

Electronic Monitoring Records-Related Q&A
Prepared by NMFS West Coast Region
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The Pacific Fishery Management Council and electronic monitoring (EM) program participants have previously requested clarification from NMFS on certain aspects of policy related to EM data, including the applicability of confidentiality provisions of the Magnuson-Stevens Act (MSA), the Freedom of Information Act (FOIA), and the Federal Records Act (FRA) to EM data. These questions have been raised both in the context of the current EFP Program and the regulatory program scheduled to begin in January 2022. NMFS has provided responses to the Council's outstanding questions below. NMFS provided largely this same guidance in our [April 2016 NMFS Report](#) and [September 2019 draft EM Program Guidelines](#). NMFS is developing additional guidance on applying information laws to raw EM data in a procedural directive, and intends to present it initially to the Council Coordination Committee at its May 2021 meeting, with an opportunity to comment to follow.

Background

West Coast EM EFP Program

Under the EM EFP Program, NMFS funds the Pacific States Marine Fisheries Commission (PSMFC) through a grant to review video collected on EFP vessels. All raw EM data (video and sensor data) from the EM EFP Program since 2015 is stored by PSMFC. NMFS' West Coast Region (WCR) generally does not possess raw video from WC EFP trips, except for a small-subset of trips it possesses for compliance and enforcement purposes.

EM Regulatory Program

Under the EM regulations, industry-funded, third-party EM service providers would be responsible for reviewing and storing video and other EM data from EM trips. Vessel operators would submit their raw EM data to their service provider, who would review the video and report discard data to NMFS (aka "primary review"). EM service providers would be responsible for storing raw EM data on behalf of their contracted vessels for a minimum of 12 months from the end of the monitoring period for a given fishing year (approximately 15-27 months).¹ NMFS would conduct a secondary review of the EM data from a subset of trips previously reviewed by EM service providers to ensure data quality and monitor performance of the EM service providers. Secondary review would be minimal where appropriate and prioritize: 1) compliance issues, 2) new providers, 3) new individual reviewers, and 4) new vessels.

Questions & Answers

1. Is EM data confidential under the MSA?

Yes, EM data is considered confidential under the provisions of the MSA from the point of collection for the lifetime of the record. This applies to EM EFP data held by PSMFC and EM

¹ The WCR is currently working on rulemaking to revise the retention period for raw EM video and sensor data to be consistent with the new national procedural directive.

data held by third-party providers under the regulatory program, as well as any EM data made or received by NMFS.

- 2. Is WC EM EFP data held by PSMFC or EM data held by a third-party reviewer an agency record? Can it be released in response to a FOIA request?*

West Coast EM EFP data held by PSMFC or EM data held by a third-party reviewer are not agency records and are not subject to FOIA.

- 3. Can EM data held by NMFS be released in response to a FOIA request?*

As information subject to MSA subsection 402(b), NMFS may only release electronic monitoring information under exceptions in paragraphs 402(b)(1) and (b)(2) of that subsection or in an aggregated or summary form that does not disclose the identity or business of the submitter. We specifically note that there is an exception under which NMFS may release MSA confidential information to its state enforcement partners who in turn may release that information as part of a state enforcement action. MSA confidential information may also be released under an order from a federal court. Other than the exceptions listed in the MSA and a federal court order, NMFS would be required to aggregate any data before releasing it to other requesters, same as with observer data. Since video imagery cannot be aggregated or summarized to obscure the submitter's identity and business, EM video submitted to NMFS would generally not be able to be released, except under the exceptions listed in paragraphs 402(b)(1) and (b)(2).

- 4. Can an EM service provider give NMFS staff access to the video data for the secondary review through a secure web portal hosted by the service provider, rather than submitting raw EM data to NMFS?*

NMFS staff could use a service provider-hosted web portal for accessing and viewing video. However, to the extent NMFS uses that raw EM data for secondary review or other agency business, NMFS should acquire and preserve the record. Therefore, a service provider could create a web portal for the secondary review, but NMFS staff would still need a mechanism to obtain copies of that video when necessary.

- 5. How is NMFS handling raw EM data it retains as a Federal record?*

NMFS is currently working with the National Archives and Records Administration to develop a record retention schedule specifically for raw EM data retained by NMFS that would require it to be retained for 5 years. NMFS anticipates the new record retention schedule to be finalized in the next month.

- 6. Can NMFS require that a third-party EM service provider collect and report information on protected species interactions from the primary review?*

The information collected by the third-party EM service provider is governed by the purpose of the EM program. For the West Coast EM Program, NMFS has reviewed the record of the

development of the 100 percent observer coverage requirement and the EM program for the trawl fishery, and the Pacific Coast Groundfish Fishery Management Plan, and determined that collecting information on protected species interactions is a purpose of both monitoring programs. Therefore, the WCR intends to require third-party EM service providers to report this information as part of the primary review in the West Coast EM Program. However, protected species data collection goals would not drive primary review sampling rates and would be incidental to IFQ species data collection.

- 7. Can NMFS require that a third-party EM service provider collect and report information on non-fishing related events from the primary review (e.g., drug use, conflicts among crew)?*

NMFS does not have jurisdiction to enforce non-fishing related laws and regulations but can refer information about non-fishing violations to the U.S. Coast Guard and other appropriate agencies. NMFS' West Coast Groundfish Observer Program (WCGOP) does not specifically require that catch share observers regularly collect information on non-fishing related events, except for instances of harassment, assault, or other safety issues. WCGOP instead provides guidance to observers "if you see something, say something." NMFS intends to take this same approach with video reviewers in the EM program.

- 8. Can NMFS EM Program staff collect information on protected species interactions or non-fishing related events during the secondary review?*

As stated in answers 5 and 6 above, NMFS has determined that collecting information on protected species interactions and some non-fishing related events would be required of third-party EM service providers in the WC EM Program (see 50 CFR 660.603(1)(5) for a list of non-fishing incidents that EM service providers must report). NMFS staff would collect the same information during the secondary review in order to evaluate whether providers are reporting this information properly. In addition, once NMFS receives any raw EM data it becomes an agency record, and NMFS has discretion to consider additional uses of such raw EM data.

- 9. Can non-EM Program NMFS staff use raw EM data for non-EM Program related uses?*

Yes, once the raw video is in NMFS' possession, it becomes an agency record, which then allows NMFS to consider additional uses of such raw EM data. NMFS intends to use the same policies regarding access to the raw and summary EM data as we use for other sensitive fishery data, like observer data, ownership interest data, and economic data.