

ENFORCEMENT CONSULTANTS REPORT ON WHITING ELECTRONIC MONITORING FINAL ALTERNATIVE AND REGULATIONS

The Enforcement Consultants (EC) have reviewed the documents for Agenda Item I.5 Whiting Electronic Monitoring (EM) Final Alternatives and Regulations and have the following comments.

We believe the Experimental Fishing Permits (EFP) for EM have provided valuable information to the Council for EM regulation consideration and would like to express our appreciation to the industry participants, Council staff, Pacific States Marine Fish Commission staff, and the National Marine Fisheries Service (NMFS) staff, for their contributions. Turning to the NMFS Report Agenda Item I.5.a, we would like to focus the bulk of our comments on the twelve items listed on pages 2-4 of that report.

1. Video Review

The EC received a briefing from Ms. Melissa Hooper and Dr. Steve Freese of SFD NMFS regarding recent guidance from NMFS HQ on the necessity of developing regulations for 3rd party provider certification and 3rd party video review. We have long advocated that the video review should be done by the NMFS or its agent. Our advocacy for NMFS video review is rooted in concerns for assuring the evidence integrity of the video and video review both in the present and into the future.

Third party video review will necessitate audits of that review by NMFS as explained by Dr. Freese in his cost analysis presentation. Through the Ad Hoc Groundfish Electronic Monitoring Policy Advisory Committee (GEMPAC) discussions we learned of an Australian video program in which Archipelago is the provider and reviewer. Our understanding of the video review process used in this program involves the hard drives and log books being sent to the Australian government. The log books are retained as the submitted data. The hard drives are copied, where upon the hard drives are then forwarded to Archipelago for review. Upon review the hard drives are wiped and reissued to the fleet. The review results are sent back to the Australian government where the log book is used to conduct a quality assurance (QA)/quality control (QC) review of the video using the copy that was initially retained by the Australian government.

We see potential benefits in this process. Evidentiary integrity and chain of custody requirements are achieved and maintained. Review of the video by a 3rd party and subsequent payment by the fleet is accomplished. All necessary data for QA/QC audit analysis is readily available to NMFS. And long term storage issues and resolution of those issues become the burden of NMFS. To the latter point, with the burden of storage requirements, both short and long term, relegated to the NMFS, 3rd party reviewers are better positioned to create a business plan that is no longer encumbered by a large yet unresolved cost factor. Going forward, the Council may want to include analysis of this or similar type of review process.

2. Eligibility Criteria

We understand NOAA General Council Enforcement Section has raised concerns regarding the Council's proposed eligibility criteria which could be construed as additional punishment. We defer to their expertise on this matter, but note as demonstrated in the EFP process, vetting of applicants can be effectively accomplished without these specific criteria.

3. Vessel Monitoring Plans

We support the development and use of Vessel Monitoring Plans (VMP) as proposed by NMFS. As noted, a similar approach has been used by NMFS for first receiver catch monitoring plans, which are a component of the First Receiver Site License application and issuance process. We also note this approach adds program flexibility, allowing vessels to choose what “spare parts” they choose to carry versus risk of trip termination when an electronic monitoring system fails during a trip.

4. EM System Certification

As with Item 3, we believe the approach being advocated here by NMFS regarding the certification of EM system installation before an application is approved addresses our initial advocacy and request for a shakedown cruise requirement.

5. Self-Enforcing Agreement

The EC believes the self-enforcing agreement concept is a unique opportunity for the industry to manage its own affairs while reducing the overall cost of the EM program and the cost of the catch shares program borne by the American public. We appreciate the efforts being made by Environmental Defense Fund (EDF), The Nature Conservancy (TNC), and the California Collective in bringing this concept to the fore. We look forward to self-enforcing agreements being incorporated into the California Collective EFP and its ultimate inclusion in the EM regulation package. Once finalized and included in the California Collective EFP, we hope other EM EFP holders and applicants will evaluate the concept, support, and adopt it as well. We support the NMFS proposal to include the self-enforcing agreement as a placeholder in the regulation deeming process.

6. Application Review and Renewal Process

We believe the two phase approach proposed by NMFS to be sound. We also endorse the briefing or training requirement proposed by NMFS and would note that this was an element the EC raised in their September comments to the Council. Finally, we believe an annual observer exemption renewal process is necessary to allow for past compliance performance reviews, adjustments per those reviews, and annual acceptance or rejection of the observer exemption application.

7. VMP Changes

As reported to us by OLE and NMFS SFD staff, the necessity to modify the VMP in season and between trips has been thoroughly demonstrated throughout this year one EM EFP season. As such, we wholly endorse VMP regulations that provide for an adaptive management approach.

8. EM Service Provider Certification Process

The EC was an early advocate of guidelines and performance standards for EM systems versus a more rigid type approval process. Guidelines and performance standards will allow for adoption of better business practices when identified, and incorporation of systems hardware and software innovations as the technology evolves.

9. Electronic Monitoring System

For the same reasons stated under Item 8, we endorse the tiered performance standard approach as described by NMFS under this item.

10. Declarations

The EM EFP has demonstrated that for the whiting sector, a limit on switching from EM to observers is not necessary. We endorse the NMFS suggestion that this concept be included as a placeholder in the regulations so that NMFS and the Council can revisit this issue during the rulemaking for other sectors.

11. Logbooks

As discussed in our September EC statement, the EM EFP language addresses the timely submittal of the log book data, but not how timely individual tow data needs to be recorded in the log book. Washington regulations are silent on timeliness of individual tow data recording. Oregon requires the logbook to be filled out within one week of landing. California requires are more stringent. Per Title 14, CCR, fishing activity records shall be completed immediately with all available information when any of the following first occurs: prior to passengers or crew disembarking from the vessel; or at the time of receipt, purchase, or transfer of fish; or at the end of the calendar day (24 hour clock) during fishing activity through the night.

We note the Alaska Pollack fishery has a 4 hour rules and that a majority of West Coast Pacific Whiting fishery vessels participate in that Alaska fishery. With an eye towards improving accuracy of log book data entries, the EC recommends adopting the Alaska 4 hour rule; require individual tow information be recorded in the log book within 4 hours after the tow is completed.

12. MS/CV Discard Accounting

The EC does not have a position on this issue.

Other Issues:

Video Review

Agenda Item I.5, Situation Summary discusses the Council's preferred alternative for video review; camera recording used to estimate discards with logbook validation verses logbook entries used to determine discards with video review used as audit. Although 100% review of video is currently being done by PSMFC for costs analysis purposes, the current EM EFP protocol is using log book information delivered by the vessel as the actual discard report for IFQ account debiting, with the video used to validate the submitted logbook discard data. Outside the issue of timely delivery of the logbooks and hard drives by vessel operators, this process has worked well for whiting trips.

The percent of video review is a question before the Council, both as a cost issue and an accountability issue. Review protocol discussions addressing random sampling, percent of review needed to identify rare events, designated percent reviews, etc. are in line with questions raised for analyzing a science or science based management objective.

As stated in 1.2 Proposed Action, EM systems will be used to determine whether a catcher vessel is "complying with catch handling/species retention/discard requirements, reporting requirements, and other conditions." 1.3 Purpose and Need for the Proposed Action goes on to state "there is a need to adequately monitor the catch shares program for compliance in an economical and flexible manner."

Unlike some EM programs being developed in other regions, this EM program has been designed to achieve compliance goals and objectives. It is, in its most generic form, an enforcement activity (monitoring in this case) designed to hold individuals accountable with regulation requirements. And unlike a science based endeavor, there is nothing random about enforcement. Every enforcement action has a purpose. As such, we believe that the level of video review is an aspect of implementation that should be differed to NMFS to determine compliance by the individual participants. The level of video review should allow for up to 100 percent review to ensure sufficient quality of data for compliance management and enforcement purposes. NMFS should be given the latitude to adjust review percentages on an individual vessel and trip basis to address compliance issues as they arise, (e.g., changes in compliance rates, frequency of bycatch events, bycatch accounting, compliance history, etc.). We would also add that this scheme creates an industry incentive where compliance can be rewarded. Based upon the vessel's compliance record review rates could be reduced, thus lowering the costs to the fishermen.

Observer 36 Hour Rule

Within the observer regulations there is a long standing regulation where upon in the event an observer becomes unable to perform their duties, the vessel has 36 hours to return to port. Information from the observer program reports that this is a very rare event, with 99.5% of all observed trips completed without interruption.

Absent guidance from the Council on this specific issue, and lacking information justifying its removal, the EM EFPs, included the 36 hour rule. Unlike EM, it is highly unlikely that an observer will be either intentionally or unintentionally rendered incapable of performing their duties. On the other hand, equipment can be tampered with, and as such it is not appropriate for a vessel to have 36 hours to return to port when an EM system goes down. An alternative approach is needed. Per their VMP, when a vessel has exhausted its options for fixing EM malfunctions while at sea, the vessel will cease all fishing, terminate their trip, and return to port.

Termination of Electronic Monitoring Authorization.

In the Annotated Draft Regulations at the bottom of page 7, section 3.k. *Termination of electronic monitoring authorization* NMFS outlines a termination process that would notify exemption holders in writing of EM observer exemption compliance deficiencies, with the exemption holder having 30 days to correct the deficiency. The EC does not believe this 30 day correction window to be warranted or appropriate. The noted deficiency and subsequent required correction(s) is not to fill in a blank space on a form, or correct a data point on a report, but rather to demonstrate the exemption holder is willing and capable of meeting the eligibility criteria. That demonstration should be immediate, starting with the very next trip made by the vessel, not 29 or 30 days after the written notification.

We understand the notification and correction principle being employed here, but believe upon written notification, an immediate correction standard and not 30 days should be the requirement.

EC Recommendations:

1. Adopt the proposals set forth in Agenda Item I.5.a NMFS Report as presented in items 1-11, pages 2-4, as Council guidance for regulation development.

2. Specific to Item 11, Logbooks; require individual tow information be recorded in the log book within 4 hours after a tow has been completed.
3. Defer determining the percent level of video review up to 100% to NMFS for purposes of determining EM program compliance.
4. Incorporate as Council guidance for regulations development:

Per their VMP, when a vessel has exhausted its options for fixing EM malfunctions while at sea, the vessel will cease all fishing operations, terminate their trip, and return to port.

Regarding termination of electronic monitoring authorization, remove the 30 day correction allowance and substitute with language reflecting the exemption holder must, upon written notification demonstrate hence forth that they meet the eligibility criteria listed under paragraph 3.a.

PFMC
11/16/15