

VESSEL MONITORING SYSTEM PING RATE

At its November 2013 meeting, under the future meeting planning agenda item, the Council received a report from its Enforcement Consultants (EC) on a recent prosecution that failed due to the long duration between reports (“60 minute pings” on average) transmitted through the satellite based vessel monitoring system (VMS). VMS is the primary tool used for enforcing area closures. On the basis of the EC report, the substance of which is recapped and expanded here in Agenda Item H.1.a, NMFS OLE Report, the Council agendaized the issue for this meeting.

If the Council wishes to proceed, a schedule for this issue should be determined. The proposed resolution to the ping rate issue is to shorten the minimum duration between pings. The ping rate issue affects the effectiveness of management regulations related to area restrictions, which generally have a conservation purpose; however, a change in ping rates would not meet the criteria for the Points of Concern Framework provided for resource conservation issues (Section 6.2.2 groundfish fishery management plan - FMP). The action appears to fit under Section 6.4.2 of the FMP, entitled “Vessel Compliance and Reporting Requirements.” This section specifies that “New regulatory requirements for the collection of fishery-related data would need to be implemented through the full rulemaking process detailed at Section 6.2. D” (p. 70). While a change to the ping rate would not be a new requirement *per se*, at this time there does not appear to be an alternative process or framework under which the change can be addressed. Section 6.2. D specifies the process for a regulatory amendment and requires a two Council meeting process and two *Federal Register* rules (proposed and final). Additionally, the FMP notes that “Any Federal program that requires the collection of information from fishery participants is also subject to the requirements of the PRA” (p. 70). Paperwork Reduction Act requirements often add substantially to the implementation time required after the Council completes its action.

At this time the Council is pursuing a number of management actions which compete with each other for agency and staff time. Development of a regulatory amendment on this issue will need to be prioritized in consideration of these other efforts. At this meeting, the Council could decide to begin the regulatory amendment process. Alternatively, in June, the Council will be engaging in an exercise to prioritize a broad spectrum of potential groundfish management actions.

Council Task:

Discussion.

Reference Materials:

1. Agenda Item H.1.b, NMFS OLE Report: NMFS Office of Law Enforcement Report on Vessel Monitoring System (VMS) Ping Rate

Agenda Order:

- a. Agenda Item Overview
- b. Office of Law Enforcement Report
- c. Reports and Comments of Advisory Bodies and Management Entities
- d. Public Comment
- e. Council Discussion

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NMFS OFFICE OF LAW ENFORCEMENT REPORT
ON VESSEL MONITORING SYSTEM (VMS) PING RATE

In August of 2013, the NOAA Fisheries Office of Law Enforcement (OLE) and NOAA Office of General Counsel, Enforcement Section, and (GCES) received an adverse ruling by Chief Administrative Law Judge (ALJ) Susan L. Biro in the administrative penalty case of the F/V Risa Lynn (NOAA Case. No. SW1002974). This Magnuson Act case involved a single charge of operating a vessel in a closed area for purposes other than continuous transit, as required by the West Coast Groundfish Fishery (WCGF) regulations.

This case was notable in that the issues for litigation were narrowed down to whether the VMS provided sufficient evidence of the vessel's activity. Unfortunately, the ALJ determined that the hourly VMS position report evidence in the case was insufficient to prove that the vessel was not operating in "continuous transit" through the closed area as required by regulation. While the raw VMS data from the communications provider did provide some information as to the location and speed of the vessel, it only does so for a five second period out of each hour. Respondents were able to present an explanation as to what they could have been doing the other 59 minutes and 55 seconds, and while NOAA found that explanation implausible, the ALJ found it credible and reasonable.

While finding that NOAA was justified in its suspicion of illegal activity based on the VMS, the ALJ found, *inter alia*, that the VMS data was not definitive proof that the vessel was stopped, that there was evidence to show that at sea it would be very difficult for a vessel to come to a complete stop, and that NOAA failed to show that the vessel was fishing or doing some other illegal act in the closed area.

Such language from an ALJ will likely have ramifications for ongoing closed area enforcement in the WCGF, and potentially other fisheries with VMS requirements. One immediate ramification is that any investigation where evidence of non-continuous transiting is based solely on hourly VMS data is suspect. That is particularly so for fixed gear and other gear types where setting/hauling is accomplished in under 55 minutes [actually, that might be 2 hours – enough data points to get a signature of some type]. Due to limited enforcement resources, the VMS data is often times the only timely evidence of vessel activity. In response, OLE is asking the Council to increase the VMS ping rate in the WCGF from once every hour to every 15 minutes, a remedy actually alluded to by Judge Biro.

OLE recognizes that increasing the ping rate will increase transmission cost for vessels required to carry VMS. Those cost increases for the current typed approved VMS units in the WCGF are summarized in the table below and should be viewed as a maximum cost because the cost estimates assume 30 days of fishing per month.

Table 1: VMS Cost Summary (1 hour rates are minimums package rates, 15 minute rates assume 30 fishing days a month)

Ping Rate Cost	Skymate	CLS America (Argos)	GIMPCS Thran & Thran	Boatracs	Faria
1 hour	\$21.99	\$45	\$43	\$34.95	\$44.95
15 minutes	\$85.19	\$90	\$172	\$59.95	\$69.95

OLE does not believe that the 15 minute ping rate needs to be required of every vessel currently required to carry a VMS unit in the WCGF. The increased ping rate should apply to vessels that are restricted/prohibited from fishing in an area, and/or required to maintain continuous transit through said restricted area.

The ping rate for type approved VMS units in the WCGF can be changed by the service provider through a request by the VMS unit owner/vessel operator. As such, when a vessel changes fisheries, moving from a fishery that requires the 15 minute rate to an hourly rate, that rate savings can be obtained through a ping rate change request to the service provider by the owner/vessel operator.

Specifically we request the Council consider the following gear types be required to use a 15 minute ping rate.

- Limited Entry Fixed Gear
- Limited Entry Bottom Trawl
- Limited Entry Demersal Trawl
- Limited Entry Midwater Trawl, except when operating during the primary whiting fishery, Mothership exempt (includes whiting and nonwhiting targeting with midwater trawl).
- Open Access Longline, Groundfish and Halibut
- Open Access Trap or Pot, Groundfish and Halibut
- Open Access California Gillnet Complex Gear
- Open Access Salmon Troll when retaining Groundfish, i.e. yellowtail or ling cod.

ENFORCEMENT CONSULTANTS COMMITTEE (EC) REPORT ON
VESSEL MONITORING SYSTEM PING RATE

The Enforcement Consultants (EC) met and discussed the NMFS Office of Law Enforcement (OLE) Report on Vessel Monitoring System (VMS) Ping Rate, the VMS Ping Rate Situation Summary, and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Initial Decision and Order regarding the F/V RISA LYNN VMS case. Based on the ruling in this case, the EC strongly recommends that the Council consider increasing the VMS ping rate in the West Coast groundfish fishery from approximately once an hour to every 15 minutes.

The Administrative Law Judge ruling on the F/V RISA LYNN case concluded that the hourly VMS position reports in the case were insufficient to prove that the vessel was not operating in “continuous transit” through the closed area, as required by regulation. The ruling significantly diminishes our ability to prosecute VMS cases at a state or Federal level under the current one hour ping rate. Increasing the ping rate interval to every 15 minutes would provide enforcement with a more detailed and accurate picture as to the activity of a vessel in a closed area, as well as more thoroughly meeting the evidentiary needs identified by the court. The effective application of VMS to ensure the integrity of the Rockfish Conservation Areas (RCAs) is especially important due to constrained Federal and state enforcement resources. In addition to assisting in the prosecution of a violation, an increased ping rate and more effective prosecution of violations would protect the interest of a vessel that is operating legally.

The EC would like to address several industry concerns regarding increasing the VMS ping rate to every 15 minutes:

1. Cost – The NMFS OLE Report on the VMS Ping Rate provided a VMS cost summary by the provider. The cost summary shows that an increase to a 15 minute ping rate will increase a monthly bill by a range of \$25 to \$129. The average monthly provider increase for three of the approved providers used in the west coast is \$37.73 per month. It is important to keep in mind that the cost estimates are assuming that a vessel is actively fishing 30 days per month. An average fishing vessel fishes less than 30 days per month. All VMS providers except one, that are currently being utilized on the west coast, offer a “sleep mode” feature that will transmit only once per hour, as opposed to 4 times per hour. Devices approved on the west coast provide a range of options which allows operators to assess their needs with the devices available.
2. NMFS can internally increase the ping rate if needed – This statement is true. However, there are numerous mandated procedural hurdles which require days of process and review.
3. Drain on Battery - A 15 minute ping rate increase should not be a problem for a vessel tied up to a dock with electrical service. A vessel at the dock can incorporate the use of a charger or a battery tender to prevent vessel battery from discharging. Again, vessel owners should consult with their service provider and/or electronics retailers to determine the best unit for their particular need and application.

The EC also believes it may be beneficial to explore the potential use of data loggers or other technologies in concert with the analysis of increasing the ping rate.

Based on the F/V RISA LYNN court decision, the ability to enforce mandated closures such as RCAs, Essential Fish Habitat and Cow Cod Conservation Areas has been severely eroded. The EC strongly urges the Council to give serious consideration to exploring options to restore the effectiveness of VMS and other tools for effective enforcement, including increasing the VMS ping rate to 15 minute intervals for specified gear types and analysis of new technologies.

In reference to the list found in the NMFS OLE Ping Rate Report, Agenda Item H.1.b, the EC supports the list, but recommends removing salmon troll gear from the 15 minute ping rate requirement. We do not believe this gear type requires any ping rate modification.

In summary, the EC recommends the following:

- Increasing the VMS ping rate to 15 minute intervals for the gear types listed in the NMFS OLE Ping Rate Report, Agenda Item H.1.b (with the exception of salmon troll gear).
- Exploring new technology to augment VMS.

PFMC
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GROUND FISH ADVISORY SUBPANEL REPORT ON
VESSEL MONITORING PING RATE

Mr. Dayna Matthews presented the Groundfish Advisory Subpanel (GAP) with updated information regarding increasing the ping rate on vessel monitoring systems (VMS). NMFS Office of Law Enforcement (OLE) is requesting the Council start the process to approve four pings an hour on VMS in several fisheries. This whole issue came about because of a recent court decision (Docket No. SW1002974, F/V Risa Lynn).

The GAP has serious concerns with this:

- Upon hearing about the potential increase, fishermen in other fisheries have already said they planned to remove their VMS units and discard fish rather than bringing them ashore. This action could actually induce discards, resulting in a loss of landed revenue and loss of crucial data to the management system.
- There are questions of which units go into sleep mode. Some units do, some don't and OLE reports conflict with those of some fishermen who use the units. Regardless, if a fisherman is required to switch to another unit, he will have an increased cost in the thousands of dollars.
- The costs, which could more than triple in some instances, are not limited to just the VMS operating costs of an increased ping rate and transmission times. VMS units draw a lot of electricity and many fishermen would have to purchase bigger batteries in order to keep the VMS unit operating within regulatory requirements if, for example, the boat is moored offshore and does not have access to shore power.
- Increasing the ping rate would have a disproportionate effect on small boats.
- Compromise: The GAP discussed whether four pings an hour would solve the problems or whether two or three pings an hour would be sufficient. The NMFS OLE report under this agenda item says Judge Biro alluded to increasing the ping rate to four an hour, but the GAP can find nowhere in the opinion where that was mentioned. The only place in the opinion that some GAP members found *may* be construed as such is in a footnote on page 30 of the [opinion](#):

“At hearing, Respondents raised two issues which are not addressed above. These concern the ten-month delay between the date of the alleged violation and the Agency's contact with Respondents in regard thereto, and the *Agency's failure to increase the polling time to obtain more frequent VMS transmission reports on their vessel*, both arguably hampering Respondents' access to evidence in their defense. ... The Agency witnesses provided credible explanations in response to both issues at hearing, and thus the issues are not deemed of significance here.” (Emphasis added.)

The GAP believes alternative ping rates may achieve the same result.

- Long-term remedies: As the GAP mentioned in its [September 2013](#) statement, other alternatives are available, such as data loggers in conjunction with electronic logbooks, specific polygons in the RCA, automatic identification systems, and more.

The GAP discussed whether increasing the ping rate to four pings an hour without incurring additional cost would be an issue and the overwhelming response was no. This matter is strictly an issue of an increased financial burden for what is perceived as a retaliatory action. Further, other options are available that have not fully been considered for an environment in which the goal should be compliance, not conviction.

Therefore, the GAP recommends that if the Council decides to move ahead with a formal rulemaking, it be a low priority as there are several issues the GAP feels is of more importance to the fishery as a whole.

PFMC
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SALMON ADVISORY SUBPANEL REPORT ON
VESSEL MONITORING SYSTEM PING RATE

The Salmon Advisory Subpanel (SAS) requests that the Council exempt open access salmon troll vessels from the requirement to increase the ping rate from one hour intervals to a 15 minute ping rate. The SAS believes the one hour ping rate for open access salmon troll vessels provides sufficient resolution to provide compliance monitoring for these vessels. Further, the SAS met with members of the Washington Trollers Association and supports their position regarding modification to the Vessel Monitoring System requirements.

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