

SUPPLEMENTAL GROUND FISH ELECTRONIC MONITORING POLICY ADVISORY COMMITTEE REPORT ON ELECTRONIC MONITORING PROGRAM UPDATE

The Groundfish Electronic Monitoring Policy Advisory Committee and Technical Advisory Committee (GEMPAC and GEMTAC) met via webinar on January 20-21 and February 25, 2021 to discuss several issues related to the ongoing development of an Electronic Monitoring (EM) program for the West Coast Groundfish Catch Shares fishery. The GEMPAC thanks Council staff and Chair Hanson for holding the webinars. National Marine Fisheries Service (NMFS) staff, Ms. Melissa Hooper, provided an update on implementation of the EM Program and summaries of all reports, including the EM Program Guidelines and Provider Manual. In addition, NMFS staff provided an update regarding the development of national guidance and the applicability of several Federal acts when using EM such as the Magnuson-Stevens Act's (MSA) confidentiality rules, the Federal Records Act, and the Freedom of Information Act (FOIA). The Committee appreciates the guidance that has been developed thus far and looks forward to seeing the final policies NMFS develops and distributes in the coming months. This information is critical for EM participants (current and future) and EM Service providers regarding the legal protection and limitations regarding access and distribution of confidential EM data. These final policies will impact the actual cost of the program.

General

The GEMPAC recognizes the incredible amount of work over many years that the GEMTAC, industry, EM providers, Pacific States Marine Fisheries Commission (PSMFC), Council members and Staff, and NMFS have put into the development of the EM program. We also recognize the significant work from the National Oceanic & Atmospheric Administration (NOAA) headquarters to develop national policies to guide the design of regional EM programs, many of which have developed uniquely across various regions of the country.

Recap of January 20-21, 2021 meeting

During this meeting, the GEMPAC received presentations from Ms. Hooper regarding the current EM timeline for NMFS activities, including rulemakings, finalization of the EM program manual and other documents, application deadlines, and effective implementation date of January 1, 2022. The Manual remained unchanged from its previous status when presented in a July 2020 public webinar.

The GEMPAC had limited discussion of outstanding issues, such as rate of secondary review, and the sampling unit (trips vs hauls), etc. However, GEMPAC members had serious questions regarding the overall structure of the program, which required legal guidance that was not available from NMFS at that time. The meeting ended with no recommendations, other than a request for information to be shared by NMFS before the next meeting. Also at that meeting we heard a presentation by Melissa Mahoney and Craig Rose summarizing the results of a pilot project to develop an automated species identification EM system for bottom trawl vessels (with the goal of reducing catch sorting time while maintaining accurate discard estimates).

Feb 25th meeting Topics

The GEMPAC adjusted the agenda at the start of the meeting to focus on three additional topics, prioritizing a discussion around the 3rd party audit model that NMFS intends to implement via regulations in January 2022 and whether the program as envisioned would meet the Purpose and Need identified by the Council. We reviewed and discussed a range of topics, including application of national acts regarding EM and the status of input on the EM Manual and Guidelines. A summary and outcomes of those discussions are noted below.

National Acts Regarding EM Use

Ms. Hooper reviewed the EM Records Q&A document ([NMFS Report 6](#)) and confirmed some previous questions, including that any secondary review conducted by NMFS will trigger raw or tabular EM data becoming a Federal record (Question 4), which will then be subject to the National Archives and Records Administration storage requirements and will require NMFS to take possession of those records. We discussed FOIA implications and NMFS guidance suggests that MSA confidentiality will apply to EM data regardless of what agency is in possession of it, and that NMFS would *not* expect to release EM video data under FOIA requests due to the inability to aggregate video.

This guidance is not yet final and is expected to be shared publicly in May 2021. However, Ms. Hooper conveyed these are ‘final positions’ of NOAA General Counsel (GC) and would simply be formalized later this spring with additional background in a policy directive. As we understand it, the new guidance on Federal record status is likely to shift not only how the West Coast program has been envisioned, but programs in other regions like New England. (e.g. using a web portal to prevent raw EM data from becoming a Federal record, so as to reduce storage costs or confidentiality concerns).

EM Manual/Guidelines

The GEMPAC has no further input on the Manual and guidelines at this time.

Prior to this meeting, the GEMPAC provided comments to the draft documents (see Appendix 1. Timeline for additional details), and we note that NMFS did incorporate some changes into the July 2020 update (e.g. logbooks to providers rather than NMFS). Since July 2020, NMFS has not made any changes to these documents, although certain issues such as video review rates and other reviewer protocols, secondary review (audit) protocols and Halibut Discard Mortality Rates are still being decided. We thank Ms. Hooper for providing additional information at this meeting ([NMFS Report 5](#)), and understand these will be incorporated into a final EM Manual for the 2022 fishing season.

We understand the EM Manual is to be a living document that can be modified in the future at the discretion of NMFS, and/or at the request of the Council. However, it should be made final by April 1, 2021 (as stated in the NMFS implementation timeline) in order for EM Providers to develop all the necessary protocols to set up business arrangement with industry, establish NMFS/Observer program communication and data request protocols. NMFS could also help providers who have applied in 2020 or will be applying with more clarity on the primary video review protocols they would need to carry out, which allows for their business planning and contracting with vessels.

Cost of 3rd Party Video Review Component

The GEMPAC adjusted its agenda to focus on a discussion of concerns over the structure of the proposed 3rd party EM Program, and in particular focused on the projections of the costs of the program and which parties will bear those costs. Ms. Hooper provided a table with updated cost estimates for the 3rd party system that would be implemented 2022 (Table 1). The table compares the current costs under the exempted fishing permit (EFP) program to the projected costs under a regulatory program, and against the existing Observer program cost. The GEMPAC notes these estimates are different than what was last provided by NMFS in November 2019 ([NMFS report 6](#)). The costs borne by industry appear lower (\$232,444 vs \$195,690), while the costs borne by the agency are slightly higher (\$528k vs \$450k previously). The lower industry costs are due to lower storage costs¹.

Program Component	EFP	Third Party	Observer
NMFS Costs	\$660,000	\$528,000	
NMFS labor	\$225,000	\$465,000	
NMFS non-labor		\$63,000	
PSMFC (Video review, data storage, reporting)	\$435,000		
Industry Costs	\$390,000	\$585,690	\$1,298,000*
Equipment, field services	\$390,000	\$390,000	
Video review, data storage, reporting		\$195,690	
Total Program Costs	\$1,050,000	\$1,113,690	

*Based on \$500/sea day observer rate and 2,596 seadays.

Table 1. Updated cost estimates provided on 2/25/21 by Ms. Hooper, NMFS

Leading up to the meeting, EM EFP participants worked with EM providers to determine potential video review costs under the 3rd party model. EM providers have been struggling to come up with exact costs due to the unknown protocols and potential requirements of the program, however they agreed to provide ‘best guess’ estimates based on their experience. Two of the three EM providers at the meeting provided numerical estimates, which were \$250k/year and \$400k/year. This cost would fall to industry, as well as any recoverable costs to NMFS, which are now at \$528k/year and likely to grow.

We have provided a comparison of the cost estimates provided by Ms. Hooper with the additional EM Provider estimates (Table 2). We have also included a ‘sole source’ option, should the Council wish to re-consider the 3rd party program. Key to the comparison is that under all options except that sole-source cost-sharing option, the expense to the industry increases. And if vessels choose to no longer utilize EM the resulting expense to the remaining participants will increase due to the

¹ NMFS reported a decrease in storage costs from \$48,754 to \$12,000 annually based on data from PSMFC

limited scale of participants – regardless of a sole source or 3rd party video review model – it will just increase more under the 3rd party model. One provider stated they were still unable to provide precise cost estimates because the protocols have not been made public that inform the video review.

Program Component	EFP	Sole Source w/PSMFC	3 rd Party NMFS Proposal	3 rd Party Provider #1	3 rd Party Provider #2
NMFS Costs	\$225,000	\$225,000	\$528,000	\$528,000	\$528,000
PSMFC Video Review	\$400,000	\$400,000	\$0.00	\$0.00	\$0.00
Equipment & Field Services*	\$481,500	\$481,500	\$390,000	\$457,500	\$481,500
3 rd party Video Review & Storage	\$0.00	\$0.00	\$195,690	\$250,000	\$400,000
Total Cost	\$1,106,500	\$1,106,500	\$1,113,690	\$1,235,500	\$1,409,500

Table 2. EM Cost Estimates with additional EM Provider estimates from 2/25/21 meeting. Shaded cells indicate NMFS responsibility. Under 3rd party, NMFS costs will be passed onto industry via cost recovery. (* Equipment & Field Services includes procurement of new systems (amortized over five years), replacement parts & maintenance, onboard assistance, cost of submitting the hard drive, and program management fees that are paid to the equipment provider)

The outcome of this dialogue is that we don’t know with any reasonable confidence what industry will have to pay for video review services from third parties, but we do know it is going to be more than what PSMFC costs right now for its review program. It is also clear that a 3rd party program does not necessarily result in cost savings for NMFS, appears to be budget additive to the tune of \$450-\$530k per year, which is \$50k - \$130k more than NMFS was paying for PSMFC’s services. Because this is a Limited Access Privilege Program , under the 3rd party model industry will be solely responsible for a program that costs more than \$1 million per year (out of pocket and through cost recovery dollars). In essence, it’s no cheaper than the observer program costs now.

Will the 3rd party model achieve the Purpose & Need of the EM Program?

The purpose for developing EM was to ‘expand the range of monitoring tools for vessel operators to meet the 100 percent monitoring requirements of the trawl program’ ([RIR March 2019](#)). Based on our discussion and the information available, the GEMPAC believes the proposed action will not meet objectives, specifically 1, 2, and 4 for the program:

Objective 1: Reduce total fleet monitoring costs to levels sustainable for the fleet and NMFS

The cost estimates show very little cost savings between the current observer program and a future EM program for some boats. The high costs of observer coverage prompted action to create the EM program, so a similar pricetag for EM does not meet this objective. We also question whether adding \$530k to NMFS budget for EM auditing is sustainable for the agency, if they are not able to recover all those costs if the total cost of the catch share program is above 3 percent for the trawl sector.

Objective 2: Reduce observer costs for vessels that have a relatively lower total revenue

A tripling of monitoring costs under the 3rd party model compared to the EFP model does nothing to assist with vessels that are struggling with lower total revenue. Between the catch handling protocols and the expense, the proposed program fails to meet objective 2.

Objective 4: Increase national net economic value generated by the fishery

Increasing the monitoring costs for EM reduces the economic value generated by the fishery. Participants already face burdensome expenses including buyback loan payments (still owe more than \$12 million), landings taxes, quota pounds lease costs, monitoring costs and cost recovery expenses. Opting for an EM model that transitions all of the expense to the industry when a cost sharing model would be more sustainable seems short-sighted. Shifting all of the expense to the industry is in conflict with Objective 4.

GEMPAC Recommendations

The GEMPAC has the following recommendations:

1. The Council should request NMFS compile and provide accurate cost estimates based on input provided by EM providers and PSMFC so that the Council can determine if the 3rd party model meets the goals and objectives of the EM program.
2. The Council should schedule additional floor time in 2021 once more accurate cost information is available to consider “fully articulated program design alternatives and cost information is available to make an informed decision on whether moving to a 3rd party provider or staying with a sole provider model best meets the goals and objectives of the program.” This was included in a motion passed by the Council in April 2017.
3. If the proposed program does not meet the Purpose and Need and objectives for this action, then the Council should rescind its decision to use the 3rd party model and replace it with a sole provider model. Further, the current EM program should remain in EFPs until such time that a regulatory program which meets the goals and objectives can be implemented.

Conclusion

EM offers a safe and reliable way to monitor fishing activity and is needed now more than ever during the Covid-19 pandemic. If designed collaboratively and with the unique aspects of our region in mind, it can be cost effective as well. The GEMPAC members recognize that we are at a tipping point where the next steps taken will decide the fate of the EM program for our coast, not only for the trawl program but other sectors and fisheries hoping to adopt EM based on the program we implement. With the available information on costs, we can assume that a 3rd party model will cost considerably more than what a sole provider model costs and this will be borne by industry and the American taxpayer. We see a fatal flaw that is fixable, and we ask the Council not to rush just to get it done, but to use your position to ensure a successful program. Success to us looks like most, if not all trawl vessels using EM for some or all of their fishing activities because it’s cost effective, and they trust where and how their data are being used. We know from experience it is harder to fix programs that fail, and much better to implement programs we know will be supported and successful from the start.

Appendix 1. EM – Program Development Timeline

Noting Record of Stakeholder Concerns and Responses

Council EM page - https://www.pcouncil.org/managed_fishery/electronic-monitoring/

- April 2017
 - Industry letter on 3rd party / maintaining PSMFC as video reviewer [Briefing Book- Page 24](#)
- Sept 2017
 - NMFS determined that it cannot designate PSMFC, or any other service provider, as the sole provider for video review (Agenda Item E.6.a, Supplemental NMFS [Report 2](#))
 - [GEMPAC report](#) re 3rd party: ‘no recommendation at this time’
- [November 2017](#)
 - GEMPAC recommends 3rd party as the only feasible way at the time to move forward with EM, and noting cost concerns and asking Council to consider language in a future MSA re-authorization to allow a funding mechanism similar to the North Pacific program (Section 313)
 - [Council Final Action](#)
- June 2018
 - <https://www.pcouncil.org/2018-third-party-video-review-discussed-2/>
- Sept 2018
 - GEMPAC ([report](#)) asks for clarification on funding for EM and confidentiality of EM data
- Nov 2018
 - Council recommended an extension of the electronic monitoring EFPs for whiting trawl, fixed gear, non-whiting midwater trawl, and bottom trawl through 2019
 - California Groundfish Collective submits written memo to NMFS on catch handling protocols to test under EFPs
- April 2019
 - Council recommends GEMPAC meet to review procedural directives and program guidance documents
- June 2019
 - Short [GEMPAC REPORT](#) on needing to review procedural directives from NMFS headquarters
- September 2019
 - GEMPAC high level concerns noted in [report](#), specifically continued uncertainty in key details and cost drivers of the program, requests for updated cost estimates and paring down of the Guidelines document and to see the Manual document that had not yet been presented
 - Industry [letter](#) noting concerns with breakdown in NMFS collaboration and direction of the program
 - Kauer public comment on H3 - concern over inflating costs in the 3rd party model (using cost data from regulatory impact review)

- Nov 2019
 - *This is first time GEMPAC reviews the Manual*
 - *NMFS issues a Q&A memo on key issues the night before the GEMPAC meeting - <https://www.pcouncil.org/documents/2019/11/agenda-item-h-3-a-supplemental-nmfs-report-5-electronic-monitoring-qa.pdf/> and issues a supplemental report on costs <https://www.pcouncil.org/documents/2019/11/agenda-item-h-3-a-supplemental-nmfs-report-6-electronic-monitoring-cost-estimates.pdf/>*
 - GEMPAC [Report 1](#) notes serious concerns with direction of program (again) related to PSMFC maintaining review role, costs of creating an audit function at NMFS
 - GEMPAC [Report 2](#) - service plan comments, asking for clarity on what is required in regs versus what is 'guideline'
 - GEMPAC [Report 3](#) - Manual comments (very limited) - also this version of the Manual from NMFS notes that it would spend the next year completing the Manual
- Feb 2020 - National EM Workshop
 - Federal records issue raised during plenary discussion
 - Clear need for agency decision on whether secondary review constitutes creation of a Federal record. Two different models operating in the West Coast and New England for how the agency determines what becomes a Federal record when conducting secondary video review. On the West Coast, General Counsel has relayed that NMFS must request a hard copy of the EM video to review, rather than using a portal, because once the video is viewed - even on a portal - it becomes a Federal record and NMFS cannot require a service provider to store video and have industry pay for the cost. In New England, NMFS views EM video on a portal provided by EM service providers and does not consider those EM data to be Federal records. Question posed during discussion of whether the agency will develop a singular position on how EM video data becomes a Federal record and what will be required? [*This may have been the first time that NOAA headquarter lawyers understood the regional differences and national-level problem*]
 - FOIA questions raised during plenary discussion
 - Agency shared that EM video data is not FOIA-able because it cannot be aggregated. No written opinions or positions shared after this.
- March 2020
 - Public comment made request for EFPs to be extended. Public comment noted that 2021 regulatory implementation would not be possible because service providers would be required to submit applications by June 1, 2020 to get approved and vessels would have to submit applications by October 1, 2020, noting that service providers could not provide any estimates at the time on proposed costs because the program Guidelines had not yet been developed to

- adequately estimate costs. Comments also noted concern over how video review (primary and secondary review) would be conducted due to costs and due uncertainty about what EM data would become a Federal record.
- NMFS stated on floor preference to maintain current implementation timeline. Will come back up in April for discussion.
- April 2020
- Industry/nongovernmental organization public comment [letter](#) – requested delay of regulatory implementation.
 - "The GEMPAC/TAC reviewed the Guidelines and Manual at the November 2019 Council meeting and attempted, with less than ample time, to provide recommendations for improvements. Since that meeting, the GEMPAC/TAC and public have not yet reviewed additional proposed changes to the Guidelines and Manual. At the March 2020 Council meeting, some EFP representatives requested another dedicated GEMPAC/TAC meeting to review and revise the Guidelines and Manual; while the GEMPAC/TAC is scheduled to meet on April 4th, 2020, we do not expect that meeting to provide sufficient opportunity to review and adequately revise the Guidelines and Manual."
 - "Finally, we are concerned about NMFS's determination of when specific types of EM data become a Federal record, and whether that determination is consistent across regions."
 - GEMPAC report - <https://www.pcouncil.org/documents/2020/04/g-5-a-supplemental-gempac-report-1.pdf>
 - requests amendment process for EM final rule and delaying effective date of the program
 - requests *meaningful consultation* between agency, GEMPAC, Council on the Manual and guidelines
 - requests extension of EFPs
 - Notes uncertainties, including status of EM data including confidentiality and ownership/disclosure; how Federal record status is determined, levels of video review, etc.
- June 2020
- GEMPAC [report](#), requesting changes to the final rule -
 - Industry coalition [letter](#) - asking among other things that "NMFS ensure adequate consultation with the GEMPAC/TAC and stakeholders to revise and improve the EM Guidelines and Manual for a cost effective EM program that provides an alternative to human observer coverage and maintains accountability in the groundfish fishery."
- July 2020
- NMFS hosts informational webinar on the Manual and Guidelines.
 - Mahoney emails questions from stakeholders to NMFS asking:
 - What data/rationale went into the decision to move from hauls to trips as sampling unit? Was there a cost or efficiency consideration involved?

- Now that the logbook data will go directly to EM Providers (as well as video data), how will ‘blind review’ be assured (i.e. there is one mention in manual on page 13 regarding cod end capacities and certain field of discard logbook not made available to reviewer – how would that work)?
 - Need explanation of NMFS process for determining which trips (for trawl, since not 100 percent) would be reviewed, and the timing of providing that information to the EM Service Provider so they are only reviewing those trips tagged for review.
 - What is the purpose of the ‘secondary review and debriefing of EM Provider’ function outlined on page 6?
 - What is the status of the bottom trawl final rule?
 - Have additional EM Service providers been certified? Is NMFS still accepting applications for next year?
 - What is the status of PSMFC funding for the 2021 fishing season? Uncertain
- Nov 2020
 - Stakeholder letter to Council asking about EFP status for 2021, status of the Program Manual and timeline for collaborative input, status of the bottom trawl rule, and schedule from NMFS for meeting all actions needed to implement the EM regulatory program.
 - January 2021
 - GEMPAC meeting – NMFS presents Manual and Guidelines documents which are unchanged since July 2020

PFMC
03/08/21