



**OFFICE OF THE GOVERNOR
AMERICAN SAMOA GOVERNMENT**

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Janet Coit, Assistant Administrator for Fisheries
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**Re: Response to January 5, 2023 Letter from Assistant Administrator for Fisheries
Janet Coit**

Dear Assistant Administrator Coit:

Thank you for your letter responding to the Territory of American Samoa's notice of intent to file a lawsuit should the National Marine Fisheries Service ("NMFS") finalize the portions of its proposed rule that would repeal the Effort Limit Area for Purse Seine ("ELAPS"), 87 Fed. Reg. 55,768 (Sept. 12, 2022). This letter provides the Government of American Samoa's response to your most recent correspondence.

First and foremost, we wish to express our appreciation for NMFS's stated commitment to ensuring that the agency's implementation of WCPFC decisions will account for and advance American Samoa's interests. We look forward to seeing the fruits of this commitment both in NMFS's final decision related to the ELAPS and in future regulatory actions (*e.g.*, to "mitigate the

adverse economic impacts of purse seine fishing restrictions on the U.S. Territories” and recognize American Samoa’s special status under the Convention).¹

Second, we would like to clarify the circumstances surrounding our November 17, 2022 letter. As your correspondence indicates, NMFS closed the comment period for its proposed elimination of the ELAPS on October 3, 2022. However, we made a timely request for an extension of this deadline to enable us to prepare more detailed comments, especially regarding NMFS’s outdated economic-impacts analysis. NMFS rejected this request without any identified basis or need. Given the proposal’s significance for American Samoa’s economy and how agencies regularly grant these extensions, we were surprised the agency would not afford us this courtesy.

Third, your letter suggests that NMFS will not consider the legal deficiencies we identified in our November 17, 2022 letter because we did “not [expressly] request” that it “be considered as a public comment on the rulemaking.” Although we believe such a request was self-evident from our letter, we take this opportunity to expressly request that NMFS consider our November 17, 2022 letter as part of the administrative record concerning the proposal to eliminate the ELAPS.

Fourth, NMFS’s above-identified mischaracterization of our letter appears to be an attempt to excuse the agency from addressing our concerns and to preclude us from raising these issues in any future litigation. If that is NMFS’s intent, we note that our letters—both directed at NMFS’s proposal to eliminate the ELAPS—have provided the agency with sufficient notice of, and the opportunity to correct, the proposal’s numerous legal deficiencies.²

Our letters, along with those of other commenters, have adequately preserved all issues raised for a future lawsuit, if it becomes necessary.³ Regardless, NMFS has “a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule” and “must justify these assumption[s] even if no one objects to them during the

¹ <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202010&RIN=0648-BF41>; <https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-02455.pdf>. We were pleased to see this action restored to NMFS’s regulatory agenda and believe that it would significantly benefit both American Samoa and the United States.

² *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010) (indicating that courts have “repeatedly held that the exhaustion requirement should be interpreted broadly” and will consider an issue if the litigant “provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations”).

³ *Bahr v. Regan*, 6 F.4th 1059, 1070 (9th Cir. 2021) (Courts “consider any issue that was raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised, whether the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party.”).

comment period.”⁴ Additionally, as is the case here, “[a regulation’s] flaws might be so obvious that there is not need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.”⁵ Based on this, each of the legal deficiencies we and others have identified to date, along with other obvious problems with the proposal, would be reviewed by a court.

Fifth, although we understand NMFS’s general position that it must move forward “in a manner that acknowledges the United States’ binding international obligations,” we firmly disagree that the presently effective and relevant management measure requires the repeal of the ELAPS. Indeed, the U.S. has maintained the ELAPS for many years under substantively identical measures and done so without ever suggesting that it violated its international obligations. We further note that the agency repeatedly has recognized that “[u]nder the [WCPFC] Implementation Act, [NMFS] exercises broad discretion when determining how it implements Commission decisions.”⁶

Sixth, and finally, we appreciate and accept your invitation to work with you to address our concerns with the proposal to eliminate the ELAPS. With that in mind, please indicate how and when you envision us working together on this to ensure that American Samoa’s interests will be protected.

Sincerely,



LEMANU P. S. MAUGA
Governor

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⁴ *Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F.2d 506, 534–35 (D.C. Cir. 1983).

⁵ *See Arizona ex rel. Darwin v. E.P.A.*, 852 F.3d 1148, 1159 n.5 (9th Cir. 2017) (brackets in original); *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 765, 124 S. Ct. 2204, 2214, 159 L. Ed. 2d 60 (2004).

⁶ *Supra* note 1.

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