

NATIONAL MARINE FISHERIES SERVICE (NMFS) REPORT ON HIGHLY MIGRATORY
SPECIES (HMS) ACTIVITIES

Update on Authorization of Deep-set Buoy Gear (DSBG):

Since the Council took final action on authorizing DSBG at its September 2019 meeting (see Agenda Item I.4 in the [meeting record](#)), NMFS staff worked with the state of California to identify existing data streams for a preliminary analysis of who would qualify under the Council's limited entry (LE) qualifying criteria. This effort uncovered some observations and questions that could use further consideration by the Council. In general, this attempt at a preliminary analysis highlighted a need to more fully consider connections between the ongoing action of monitoring and issuing DSBG exempted fishing permits (EFPs) and the planned action to issue LE DSBG permits.

The Council's Amendment 6 to the Highly Migratory Species Fisheries Management Plan (FMP) provides for LE DSBG permits to be issued to a limited number of individuals and employs the term "DSBG EFP holder," but this approach does not align with NMFS' practices in issuing EFPs. NMFS has been issuing DSBG EFPs since 2015, well before the Council decided to authorize the gear. In doing so, NMFS has focused on limiting vessel participation as it relates to the Council's approval of EFP applications and defining effort for consultations under Section 7 of the Endangered Species Act. This is because the goal with issuing EFPs has been to maximize data that can be collected from vessels listed on the permits. Therefore, it has been a customary practice for NMFS to list more individuals' names on the EFP than may be listed on the corresponding EFP application reviewed by the Council. For example, individuals listed on the EFP can include the EFP applicants or managers, vessel owners, and operators or alternate operators. In some instances, these roles may all be served by one individual. However, it is sometimes the case that these roles are fulfilled by multiple individuals.

We also note that the language in the Council's adopted FMP amendment language differs slightly from the language in the Council's final preferred alternative (FPA), which was adopted in the same motion. The FPA (based on the Council's preliminary preferred alternative, with one small amendment) refers, in the first and third qualifying criteria tiers, to "EFP Recipients." However, the FMP language refers to "EFP Holders." While the differences in these terms are subtle, interpretation would benefit from clarification as to whom exactly the Council intends to qualify under these tiers.

For Tier 1 of the qualifying criteria, NMFS planned to use observer data to determine which EFP holders made at least 10 observed fishing days. This data stream indicates the operator of the vessel during observed fishing days. Understanding that the Council was interested in leveraging swordfish fishing experience when adopting qualifying criteria, NMFS might assume that the Council intended for the operator on the vessel during the observed fishing days to qualify for the EFP. However, the operators who have ten or more observed fishing days may not include all the individuals listed on the EFP applications reviewed and recommended for approval by the Council. The result would be that certain EFP managers, who assumed legal responsibility for operators and vessels that performed 10 or more observed fishing days under the EFP, would not qualify

under Tier 1. For these reasons, NMFS questions whether this course of validating EFP holders' qualifications would be consistent with the Council's intent. These considerations also relate to Tier 3 of the Council's qualifying criteria.

Another consideration with respect to Tier 2 is that NMFS has been amending the names listed on EFPs, as requested by the EFP applicant, to remove or add authorized operators. Again, this practice was adopted with the goal of maximizing data that can be collected from vessels listed on EFPs. However, because the Council's adoption of a LE DSBG permit program yields new incentives for individuals to record fishing experience under EFPs, changes to existing EFPs to add or remove operators could affect the pool of qualified applicants. Therefore, it would be useful for the Council to consider the potential for additional changes in the names listed on existing EFPs in any subsequent effort to clarify terms used in qualifying criteria or methods to document swordfish fishing experience.

Another question that arose in review of data to support Tier 1 and 3 of the Council's preferred qualifying criteria concerns "observed DSBG sets." The Observer program defines "set" as deployment and retrieval of a piece of gear. Based on this definition, a DSBG fishing day would include up to 10 "sets." Therefore, NMFS regards fishing days as a better measure of fishing experience than "sets." Further, with respect to Tier 3, NMFS questions whether it is still in the Council's interest to specify "ten" sets/fishing days. That is, with the recent reduction in observer coverage for the first ten DSBG days to the first three DSBG days and a reduction in coverage from 30 to ten percent of fishing days thereafter, it may take EFP holders many more fishing trips/days to demonstrate observed fishing experience than those who obtained EFPs prior to 2020. For example, prior to 2020, a DSBG EFP holder would have observers on their first ten fishing days. However, it might take a DSBG EFP holder who was issued their permit in 2020, or after, as many as 73 fishing days before they are able to accumulate ten observed days of fishing effort.

Lastly, NMFS has some concerns regarding the Council's interest in issuing LE DSBG permits to "persons" as defined in 50 CFR 660.702, which includes corporations, partnerships, and other entities, rather than "individuals." For Tier 1 and 3 it is unclear whether NMFS is to qualify fishing experience of individuals, persons, or both. All other tiers in the Council's qualifying criteria clearly regard individuals as potential qualifiers. While NMFS could qualify individuals and issue permits to a corporation as a person, we question if this approach might undermine the Council's restrictions on transferability. For example, it may be possible to transfer permits from one individual to another within a corporation, partnership, or other entity.

For these reasons, NMFS recommends the Council schedule some time on its March agenda to provide further guidance, clarify LE qualifying criteria in its adopted FMP language, or both. It is important that terms used in the qualifying criteria and records used to validate fishing experience are clear and consistent with the Council's intent. The one-year timeframe, described in the Council's FPA, is very tight for NMFS to be able receive applications for DSBG LE permits, determine qualifiers, provide qualifiers an opportunity to correct their data, issue permits, and resolve any appeals before running the process iteratively in the following year. Unresolved disputes over permit issuance could undermine NMFS's ability to fairly qualify LE permit applicants as the number of permits issued (or not) in one year impacts the number of permits that may be issued in subsequent years.

NMFS, at this time, is hopeful that the Council can clarify the qualifying criteria in the FMP amendment language in March 2021 without considerable delay in authorization of DSBG. Presently, it is NMFS' view that the specific details of the qualifying criteria do not affect the impact analysis of the proposed action under the National Environmental Policy Act (NEPA). Currently, this analysis is premised on the maximum number of permits that can be issued in any given year under the Council's range of alternatives. At this time, NMFS is unable to discern differences in impacts to the environment, including to whole communities or fleets, of the Council's suboptions of qualifying criteria. Without changes to the FMP language that require substantially revising the NEPA analysis, NMFS can continue to make progress towards implementation while additional Council discussion takes place.