

Marc Gorelnik, Chair
Pacific Fishery Management Council
Portland, OR

RE: G3 Electronic Monitoring (EM) Update

June 21, 2021

Dear Chair Gorelnik and Pacific Council Members:

At the March 2021 meeting, you received a report from the GEMPAC as well as public comment from EM Stakeholders re-emphasizing their deep concerns about the future West Coast EM program. As you may recall, the primary concern is lack of cost-effectiveness of this program for both NMFS AND the industry. The Council reviewed updated cost estimates put forth by EM EFP participants, and NMFS WCR staff, which led to the conclusion that at the very least, refined and vetted cost information was needed to allow the Council to compare across monitoring programs. Council discussion approached the limit for how this topic had been noticed (i.e. informational only), thus the Council at that time was unable to take any action to consider changing course. We are at this juncture now, and there is significant new information available for consideration.

Since the March 2021 PFMC meeting, there has been a sea change in EM related policy that now provides the opportunity to overcome the sticking points contained in the Agency's EM regulatory program; road blocks that we believe will result in a failure of achieving the PFMC's primary goals and objectives ([RIR March 2019](#)).

The North Pacific Fishery Management Council (NPFMC), during its June 2021 meeting, unanimously agreed to move forward with a [Range of Alternatives](#) (ROA) for an EM regulatory program for three sectors currently under EM EFPs. Of particular importance is the EM model for the Bering Sea Pollock limited access privilege program (LAPP) fishery, in which it is intended that the Pacific States Marine Fisheries Commission (PSMFC) will conduct primary video review under contract by NMFS, and will be funded via that sector's Cost Recovery fund. NOAA staff went on record¹ at that meeting to confirm that this approach is "both feasible and allowable under the Cost Allocation Policy Directive (CAPD)."² There is a clear parallel between the Pacific Groundfish trawl IFQ fishery, which is also a LAPP fishery, and now a discrepancy in how NMFS is contemplating EM regulatory implementation across regions.

This information on NMFS' updated position on use of cost recovery, and their ability to contract directly with PSMFC for primary video review is *new information, not available to the Council over the course of the previous year's delay*.

¹ Josh Keaton presentation, slide 13, time 5:36:31. <https://www.youtube.com/watch?v=s05Q7Rqil9g>

² <https://media.fisheries.noaa.gov/dam-migration/04-115-02.pdf>

Key challenges of existing model

The EM EFPs on the West Coast have been developed and tested in a model that utilizes PSMFC to conduct primary video review to verify self-reported discard data (i.e. logbooks). NMFS contracted directly with PSMFC for this primary review, which alleviates NMFS of a requirement to systematically audit- or conduct secondary review- of raw footage. This model has proven cost effective, reliable, and secure. It minimizes NMFS costs by mitigating the need to re-review raw data. In doing so also minimizes the generation of federal records- which drives up costs and creates data confidentiality concerns for industry. (Also see comment below regarding the Information Directive for review at this meeting.)

It has been NMFS' position throughout the development of WC EM regulations that implementing this model into regulation is not feasible, because: a) industry must bear costs of primary review (considered 'sampling' costs per the CAPD), and b) cost recovery, according to the Agency, is intended to fund NMFS direct costs. This led NMFS to develop a model that requires industry to directly fund a third party, which would in turn require NMFS to develop a secondary review program to ensure that third parties are meeting standards and requirements. As noted repeatedly over the past 4 years, and most recently elaborated in the March GEMPAC statement, this program design has raised grave concerns amongst EM stakeholders. As recent cost estimates³ demonstrate, the 3rd party audit model is cost intensive for both NMFS and industry, unduly burdensome to industry relative to models in other regions, and unlikely to induce uptake by the industry, which is its sole purpose to relieve monitoring cost of the 100% requirement.

Justification for the PSMFC Model

The allowance of a program model for the North Pacific region whereby NMFS intends to contract PSMFC for primary review, and for the LAPP sector EM review costs funded by cost recovery, is justifiable in our region as well.

This program model is the most cost-effective overall, which is the aim of Objective 1 of the Purpose and Need as expressed in the Regulatory Impact Review (RIR March 2019). The existing proposed third party model and the preferred PSMFC model would seek to utilize similar amounts of cost recovery dollars - the difference is that under the third party model, industry is responsible for funding primary video review out of pocket, *in addition* to the cost recovery fees which will fund NMFS secondary review and related costs. Given that redundancy in cost, it would seem that preserving the existing PSMFC EM program, staff expertise, data infrastructure is the best use of public and private dollars.

Investing in the most cost-effective EM program will increase the national net economic value generated by the fishery, mitigating strain on cost recovery over time (Objective 4 of the RIR March 2019). A cost-effective program, and one with industry confidence, will increase program uptake which should offset financial burden in the observer program while also making fishing more profitable. For some vessels struggling with lower total revenue, this model may be the only approach that allows them to operate in compliance with monitoring requirements (Objective 2). Increasing fishery participation should ultimately increase the

³ See NMFS Supplemental report 8, March 2021: <https://www.pcouncil.org/documents/2021/03/g-5-a-supplemental-nmfs-report-8-em-cost-estimates.pdf/>

capacity of cost recovery to cover NMFS administrative costs.

Utilizing cost recovery to fund a contract between NMFS and PSMFC is consistent with the intended use of cost recovery and NMFS contracting requirements.

As cited in the CAPD, the MSA requires that, when establishing a LAPP, a Council must provide for a program of fees paid by LAPP privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities directly related to and in support of the LAPP (i.e., those costs that would not have been incurred but for the LAPP; 16 U.S.C. § 1853a(e)). The cost allocation directive, while not legally binding, further states ‘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.’ (p 4 CAPD). Therefore, primary review as a sampling cost and a data collection function clearly falls within provisions for cost recovery use. And under MSA, NMFS has authority to contract directly with PSMFC⁴, despite its decision not to do so.

Finally, applying this approach will optimize efficiency and greater consistency across EM programs along the Pacific Coast. By aligning the west coast EM program with the proposed Bering Sea Pollock Trawl EM program model (ROA) approved at the June NPFMC meeting, the Agency can minimize costs and harness ‘common infrastructure capabilities that support multiple catch share programs and spread the costs across multiple fisheries’⁵. This is especially important on our coast since many BS Pollock trawl vessels also participate in the Pacific IFQ program. Having a consistent EM program for this large group of early EM adopters would go a long way to support uptake and growth of EM in the various sectors.

In summary an EM program model alternative in which NMFS funds PSMFC is:

1. The most cost-effective alternative (for both NMFS and industry)
2. An approach most consistent with that envisioned by our closest region (NPMFC)
3. The only current pathway that industry stakeholders can support
4. The program model most likely to succeed and therefore scale.
5. The model we have sought all along, but were told by WCR was not feasible.

Recommendation (Council Action)

We strongly recommend that the Council act now to ensure that the EM program on the West Coast be revised to account for this change, and create a pathway for PSMFC to be contracted by NMFS to conduct primary EM video review.

⁴ 16 U.S.C. 1881a-1881b MSA §§ 402-403 (d) CONTRACTING AUTHORITY.—Notwithstanding any other provision of law, the Secretary may provide a grant, contract, or other financial assistance on a sole-source basis to a State, Council, or Marine Fisheries Commission for the purpose of carrying out information collection or other programs if—

(1) the recipient of such a grant, contract, or other financial assistance is specified by statute to be, or has customarily been, such State, Council, or Marine Fisheries Commission; or

(2) the Secretary has entered into a cooperative agreement with such State, Council, or Marine Fisheries Commission.

⁵ CR Guidance, E7b NMFS Report 1, June 2011; <https://www.pcouncil.org/documents/2011/06/e-groundfish-management-june-2011.pdf/>

If a regulatory change is required, this will likely require an additional delay to the program and extension of the current EM EFPs. The EFPs could be funded through 2022 appropriations, which are now in progress and wherein EM funding is being advocated by a wide coalition of industry, NGOs, and key members of Congress.

The decision you make now is akin to walking through a one-way door: once the program is implemented, if it fails like the industry anticipates it will due to cost burden, it will take monumental efforts to fix it, some vessels may even retire due to overhead costs, and time to regain industry trust and engagement for those who remain to pick up the pieces. An EM program failure in 2022 only sets back further the scaling out of EM to non-LAPP fisheries who have expressed interest and/or need to implement EM (LE fixed, OA wanting non-trawl RCA access, HMS gears).

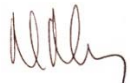
Info Law Policy Directive comments:

We appreciate the Agency's efforts to formalize the variety of legal questions and concerns included in the policy directive. WC EM stakeholders have maintained concerns with confidentiality, mission creep within the Agency, and the ability for the public to gain access to video through FOIA.

The contracting of PSMFC by NMFS to conduct video review would also alleviate these concerns, because under this directive, PSMFC under contract by NMFS is **not subject** to an audit, and any data they possess/store is NOT a federal record.

Thank you for considering these comments and recommendations. We, the EM EFP stakeholders remain committed to supporting the development of a successful, scalable EM program.

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