

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE REPORT ON DEEP-SET BUOY GEAR PERMIT QUALIFICATION CRITERIA AND ISSUANCE

The National Marine Fisheries Service (NMFS) Agenda Item H.4 Supplemental Reports 1 and 2 raise important clarifying questions regarding implementation of the deep-set buoy gear (DSBG) [draft FMP Amendment](#) language and the [Council's Final Preferred Alternative](#) (FPA) from the September 2019 meeting, as well as the proposed qualifying criteria for limited entry permit issuance. The California Department of Fish and Wildlife (Department) has reviewed these reports, along with other information provided in the briefing book and past meeting records regarding these questions. The Department offers the following responses and recommendations.

DSBG PERMIT OWNERSHIP

The Council and Department have been extremely clear that the intent is for DSBG permits to be non-transferable. The draft FMP amendment, reflecting the Council's motion, states that permits would be held by a "person" as defined by 50 CFR 660.702. This definition includes corporations, partnerships, or other entities, and as noted in the NMFS report, these could potentially be sold, dissolved, or otherwise changed. Such changes could constitute a "transfer" from one individual to another. The Department's intent in allowing permits to be held by corporations, partnerships, or other entities defined under 50 CFR 660.702 was not to allow the permits to move from one individual to another through those entities but rather to allow individuals who qualify for a permit to operate their fishing businesses in a manner consistent with their current practice.

NMFS has clarified that if initial qualifier assigns their permit to a corporation, partnership, or other entity, they can implement regulations that prohibit changes to the makeup of that entity. An example of this is seen in the sablefish permit implementing regulations, which prohibit changes and define change as:

"Change in partnership or corporation means the addition of a new shareholder or partner to the corporate or partnership membership. This definition of a "change" will apply to any person added to the corporate or partnership membership since November 1, 2000, including any family member of an existing shareholder or partner. A change in membership is not considered to have occurred if a member dies or becomes legally incapacitated and a trustee is appointed to act on his behalf, nor if the ownership of shares among existing members changes, nor if a member leaves the corporation or partnership and is not replaced. Changes in the ownership of publicly held stock will not be deemed changes in ownership of the corporation."

Similar regulatory language could be used to prohibit changes for ownership of DSBG permits. If, for example, a corporation is sold to another individual or the initial qualifier is no longer affiliated with it, the permit would not be renewed. It is the Department's intent in this recommendation, as stated previously in floor discussions, that DSBG permits not have a market value. By prohibiting transfer along with a corporation or other entity, the permit wouldn't be able to be included as "value" in that entity.

The Department recommends that DSBG permits be assigned to a “person,” but that if a person designates a corporation, partnership, or other entity as the permit holder, that changes to such entities be prohibited.

DSBG PERMIT TRANSFERS TO HEIRS

Upon adoption of the motion selecting a preferred alternative at the Council’s September meeting, additional discussion occurred regarding the ability to transfer a permit to a family member if the permit holder dies. As noted in that discussion, the Department supports the ability for a permit holder’s estate to transfer the permit on a one-time basis to a surviving family member. There are examples in California Fish and Game Code, with similar provisions for transfers upon death (e.g., FGC §8104, 8405.2, 8681.5). Based on the September floor discussion and apparent consensus of Council members present at that meeting, **the Department recommends that NMFS allow for transfers upon death of a permit holder to a member of that permit holder’s immediate family** in the final rule establishing a DSBG permit.

There are numerous legal definitions of “immediate family” in State and Federal statutes. **The Department recommends that such a rule be as broad and inclusive as possible in defining family**, consistent with more recent definitions and an intent to recognize the diversity in family structures found today. An example, taken from California Labor Code Section 13692 defines “immediate family member” as a:

“...spouse, domestic partner, cohabitant, child, stepchild, grandchild, parent, stepparent, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, great grandparent, brother, sister, half-brother, half-sister, stepsibling, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, or first cousin...”

INITIAL DSBG PERMIT QUALIFICATION TIMEFRAME

The proposed process to determine permit eligibility in the FMP amendment language states:

“Applications will only be accepted during a predetermined time period each year. Qualification for issuance of a permit will be determined prior to the permit year and/or fishing season. Applications may be submitted until the maximum number of permits have been issued.”

NMFS points out that such a process may be infeasible and that the number of people requesting a permit within each tier necessarily impact the number of available permits in subsequent tiers. Therefore, NMFS recommended conducting a single initial qualification period for Tiers 1-7.

The Department agrees with this recommendation. As noted below, the Department also recommends edits to the tiers to help clarify the intent and the addition of a 9th tier to address individuals who do not meet the criteria during the initial qualifying period but who wish to acquire a permit should they still be available. **The Department recommends that a single initial qualification be applied to Tiers 1 through 8. The Department proposes the following changes to the current draft FMP amendment language:**

“Applications for Tiers 1-8 will only be accepted during a predetermined time period each year. Qualification for issuance of a permit will be determined prior to the permit year

and/or fishing season. Tier 9 Applications may be considered on first-come first served basis annually submitted until the maximum number of permits have been issued.”

DSBG PERMIT QUALIFICATION CRITERIA

NMFS points out that both Tier 1 and Tier 3 use the term “DSBG EFP holders” in reference to qualifying for a permit. While the Council reviewed and approved EFPs on an individual, or sometimes multiple-person, basis, NMFS’ policy allowed for DSBG EFPs to add additional fishing captains and occasionally allowed original applicants to serve only as EFP managers. As such, the number of “DSBG EFP holders” is greater than the number of EFP applications approved by the Council and changes depending on who within the broader group of people engaged in the EFP process are included. The Council’s stated intent during the DSBG fishery consideration process was to prioritize permit issuance to individuals who had made a real contribution to the development of the gear type, tested its use, and provided data necessary for the final approval. As such, the Department recommends that the definition of “EFP holder” include both those who actively captained a vessel conducting DSBG fishing effort under an EFP and the few individuals who, while they may not have captained a vessel conducting DSBG effort, did make a substantive contribution as an EFP manager by providing boats, gear, and oversight to those actually fishing under the EFPs.

For the purpose of Limited Entry Permit Qualification, the Department recommends that the Council define an EFP holder as the following:

1. Any individual with NMFS approval to captain a commercial vessel and use DSBG under the authority of an EFP; or
2. Any individual who is identified by NMFS as having managed a DSBG EFP.

The use of the term “individual” in this context is intended to mean a single person, and not include the broader definition of “person” as discussed above.

NMFS raises several clarifying questions regarding the tiers themselves, including the ability for applicants in Tier 3 to achieve the required “10 observed sets” of fishing effort. Given that NMFS reduced the required number of observed sets from the Council-recommended 10 to 3, followed by 10% of future EFP fishing days, it could take in individual more than 70 days of fishing effort to achieve the original qualification criterion of 10 observed days found in Tier 3.

There were also questions regarding what constituted a “set” as well as how individuals would document effort in a variety of the tiers. Based on the description of DSBG in the proposed FMP amendment and previous floor discussions, the Department’s intent when making the motion to establish qualification criteria was that a “set” was defined as fishing effort conducted on a single calendar day with up to 10 pieces of DSBG, and 10 calendar days of fishing effort was required for qualification, as clarified in the Highly Migratory Species Management Team’s [report 1](#). A day of fishing effort is not defined by the number of times gear is set or retrieved or if an individual caught and landed fish in that day.

The Department has attempted to clarify the many questions in the following proposed revision to the qualification criteria. The proposed criteria do not change the order or qualification requirements, but attempt to clearly specify how an individual would qualify within each. Changes

have been made to terminology used to make it consistent with permitting requirements during the stated window periods (e.g., “California Drift Gillnet Shark and Swordfish permit” during the time when that was the only permit in use for the fishery). The proposed language also clarifies the necessary documentation to support qualification.

A question was also raised regarding how to rank qualified candidates within each tier. The Department recommends that for tiers 1-5, applicants will be prioritized within a tier based on their total swordfish landings within the window period for that tier. For tiers 6 and 7, which do not require landings, applicants will be prioritized on a first come, first served basis within the one-time application period. Applicants in tiers 8 and 9 will be ranked on a first come, first served basis. In tier 8, the Department is recommending a change from the term “landing” to “experience.” As landings are assigned to the vessel captain, using landings as the sole basis for qualification in this tier would eliminate the ability for crew to qualify. Since the intent for this tier was to encompass vessel crew, we propose modifying the tier to be inclusive. Finally, an end date for Tier 8 has been added in order to allow NMFS to determine qualifiers in the one-time process.

The Department recommends that the Limited Entry Permit Qualification Criteria for Deep-Set Buoy Gear (DSBG) permits be modified to:

1. EFP holders, with at least 10 documented calendar days of DSBG fishing effort by December 31, 2018. Documentation shall consist of a West Coast Observer Program record indicating either:
 - a. the EFP holder as vessel captain for that fishing day; or
 - b. fishing effort for that day conducted on a vessel owned by or under the EFP managed by that individual.
2. California Drift Gillnet Shark and Swordfish permit holders who made at least one large-mesh DGN swordfish landing between the 2013-2014 and 2017-2018 fishing seasons and surrender their state or federal DGN permit as part of a DGN permit trade-in or buy-back program.
3. EFP holders approved by the Council prior to April 1, 2021 who conducted at least 10 calendar days of DSBG fishing effort or with 10 days of DSBG effort on their vessel or by vessels they manage under the EFP by the effective date of the Final Rule authorizing DSBG. Documentation shall consist of a NMFS West Coast Observer Program record or a properly submitted NMFS DSBG logbook indicating either:
 - a. the EFP holder as vessel captain for that fishing day; or
 - b. fishing effort for that day was conducted on a vessel owned by or under the EFP managed by that individual.
4. California General Swordfish permit holders who possessed a permit during the 2018-2019 fishing season and made at least one swordfish landing using harpoon gear between the 2013-2014 and 2017-2018 fishing seasons.
5. California Drift Gillnet Shark and Swordfish permit holders who have made at least one large-mesh DGN swordfish landing between the 2013-2014 and 2017-2018 fishing seasons and who did not surrender their state or federal DGN permit as part of a trade-in or buy-back program.
6. California Drift Gillnet Shark and Swordfish permit holders who have not made a swordfish landing with large-mesh DGN gear since March 31, 2013 and who surrender their state or federal DGN permit as part of a permit trade-in or buy-back program.

7. State or Federal DGN LE permit holders who have not made a swordfish landing with DGN gear since March 31, 2013 and did not surrender their DGN LE permit as part of a state or Federal DGN permit trade-in or buy-back program.
8. Any individual with documented commercial swordfish fishing experience between January 1, 1986 and the effective date of the final rule on a first come first served basis. The basis for documenting commercial swordfish fishing experience attributable to the applicant will be possession of a valid commercial fishing license on that date and either:
 - a. A valid California Department of Fish and Wildlife fish landing receipt identifying the individual as the fisherman of record; or
 - b. A valid state or federal logbook where swordfish were taken and identifying the individual as captain or crew on that day; or
 - c. A signed affidavit from a vessel owner or captain identifying the individual as vessel captain or crew on the day that swordfish were taken.
9. Any individual on a first come first served basis.