

NATIONAL MARINE FISHERIES SERVICE REPORT
ELECTRONIC MONITORING UPDATE

In a [July 2021 letter](#) to National Marine Fisheries Service (NMFS), the Council identified three topic areas for NMFS to investigate and requested a delay of the electronic monitoring (EM) regulatory program. The topics were:

- 1) Utilizing cost recovery under section 303A(e) of the Magnuson-Steven Act (MSA), 16 U.S.C. § 1853a(e) to fund EM video review;
- 2) Utilizing the sole-source authority for a grant, contract, or other financial assistance under section 402(d) of the MSA, 16 U.S.C. § 1881a(d), for video review by the Pacific States Marine Fisheries Commission; and
- 3) Clarifications regarding confidentiality and federal record retention.

This NMFS report summarizes our progress to date on these questions.

1) Use of Cost Recovery for EM Video Review

The [NMFS Catch Share Policy](#) was published in 2017, following the release of a draft policy in 2010, which included a public comment period in addition to broad input via NOAA engagement with the public and stakeholders. One of the policy's guiding principles is that "incremental government costs for management, data collection and analysis, and enforcement of limited access privilege programs shall be recovered from participants as required by the MSA." The policy further states that, "Cost recovery aims to recover a variety of government costs attributable to the private sector use of a public resource." Cost recovery as authorized in MSA section 303A(e) provides for NMFS to collect a fee from limited access privilege holders to recover funds NMFS pays to cover such costs. The policy is clear that cost recovery funds should reimburse the public for some of these government costs, as consistent with the MSA. This guiding principle, like the others in the policy, were developed through the aforementioned public process, and they demonstrate NOAA Fisheries' resulting interpretation of the cost recovery provisions in the MSA.

The NMFS Procedural Directive, [Cost Allocation in Electronic Monitoring Programs for Federally Managed U.S. Fisheries](#) (Cost Allocation PD) states, "For EM programs that are initiated by a Council...industry will be responsible for the sampling costs¹ of such programs". The Cost Allocation PD further states that "NOAA Fisheries is specifically authorized and required by the MSA to collect fees to cover the actual costs of certain activities, including data collection and analysis, associated with Limited Access Privilege Programs (LAPPs). In such fisheries, NOAA Fisheries may collect fees from industry to pay for administrative costs, sampling costs, or both, as consistent with statutory and regulatory requirements." Here, the inclusion of "sampling costs" is in conflict with the Catch Share policy, since sampling costs are the industry's responsibility.

¹ The Cost Allocation PD identifies sampling costs to include, among other things, equipment purchases, equipment maintenance, data transmittal, and video processing and storage.

A review and possible change to either national policy would require a process for public comment, an assessment on how any changes in policy would impact other regions and fisheries, as well as detailed justification and rationale for why such a change to NMFS policy is needed that is consistent with the original intent of the policy. Revisiting either or both national policies would be a multi-year process.

2) Utilizing the MSA Sole-Source Authority

We have had initial discussions regarding the use of a sole-source agreement with Pacific States Marine Fisheries Commission for EM video review with the NMFS Western Acquisitions Division of the Acquisition and Grants Office. During an informal review, they did not identify barriers to using sole-source authority, however the official review and determination would be done if the detailed package is submitted.

3) Confidentiality and Federal Record Retention

Procedural Directive 04-115-04 on Information Law Application for Data and Supporting Guidance for Electronic Monitoring Programs for Federally Managed U.S. Fisheries is expected to be finalized soon and was presented at the Council Coordination Committee meeting in May 2021.

Exempted Fishing Permit (EFP) Extension

The EM EFPs were issued for 2022 and 2023 under 50 CFR § 600.745. The intent of issuing new EFPs was to allow adequate time to address concerns from the Council as indicated in the [July 2021 letter to NMFS](#). Further extension could undermine the purpose of EFPs, which are intended for limited development of a new program. The EFPs are implemented outside the regulations and therefore could deprive the public of opportunity for input that occurs in the regular fishery management process and notice-and-comment rulemaking. For these reasons, NMFS will not extend the EFPs beyond the current December 31, 2023 expiration; therefore, a regulatory program must be in place in order for EM to continue as a monitoring option.

Next Steps

Given the above rationale, and the timeframe needed to have a complete program in regulation, NMFS does not see a path forward using cost recovery funds to pay for EM video review and storage. If a compelling case is made, which takes the intent of the policies into account, considers the national implications of such a change, and provides sufficient justification and rationale for either why a policy change is still consistent with that intent or is needed at this time, there will likely not be sufficient time to implement the policy change, given the public review and comment process that will be needed to make such a change.

PFMC

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