

BACKGROUND ON THE COUNCIL’S SEPTEMBER 2019 FINAL ACTION
AUTHORIZING DEEP-SET BUOY GEAR UNDER THE HIGHLY MIGRATORY SPECIES
FISHERY MANAGEMENT PLAN

At the November 2020 Council meeting National Marine Fisheries Service (NMFS) submitted a report ([Agenda Item I.4.a, Supplemental NMFS Report 1](#)) seeking clarifications about the Council’s September 2019 final action (final preferred alternative) to authorize deep-set buoy gear (DSBG) and specifically related to the proposed limited entry (LE) permit program. This report focuses on the questions related to the LE permit qualification criteria tied to using DSBG under an exempted fishing permit (EFP). Two other issues – definition of “person” relative to permit possession and the frequency of permit issuance – are not addressed here.

The Council’s September 2019 final action (Motion 14, Attachment 1) adopted the preliminary preferred alternative as its final preferred alternative, with clarifications/modifications, and adopted Amendment 6 to the Highly Migratory Species Fishery Management Plan (HMS FMP). Attachment 3 shows proposed amendatory changes as modified by the motion.¹

While the draft FMP amendment language and the Council’s final action based on it (Attachment 1) used the term “EFP holder” in describing qualification criteria, the terms “EFP applicant” and “EFP recipient” were used in the description of the range of alternatives described in HMS Management Team reports referenced in the Council’s November 2018 action. Because of the use of these different terms in the record, NMFS is seeking confirmation that the Council intended to use the term EFP holder, which seems apparent by the use of this term in the Council final action (and adopted amendment language).

The qualification criteria (described in the FMP amendment language as modified by Motion 14) include two tiers based on being an EFP holder:

Tier 1: DSBG EFP holders who made at least 10 observed DSBG sets by December 31, 2018.

Tier 3: DSBG EFP holders who have made at least 10 observed DSBG sets by the effective date of the Final Rule authorizing DSBG.

NMFS has explained that EFPs are associated with a vessel and multiple names may appear on an EFP including the vessel owners, vessel operators, and operations managers who sign the permit, and are thus jointly and severally liable for compliance with the EFP Terms and Conditions. Vessel operators are separately listed at the top of the permit and in the Terms and Conditions (see Attachment 4).² In some circumstances, not all who sign the EFP, and are designated EFP holders,

¹ The November 2018 preliminary preferred alternative is based on the description in [Agenda Item J.4.a, HMSMT Report 1](#) including modifications and the ranked or tiered list of permit qualification criteria found in [Agenda Item J.4.a, Supplemental HMSMT Report 2](#), again with modifications described in Motion 19 made at that meeting.

² Attachment 4 is a sample of DSBG EFP and Terms and Conditions sheet as would be issued by NMFS. The first page in this example is the actual EFP, which must be carried on the vessel when fishing under the permit occurs. EFPs authorizing DSBG first started to be issued in 2015 and EFPs issued prior to 2017 only include vessel names and the signatories/EFP holders, although per the Terms and Conditions all vessel operators have always been required

are separately listed as vessel operators. While signature lines on the EFPs are denoted for “EFP holders,” there is a question as to whether the Council intended that all these persons qualify, even if they didn’t operate the vessel during an “observed set.” (While it is reasonable to conclude that “observed” in this context refers to activity observed by a “NMFS certified observer” as described at 50 CFR 660.719, the Council may wish to clarify its intent here as well.) A straightforward interpretation of the Motion 14 and FMP amendment language would be that only those EFP holders that individually “made at least 10 observed sets” as documented in observer records qualify.³

NMFS also explained that it has added and/or removed the names of vessel operators from EFPs at the request of the vessel owner (who also signs the permit) so that data collecting could continue under the EFP. Since the ability to qualify under Tier 3 can be based on future fishing activity, there is some risk that vessel operators could be added to the EFP to increase the pool of potential qualifiers (although in theory such strategic behavior would have been possible at any time NMFS engaged in this practice).

Two additional issues arise related to the observer program’s practices and the specification of “observed DSBG sets.”

First, for data management purposes, NMFS defines “set” as the deployment and retrieval of a single piece of deep-set buoy gear. While the FMP amendment language and the Motion 14 language do not define set (under the premise that these specifics would appear in Federal regulations), the language adopted by the Council in [Agenda Item J.4.a, HMSMT Report 1, November 2019](#), describing the range of alternatives, defines the gear, stating a “collective gear *set* includes ten individual pieces of gear that can fish up to three hooks each...” (emphasis added).⁴ Throughout discussions by the Council and its advisory bodies this interpretation of the word set as multiple pieces of gear deployed simultaneously was assumed. NMFS also defines a “fishing day” as the deployment of any number of pieces of gear (observer “set” definition) for a reasonable amount of time (as determined by the observer) over one calendar day. It seems apparent that the Council and its advisory bodies used of the term “set” to refer to “fishing day” as recorded in NMFS data.

Second, beginning in 2020 the observer program reduced its minimum observer coverage rate from the first 10 fishing days made by an EFP vessel and 30 percent of fishing days thereafter to the first three fishing days and 10 percent thereafter. That means that it may be more difficult for individuals to accumulate the required 10 observed fishing days to qualify in Tier 3. At the extreme, an individual that only began fishing in 2020 would need to fish 73 days to accumulate the required 10 observed fishing days (the first 3 days plus 10 percent of a subsequent 70 days).

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to participate in a safe handling and release workshop conducted by the NMFS WCR Protected Resources Division prior to beginning fishing under the EFP, which could offer a record of any differences between EFP holders and vessel operators.

³ Note that observer reports only list the name of the vessel operator and crew onboard when observed fishing occurred.

⁴ Note, however, that Agenda Item J.4.a, Supplemental HMSMT Report 2, November 2018, modified the gear definition, dropping the use of the term “set.”