

Applying Information Law to Electronic Monitoring Data in U.S Fisheries



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U.S. Electronic Monitoring Programs

Electronic monitoring (EM) is being piloted and implemented across the U.S. to expand and improve fisheries-dependent data collection, while reducing costs and increasing the timeliness of information. EM is used to audit logbook data, monitor compliance with discard requirements, and collect information on discards and bycatch. The programs on this map are listed in three categories: Operating under regulations; operating under an exempted fishing permit (EFP) and/or being developed by a Fishery Management Council (FMC); and operating as a pilot project.

For more information, visit fisheries.noaa.gov/national/fisheries-observers/electronic-monitoring.

Alaska

Under Regulation

- Bering Sea and Aleutian Island (BSAI) Non-Pollock Trawl Catcher/Processor (C/P)
- Bering Sea Pollock Trawl C/P and Motherships
- Central Gulf of Alaska Rockfish Trawl C/P
- BSAI Pacific Cod Longline C/P
- Small Boat Fixed Gear (Longline and Pot)
- Halibut Deck Sorting Trawl C/P

Under FMC Development or EFP

- Pollock Trawl Catcher Vessels

Greater Atlantic

Under FMC Development or EFP

- Northeast Multispecies
- Herring Mid-Water Trawl

Pilot Project

- Northern Gulf of Maine Scallop
- Northeast Multispecies For-Hire

West Coast

Under FMC Development or EFP

- Whiting Mid-Water Trawl
- Fixed Gear IFQ
- Non-Whiting Mid-Water Trawl
- Groundfish Bottom Trawl

Pilot Project

- Nearshore Rockfish

Atlantic HMS

Under Regulation

- Pelagic Longline

Pacific Islands

Pilot Project

- Pelagic Longline—Hawaii Deep and Shallow Set

Southeast

Pilot Project

- Snapper-Grouper
- Gulf of Mexico Shrimp

Background on the Procedural Directive

Connected to existing policies

- [National Electronic Technologies Policy Directive \(04-115\)](#)
- [EM Cost Allocation Procedural Directive \(04-115-02\)](#)
- [EM 3rd-Party Data Retention Procedural Directive \(04-115-03\)](#)

Balances – Legal analysis and brevity, national consistency and flexibility

Informed by – Many workshops, Council actions/rulemakings, and the feedback on the previous EM policies

Two primary sections – Information law and guidance on the use of data

Guidance – Will require implementation by individual programs via rulemakings, adjustments to grants and contracts, and other forms of guidance

Applicability of FRA – Section I

What is a Federal record?

- Data made or received by NMFS in conducting official business
- Raw EM data retained for 5 years, starts at the end of the fishing year***
- Summary data, compliance reports, etc. retained indefinitely

What is not a Federal record?

- Data made and retained by a 3rd-party
- If NMFS receives a copy of a record, see above
- Raw EM data would be stored per EM program regulations, informed by the NMFS Procedural Directive on Data Retention for 3rd-Parties

Applicability of MSA-C – Section I

When NMFS is part of a 3rd-party agreement

- Include language in applicable contracts and grants
- Specific exceptions in MSA allow for disclosure (e.g., Court order)

When NMFS is not part of a 3rd-party agreement

- Contracts should include data security and confidentiality requirements
- NMFS would include this requirement in a regulatory framework when approving 3rd-party service providers
- NMFS would not provide or enforce specific language in private contracts
- NMFS would require access to all raw EM data

Applicability of FOIA – Section I

When FOIA applies

- Data that NMFS creates or obtains
- Specific MSA exceptions allow disclosure of raw data (e.g., Court order)
- NMFS would need to obscure submitter and vessel info to allow disclosure
- The process could be costly and time-intensive, and even leave the image(s) almost entirely obscured

When FOIA does not apply

- Records maintained by a 3rd-party
- If NMFS obtains a copy of a record, see above

Party Maintaining Raw EM Data	FRA	MSA 402(b)	FOIA
NOAA Fisheries	Applies	Applies	Applies
NOAA Fisheries Contractor	Does Not Apply ⁴	Applies ¹	Does Not Apply
NOAA Fisheries Federal Financial Assistance Recipient ²	Does Not Apply ⁴	Applies ¹	Does Not Apply
Fishing Industry Contractor/Service Agreements	Does Not Apply	Applies ³	Does Not Apply

¹NOAA Fisheries would include a requirement in any contract or financial assistance award to maintain the confidentiality of raw EM data.

²Entity is a recipient of a grant or is a party to a cooperative agreement.

³Regulations for an industry funded EM program should require third-parties to have a means to maintain confidentiality of raw EM data as part of the EM service provider approval process.

⁴NOAA Fisheries could include a provision in a contract or an award of federal financial assistance that requires raw EM data to be treated records for purposes of the FRA. In such cases, raw EM data would also be subject to FOIA.

Web Portals for Video Review – Section II

Purpose of Secondary Video Review

- Monitor EM service provider performance and data quality
- Ensure that EM systems are functioning properly
- Verify the vessel's adherence to a vessel monitoring plan

Establishing Standards for Secondary Review

- No national standard, but prioritization should consider (1) new providers, (2) quality of individual reviewers, and (3) new vessels

NMFS Must Take Possession of Records it Uses

- E.g., Summarize raw EM data for comparison to 3rd-party submitted data
- EM program would need a mechanism for acquiring records
- Apply FRA to data it receives

3rd-Party Reporting Requirements – Section II

Authority established by FMP and monitoring program

- Generally means species managed under MSA, MMPA, and ESA
- Some industry-funded programs may only require a subset of data
- Should be decided as a program is developed or revisited
- Independent of the monitoring program, other requirements remain
 - E.g., vessel logbooks, MMPA mortality/injury form

Video Review Standards and Sampling Rates

- Driven by the FMP and monitoring objectives
- Driven by 3rd-party and vessel performance
- Not driven by observations of catch events outside of the scope

Access and Use of Information – Section II

Non-Fishing Related Events

- NMFS has limited jurisdiction for enforcing non-fishing events
- May refer potential violations to USCG or others
- May apply an MSA-C exception and disclose information

Non-EM Program Use of Data

- NMFS may provide access to staff, contractors, etc.
- Similar to other forms of raw data (e.g., observer, economic)
- EM programs should examine the nature of a data request
- Determine if raw EM data is necessary vs. summarized information
- Access may include an agreement of non-disclosure
- Access may be given to other Federal agencies, but must be in support of fisheries conservation and management, or under an MSA-C exception

Implementation Guidelines of the Directive

- NMFS and Councils should develop appropriate regulations and guidance for EM programs
- Process should include an opportunity for notice and comment
- Develop regulations as soon as practicable
- EM programs should examine current practices, data collected under pilot projects and EFPs, etc.

Next Steps, Process, and Timelines

- Transmit the draft directive to the Councils shortly after CCC
- Deadline to provide feedback: July 15, 2021
- NMFS will develop and publish final directive in Fall 2021

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Thank you!

