



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
Sustainable Fisheries Division
510 Desmond Drive SE, Suite 103
Lacey WA, 98503

September 15, 2015

Ms. Dorothy Lowman, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97225

Dear Chair Lowman:

NOAA's National Marine Fisheries Service (NMFS) is writing to respond to a request for information regarding the deep-set buoy gear (DSBG) exempted fishing permit (EFP) that NMFS recently issued to the Pflieger Institute of Environmental Research (PIER). The request was made on Friday, September 11, 2015, by Ms. Marci Yaremko, California Department of Fish and Wildlife (CDFW), during Agenda Item B.1.a.¹ of the September 2015 Pacific Fishery Management Council (PFMC, Council) meeting. Under that agenda item, NMFS offered a courtesy informational update to the Council on the status of issuing several Highly Migratory Species (HMS) EFPs as follow-up to the Council's March and June 2015 recommendations to NMFS to issue the EFPs.

Following NMFS' report by Mr. Bob Turner, Ms. Yremko asked five questions about the EFP issued to PIER and also provided him with the questions in writing. The responses are provided below. We also provide a response to a question from Councilmember David Crabbe regarding the protected species cap for the EFP.

NMFS Responses to CDFW Questions

1) The Supplemental NMFS Report references an "SFD Request" for 30 percent observer coverage. Is there a document or other supporting material outlining the rationale for SFD's recommendation to apply a rate of 30 percent as opposed to the Council's recommendation of 100 percent for this EFP? Or was the recommendation made relying on comments/recommendations of the applicant (ref June Briefing Book)?

The request for concurrence for a proposed 30% observer coverage rate for PIER's EFP (and 100% for the other two buoy gear EFP applicants) was made by the NMFS West Coast Region (WCR) Sustainable Fisheries Division (SFD) on July 20, 2015, to NMFS WCR Protected Resources Division (PRD). SFD sought PRD concurrence that the proposed issuance of three

¹ Supplemental NMFS Report on Domestic Highly Migratory Species Activities, http://www.pcouncil.org/wp-content/uploads/2015/09/B1a_SUP_NMFS_Rpt_DomesticHMSActivities_SEPT2015BB.pdf



EFPs in California using experimental DSBG would not likely adversely affect 10 species listed as threatened or endangered or critical habitats designated under the Endangered Species Act (ESA). The rationale for this request is based on the information highlighted below and in SFD's letter to PRD requesting concurrence. On August 12, 2015, PRD concurred with SFD.

PIER's original EFP application requested 20% observer coverage rate, with an intended operational target of 25-30% coverage.² Their rationale was based on their past DSBG research done in cooperation with the NMFS Southwest Fisheries Science Center, which determined a minimum sampling rate of 20% to detect rare bycatch events.³

On May 22, 2015, NMFS published a Federal Register notice announcing receipt of the EFP application and Council recommendations and requested public comments through June 22, 2015.⁴ During the public comment period, NMFS received a letter of support from PEW for a lower observer coverage rate in the PIER EFP.⁵ The June 2015 Council meeting took place during the comment period, thus NMFS also considered comments and information raised at the meeting about the EFP, such as PIER's comments to the Council and a report by the Council's Highly Migratory Species Management Team (HMSMT). During the Council's open comment period, PIER requested that the Council revise their recommendation to a lower rate, although PIER modified their request and asked the Council for a 50% coverage level rather than 100%.⁶ The HMSMT report to the Council in June directly recommended that the Council "reduce observer coverage requirement in [the] PIER EFP to the originally requested 20% to 30% range"⁷ The HMSMT report was not addressed by the Council because HMS EFPs were not on the June 2015 Council agenda for discussion; although there was no indication to NMFS that the Council was unsupportive of the recommendations. The NMFS adopted coverage level was consistent with the high end of the HMSMT's recommended range.

² PIER application. http://www.pcouncil.org/wp-content/uploads/H3a_Att2_PIER_MAR2015BB.pdf

³ <https://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-528.pdf>

⁴ FR Vol. 80, No. 99, 5/22/15: <http://www.wpcouncil.org/wp-content/uploads/2015/05/SSPC-Mtg-FR-notice.pdf>

⁵ "...we request NMFS reduce observer coverage from the 100 percent requirement recommended by the PFMC. One hundred percent monitoring is unnecessary to ensure accurate reporting of catch given DSBG is able to target swordfish and other HMS species with minimal bycatch and bycatch mortality. There is little concern about the impacts this gear will have on the marine ecosystem, particularly with the scientific protocols established by PIER and the expertise they gained from their previous research. As noted by the Highly Migratory Species Management Team in their recommendations to the PFMC, "this gear type has been tested under research conditions for several years and has demonstrated minimal bycatch and protected species interactions. The applicant is a research institution and has carefully designed the EFP so that unbiased data can be gathered." Therefore, we believe that reduced observer coverage in the PIER EFP is appropriate to allow for more vessels to participate and more data to be collected." Letter to Chris Fanning, NMFS, dated 6/17/15, from Tara Brock and Paul Shively, PEW. Notably, PEW and Ocean also provided similar support in letters to the Council at the March 2015 meeting where these EFPs were on the agenda; see http://www.pcouncil.org/wp-content/uploads/2015/03/H3c_Sup_PubCom_MAR2015BB.pdf

⁶ http://www.pcouncil.org/wp-content/uploads/2015/06/F5b_SupPubCom_PIER_JUN2015BB.pdf

⁷ See Agenda Item F5a June 2015, EFP FRN open comment period: http://www.pcouncil.org/wp-content/uploads/2015/05/F5a_HMSMT_Rpt_JUN2015BB.pdf

The HMSMT's statement provided a detailed rationale for their 20-30% coverage recommendation including the following key points (paraphrased):

- The high cost of observers would limit the number of participating vessels, which would limit the number of EFP sets and ultimately the volume of data derived from the EFP.
- The Council's intent is to minimize risk to protected species; however, effort limitations are a substantial constraint on collecting sufficient information, particularly about rare event bycatch.
- The two other EFP buoy gear applicants are commercial fishers with no experience using the gear, whereas PIER is a research institution with four years of experience using the method. For PIER, the risk of protected species interactions is likely to be low to nonexistent based on past PIER-sponsored research and development for this gear type.
- The HMSMT notes that this gear type has been tested under research conditions for several years and has demonstrated minimal bycatch and protected species interactions. PIER is a research institution and has carefully designed the EFP so that unbiased data can be gathered. For these reasons the HMSMT recommend[ed] that the Council reconsider the 100% observer requirement for this EFP.

As standard practice in issuing EFPs and consistent with regulations at 50 CFR 600.745(b)(3)⁸, NMFS is obligated to consider the EFP application, Council comments/recommendations, and any other public comment received in response to the Federal Register notice announcing NMFS' receipt and consideration of an EFP application. Observer coverage for the buoy gear EFP is driven by protected species issues rather than fish catch monitoring; therefore, NMFS SFD is confident, based on PRD's concurrence, that a 30% observer coverage rate is appropriate.

2) What makes the PIER EFP special or different from the other DSBG applicants which warrant the change to 30% observer coverage for that EFP only? Other DSBG EFPs still require 100% coverage. How will this decision not be precedent-setting for other EFPs?

Please see rationale described in response #1 above.

NMFS does not expect this to be precedent setting as each EFP is evaluated on its own merits and is based on the unique and best science available to inform the decision. Again, a key difference was that PIER is an experienced research institution with extensive history using DSBG; the other two applicants are commercial fishermen with no familiarity with the gear and no experience deploying it.

3) We note that the EFP commenced activities already and activities have occurred around Catalina Island. The EFP applicant is supposed to notify immediately of any encounters with protected species. Please report on any interactions to date.

A term and condition of the EFP is that the EFP permit holder will report any ESA-listed species entanglement or hooking, the species, and its release condition to the NMFS point of contact via

⁸ http://www.ecfr.gov/cgi-bin/text-idx?SID=63fd0fd95cbaee4d443079447acef34a&mc=true&node=se50.12.600_1745&rgn=div8

email or phone within 24 hours after every EFP trip. To date, there have been no reports to NMFS of protected species interactions from the three fishing trips thus far.

The NMFS issued DSBG EFPs each include the condition that if an ESA-listed species is taken during the proposed action, then fishing under that EFP must cease and formal ESA section 7 consultation initiated. Given the similarity of the proposed actions, if take of a listed species occurs, NMFS PRD would consider the specific circumstances associated with that take to determine whether reinitiation of consultation is warranted under one or more of the EFPs covered under this consultation.

As a reminder, PIER will provide a preliminary report to the HMSMT in June next year about outcomes of this first fishing year under the EFP. Per Council Operating Procedures 20,⁹ the EFP applicant (i.e., PIER) must present: 1) a preliminary report on the results of the EFP and the data collected (including catch data) to the HMSMT at the June Council meeting of the following year (i.e., 2016), and 2) a final written report on the results of the EFP and the data collected to the HMSMT and the Council at the September Council meeting (i.e., 2017). The final report should include: a summary of the work completed; an analysis of the data collected; and conclusions and/or recommendations. NMFS wrote this into the Terms and Conditions of PIER's EFP.

4) The EFP as issued allows co-mingling of various gears within a trip (i.e., the vessels can concurrently fish DSBG, DGN, and harpoon on same trip, and fish are supposed to be partitioned). Meanwhile, the goal of the EFP is to test this gear's efficiency both as to target and non-target/protected species. What steps are being taken to ensure which fish came from EFP versus non-EFP gear in the absence of no at-sea observer to record this information? Fish buyers are the individuals responsible for recording fish on fish tickets (not EFP participants) - and no provisions were included in the EFP dealing with fish buyers. What is being done to ensure that the information is being collected accurately?

It is true that the EFP issued to PIER (as well as those issued to Perguson and Mintz) does allow for fishing with other gears to occur on the same trip that EFP fishing takes place. Because DSBG is still in the early stages of developing into a viable fishery, NMFS allowed this flexibility to also fish via HMS FMP authorized gear types during EFP trips to help the fishermen mitigate costs associated with the EFP fishing. However, NMFS had a similar concern (i.e., of ensuring appropriate data reporting, getting good information, and not mixing of catch on tickets); and therefore, NMFS included a term and condition that landings are required to be annotated, with separate tickets for the various gear types. Prior to a conference call on July 10th, NMFS shared the draft Terms and Conditions with CDFW for their input and comment. After consideration of CDFW's concerns regarding the co-mingling of fish taken under a California Scientific Collection Permit and fish harvested under an EFP, NMFS made modifications to the draft Terms and Conditions. NMFS again received comments from CDFW July 28th and 29th and incorporated their suggestion on the fish ticket annotations as well as other suggested conditions such as a pre-trip notification and a prohibition of the transfer of fish at sea. Excerpt from the Terms and Conditions:

⁹ <http://www.pcouncil.org/wp-content/uploads/cop20.pdf>

“2. Landings Reports: All fish tickets must have “PIER EFP” written in the notepad area of the landing receipt to assist CDFW reviewing biologists, and allow proper EFP coding into the PacFIN landings database. Fish caught by other authorized HMS gears (e.g. harpoon, drift gillnet) must be kept separate in the vessel hold and reported on separate landings receipts marked with the correct gear codes.”

As stated in the Terms and Conditions of PIER’s EFP, it is the EFP manager’s (PIER) responsibility to ensure that all terms and conditions are met. Even with 100% observer coverage this would still be the EFP manager's responsibility as observers do not verify the accuracy of fish tickets in the current process. Vessel captains also sign the landings receipts/fish tickets and attest to the accuracy. If it was determined that there was a failure to comply with the Terms and Conditions, then this could be grounds for NMFS to revoke the permit. Excerpt from the Terms and Conditions:

“These Terms and Conditions apply to all fishing activities of the EFP referenced above. **In addition to all the terms and conditions in this document, the EFP manager (PIER) is responsible for instructing all fishing permit holders, vessel owners, vessel operators crew members and processors, concerning the terms and conditions of the EFP permits.**”

Failure to comply with these terms and conditions will be grounds for revocation, suspension, invalidation, or modification of the EFP with respect to all parties, persons, vessels, and processors conducting activities under the EFPs referenced above.”

5) What is the process NMFS uses to decide whether something is its own scientific research, or research that is authorized pursuant to an LOA, or must go through the Council’s EFP vetting process? More transparency and background on how this internal process works would be helpful.

Research conducted by NMFS’ science centers (or its contractors) would be NMFS’ own scientific research. Such research is conducted under a scientific research permit (SRP) issued by NMFS.

For individuals or institutions conducting research from “bona fide” research vessels on species that are regulated by Magnuson-Stevens Act (MSA), NMFS encourages them (but does not require them) to seek a letter of acknowledgement (LOA) from NMFS under MSA regulations at 50 CFR 600.745(a)¹⁰. NMFS reviews the research plans and indicates concurrence by issuing an LOA.

Under 50 CFR 600.745(b), anyone can submit applications to NMFS for EFPs for the purpose of conducting research or other fishing activities using private (non-research) vessels. There is no requirement in the regulations that such applications go through and/or be approved by a council; there is a requirement that NMFS share such applications with the relevant council and seek the council's input, as well as solicit public input. Under the regulations, council and public input is sought via a Federal Register notice that NMFS publishes announcing receipt of an application and requesting comments.

¹⁰ http://www.ecfr.gov/cgi-bin/text-idx?SID=63fd0fd95cbaee4d443079447acef34a&mc=true&node=se50.12.600_1745&rgn=div8

If an application for an EFP is submitted directly to the PFMC, and the PFMC decides to consider the application under its own process, NMFS will respect that as the initial review. Henceforth, NMFS will process the application under 50 CFR 600.745.

6) Given the inability to conclusively determine which swordfish were taken with which gear types in the absence of observer records, how will the EFP (as permitted) allow for collection of data on economic efficiency on DSBG when activities can be co-mingled with the other gears? As an example, how can we assure separation of things like fuel costs or fishing effort (search/soak time) solely attributed to DSBG versus other gears?

Our expectation is that the participants keep and submit accurate records on take and allocation of costs and will include this in their preliminary and final reports. If there was evidence of noncompliance and/or inaccurate reporting, then NMFS would revoke the EFP. Observers are placed on the vessels for this EFP for the purpose of monitoring protected species interactions, not to collect economic data.

The expected preliminary report(s) to be submitted by PIER in June 2016 will be reviewed and evaluated by NMFS. Adjustments to the Terms and Conditions and required report information can be made at the time to apply to any fishing effort in the remainder of 2016.

See response to # 4. The vessels need the flexibility to land fish via authorized gears in addition to DSBG.

NMFS Response to Mr. Crabbe's Question

What is the cap is for protected species?

The March 2015 Council recommendation was:

“NMFS to close fishing under any EFP for the remainder of the year of the amount of an ESA-listed species taken in the EFP fishery is the lower of either double the amount of incidental take estimated in an ESA biological opinion (BO) prepared for that activity, or 10 animals.”

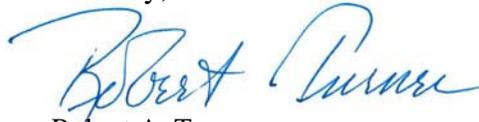
The EFP Terms and Conditions include the following requirements regarding protected species interactions, based on the ESA consultation with NMFS PRD:

1. All vessel operators shall undergo a safe handling and release workshop conducted by the NMFS WCR Protected Resources Division (PRD) prior to beginning fishing under the EFP.
2. Fishing is prohibited within designated Pacific leatherback sea turtle critical habitat.
3. For any Endangered Species Act (ESA)-listed species entanglement or hooking, the EFP permit holder will report the species and its release condition to the NMFS point of contact via email or phone within 24 hours after every EFP trip.

4. If a single ESA-listed species is taken while fishing under the EFP, then fishing will cease by all EFP holders operating under the PIER EFP until granted authorization to resume fishing from NMFS WCR, which in no event will be before NMFS completes a formal ESA section 7 consultation on continued operation of the EFP.

NMFS thanks the Council for allowing time for us to provide responses in this letter. If there are further questions, please contact Mr. Chris Fanning, HMS Fishery Policy Analyst (562-980-4198 or Chris.Fanning@noaa.gov) or Lyle Enriquez, HMS Fishery Biologist (562-980-4025 or Lyle.Enriquez@noaa.gov).

Sincerely,



Robert A. Turner
Assistant Regional Administrator
for Sustainable Fisheries