Electronic Monitoring Workshop
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"Legal and Enforcement Considerations"

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1. In a civil administrative enforcement proceeding, NOAA must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. This standard requires NOAA to demonstrate that the facts it seeks to establish are more likely than not to be true.

2. NOAA's administrative enforcement proceedings are governed by the procedures in 15 Code of Federal Regulations Part 904. Under 15 C.F.R. § 904.251(a)(2), "All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such."

3. The Federal Rules of Evidence apply only in federal district court, and do not apply to NOAA administrative hearings, however the administrative law judge (ALJ) hearing a NOAA administrative enforcement case may choose to consider the Federal Rules, and related federal case decisions, for general guidance on evidentiary issues, including Federal Rule of Evidence 702, which governs the admissibility of scientific or technical expert witness testimony in federal district courts.

4. In bringing an enforcement action based on electronic monitoring (EM) technology, NOAA may choose to rely on expert testimony and related evidence to establish the reliability of the EM technology, and the accuracy of the data it produces. In an enforcement hearing, in determining whether to admit or exclude scientific or technical evidence relating to EM technology, the ALJ may choose to apply certain factors developed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to determine whether scientific testimony is sufficiently reliable: (1) whether the scientific theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the scientific community.