small entities, at a significant competitive disadvantage to large entities.

For the reasons above, NMFS does not expect the proposed action to have a significant economic impact on a substantial number of small entities. As such, an initial regulatory flexibility analysis is not required and none has been prepared.

Executive Order 12866

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

Executive Order 13771

This proposed rule is not an Executive Order 13771 regulatory action

because this rule is not significant under Executive Order 12866.

List of Subjects in 50 CFR Part 665

Accountability measure, American Samoa, Bottomfish, Fisheries, Fishing, Interim catch limit, Pacific Islands.

Dated: September 3, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 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. Add § 665.102 to read as follows:

§ 665.102 Bottomfish Interim Catch Limit.

(a) The interim catch limit for American Samoa bottomfish MUS for fishing year 2020 is 13,000 lb.

(b) When the interim catch limit is projected to be reached, the Regional Administrator shall publish a document to that effect in the **Federal Register** and shall use other means to notify permit holders. The document will include an advisement that the fishery will be closed, beginning at a specified date that is not earlier than seven days after the date of filing the closure notice for public inspection at the Office of the Federal Register, through the end of the fishing year in which the interim catch limit is reached.

(c) On and after the date the fishery is closed as specified in paragraph (b) of this section, fishing for and possession of American Samoa bottomfish MUS is prohibited in Federal waters around American Samoa, except as otherwise authorized by law.

(d) On and after the date the fishery is closed as specified in paragraph (b) of this section, possession, sale, offering for sale, and purchase of any American Samoa bottomfish MUS caught in Federal waters around American Samoa is prohibited.

■ 3. In § 665.103, suspend the introductory paragraph, add paragraph (a) and reserve paragraph (b) to read as follows:

§ 665.103 Prohibitions.

(a) In addition to the general prohibitions specified in § 600.725 of this chapter and § 665.15, it is unlawful for any person to do any of the following:

(1) Fish for American Samoa bottomfish MUS or ECS, or seamount

groundfish MUS using gear prohibited under § 665.104.

(2) Fish for, possess, sell, offer for sale, or purchase any American Samoa

bottomfish MUS in a closed fishery, in violation of § 665.102.

(b) [Reserved]

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