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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 600**

**[Docket No. 240304-0067]**

**RIN 0648-BM26**

#### **Confidentiality of Information**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule, request for comments.

**SUMMARY:** The National Marine Fisheries Service (NMFS) proposes revisions to existing regulations governing the confidentiality of information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; MSA). The purposes of these revisions are to make both substantive and non-substantive changes in light of amendments to the MSA under the 1996 Sustainable Fisheries Act (SFA) and the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) and amendments to the High Seas Driftnet Fishing Moratorium Protection Act (FMPA) under the 2015 Illegal, Unreported and Unregulated Fishing Enforcement Act (IUU Fishing Act). NMFS proposes additional revisions necessary to address some issues that concern its application of the MSA confidentiality of information requirements to information

requests.

**DATES:** Comments on this proposed rule must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments on this proposed rule, identified by NOAA–HQ–2023–0146, by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–HQ–2023–0146, in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

*Instructions:* Comments must be submitted by the above method to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and NMFS will post them for public viewing on <https://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

*Electronic Access:* Information relevant to this proposed rule, which includes a regulatory impact review and a Regulatory Flexibility Act certification, is accessible via the internet at: <https://www.regulations.gov/docket/NOAA-HQ-2023-0146>.

**FOR FURTHER INFORMATION CONTACT:** Karl Moline at (301) 427-8225 and via Email: *NMFS.MSA\_C@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The MSA authorizes the Secretary of Commerce (Secretary) to regulate domestic fisheries, seaward of States to the seaward limit of the U.S. Exclusive Economic Zone (EEZ). *See* 16 U.S.C. 1811, 1802(11) (further explaining United States sovereign rights to fish and fishery management authority and defining EEZ). NMFS implements and administers the MSA through authority delegated from the Secretary. Conservation and management of fish stocks is accomplished through Fishery Management Plans and plan amendments (collectively, FMPs) and implementing regulations. To assist in the fishery management process, eight regional fishery management councils (Councils) prepare FMPs for fisheries within specified geographic areas and submit them to NMFS. *Id.* 1853. NMFS directly prepares and amends the FMP for highly migratory species in the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea. *Id.* 1852(a)(3), 1854(g). For any FMPs that it approves, NMFS promulgates regulations to effectuate them.

Information collection is an essential part of the fishery management process. Conservation and management measures in FMPs and in their implementing regulations must be based on the best scientific information available (see National Standard 2, 16 U.S.C. 1851(a)(2)). Under section 303(a)(5) of the MSA, any FMP must specify the pertinent information to be submitted to the Secretary with respect to commercial, recreational, or charter fishing, and fish processing in the fishery. *Id.* 1853(a)(5). In addition, section 303(b)(8) provides that an FMP may require that one or more observers

be carried onboard a vessel for the purpose of collecting data necessary for the conservation and management of the fishery. Id. 1853(b)(8).

The MSA sets forth confidentiality of information requirements at section 402(b), 16 U.S.C. 1881a(b). Under the MSA as amended, the Secretary must maintain the confidentiality of any information that a person is required to submit in compliance with any regulation or requirement under the Act and any observer information. The MSA defines person “as any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.” Id. at 1802(36). “Observer information” is defined as “any information collected, observed, retrieved, or created by an observer or electronic monitoring system pursuant to an authorization by the Secretary, or collected as part of a cooperative research initiative, including fish harvest or processing observations, fish sampling or weighing data, vessel logbook data, vessel or processor-specific information (including any safety location, or operating condition observation), and video, audio, photographic, or written documents.” Id. at 1802(3)(32).

The MSA includes exceptions to these confidentiality requirements. Some exceptions allow for access to confidential information by specified entities provided that these parties treat the information as confidential, while other exceptions allow for the release of information without restrictions. In addition, the MSA authorizes the Secretary to disclose information that is subject to the Act's confidentiality requirements in "any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information." Id. at 1881a(b)(3). As discussed

below, after finalization of this rule, NOAA intends to rescind NOAA Administrative Order (NAO) 216-100 that outlines the current internal control procedures for confidential information. NMFS will replace the NAO with new internal control procedures that apply to the collection and maintenance of, and access to and release of, any confidential information. NMFS will make these procedures available to the public.

NMFS also notes that the Illegal, Unreported and Unregulated Fishing Enforcement Act of 2015 (IUU Fishing Act), Pub. L. 114–81 101(b) (Nov. 5, 2015), amended the High Seas Driftnet Fishing Moratorium Protection Act (FMPA) to include provisions at 16 U.S.C. 1826i and 1826g related to MSA confidential information. NMFS implements and administers the FMPA through authority delegated from the Secretary. Under section 1826i(b)(1), the Secretary is authorized to disclose information collected under joint authority of the MSA and another statute that implements an international fishery agreement (IFA), such as the Atlantic Tunas Convention Act of 1975, *id.* at 971 *et seq.*, to specified governmental bodies if certain conditions are satisfied. Section 1826i(b)(2) provides that the confidentiality requirements of the MSA are not applicable to information sharing obligations of the United States under a Regional Fishery Management Organization to which the United States is a member and to information collected from foreign fishing vessels. Section 1826g, the enforcement section of the FMPA, includes the same text as in section 1826i(b)(2). In addition, section 1826g allows for disclosure of information to the same governmental bodies in section 1826i(b)(1) and a foreign government, if necessary for specified compliance and enforcement purposes.

Section 402(b)(3) of the MSA provides that the "Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of

information submitted in compliance with any requirement or regulation under this Act.” Id. 1881a(b)(3). Accordingly, NMFS has promulgated confidentiality regulations, which are set forth at 50 CFR part 600, subpart E. Certain terms used in these regulations are defined under 50 CFR part 600, subpart A. NMFS last revised the regulations under subpart E in February 1998 (63 FR 7075, February 12, 1998). The revisions were non-substantive.

On May 23, 2012, NMFS published a proposed rule (77 FR 30486) with substantive and clarifying revisions to the confidentiality of information regulations at subpart E and provided for public comment on that proposed rule through August 21, 2012 (77 FR 35349, June 13, 2012). Following public comment, on January 13, 2017, NMFS issued a document withdrawing the proposed rule (82 FR 4278). In that document, NMFS stated that it would like to reevaluate those proposed revisions to the regulations.

NMFS has reevaluated the need for revised confidentiality regulations and determined that updates to the regulations at 50 CFR part 600 subparts A, B, and E are warranted. Updates and clarifications would be helpful in light of amendments made under the 1996 SFA, 2006 MSRA, 2015 IUU Fishing Act and other changes in law. Additionally, NMFS proposes changes to improve the effectiveness of, and address inefficiencies in, its current procedures for maintaining the confidentiality of information and the collection, transmission, management and dissemination of fisheries data. Given that the regulations were last revised in 1998, they do not address recent methods of collecting observer information through electronic monitoring systems (*e.g.*, imagery and video). NMFS intends to update and modernize its regulatory framework for protection

of confidential information to reflect advances in the methods available to evaluate, summarize, display, and release data.

As identified in table 1, this proposed rule, if adopted, would reorganize and relabel headers in 50 CFR part 600 subpart E as follows:

**Table 1 – Current Structure of 50 CFR Part 600 Subpart E and Proposed Redesignations**

<b>Current headings and order of sections</b>	<b>Proposed new headings and order</b>
Subpart E Confidentiality of statistics	Confidentiality of information
§ 600.405 Types of statistics covered	Applicability
§ 600.410 Collection and maintenance of statistics	Protection of confidential information
§ 600.415 Access to statistics	Access to confidential information
§ 600.420 Control system	Release of confidential information
§ 600.425 Release of statistics	Release of information in aggregate or summary form

**II. Proposed Changes Addressing the Expanded Scope of the MSA Confidentiality Requirements**

When the Fishery Conservation and Management Act (MSA precursor) was enacted, its confidentiality requirements applied to "[a]ny statistics submitted to the Secretary". Pub. L. 94-265, Title III, 303(d) (1976). Congress broadened the confidentiality requirements through the SFA, Pub. L. 104-297 (1996) by substituting the word "information" for "statistics." Accordingly, NMFS' proposed rule, if adopted, would update the confidentiality regulations under 50 CFR part 600 to reflect the change from "statistics" to "information".

This proposed rule would also update regulations consistent with the 2006 MSRA, Pub. L. 109-479 (2007). Prior to the 2006 MSRA, the confidentiality requirements applied only to information submitted to the Secretary in compliance with any requirement or regulation under the Magnuson-Stevens Act. The 2006 MSRA amended the confidentiality requirements at section 402(b) of the Magnuson-Stevens Act, 16 U.S.C. 1881a(b), to include information submitted to a state fishery management agency or a Marine Fisheries Commission in compliance with a requirement or regulation under the Act. Pub. L. 109-479, Title II 203. The 2006 MSRA also amended the confidentiality requirements to apply to any observer information, which is now defined under section 3(32) of the Magnuson-Stevens Act, 16 U.S.C. 1802(3)(32).

In light of these amendments to the scope of the MSA confidentiality requirements, NMFS proposes making the following changes to its regulations. NMFS believes that these proposed changes, if adopted, would improve the effectiveness of its administration of the MSA confidentiality requirements.

1. Replace the term "statistics" with "information" in §600.130 and all regulations under 50 CFR subpart E;

2. Delete the definition of "confidential statistics" and add a definition for "confidential information" (§ 600.10). Under this proposed rule, confidential information would be defined to include any observer information as defined under 16 U.S.C. 1802(32) or any information submitted to the Secretary, a state fishery management agency, or a Marine Fisheries Commission by any person in compliance with any requirement or regulation under the Magnuson-Stevens Act. As explained further below in section IV, NMFS proposes that confidential information be explicitly defined to not include the following observer information related to interactions with species protected under the Marine Mammal Protection Act: the date, time, and location of interactions, the type of species, and the fishing practices and gear involved provided that information regarding fishing practices and gear would not constitute a trade secret under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). As explained further below in section III, to implement the FMPA as amended, confidential information would be defined to not include fishing effort, catch information and other forms of vessel-specific information that the United States must provide to a Regional Fishery Management Organization (RFMO) to which the United States is a member in order to satisfy any information sharing obligations of the respective RFMO. Confidential information would also not include any information collected by NMFS under the MSA regarding foreign vessels.

3. Add to the general prohibitions under § 600.725 that it is unlawful for any person to use or disclose confidential information without authorization. NMFS would enforce that prohibition through a civil enforcement action as authorized under MSA 308(a), 16 U.S.C. 1858(a).

4. Rename and replace procedures at § 600.410, “collection and maintenance of statistics” with new internal procedures for protection of confidential information. These new procedures, which are described below, would specify confidentiality of information requirements for information collected by NMFS, a State fisheries management agency, a Marine Fisheries Commission (Commission), and companies that provide services to collect and/or process observer information. (§ 600.410(b)).

*Confidential Information Collected by NMFS (§ 600.410(b))*

This new subsection would require NMFS to develop new internal procedures that apply to the maintenance of, and access to and release of, any confidential information. NMFS’ current internal control procedures for confidential information are codified at § 600.415(a) and § 600.420 and in NOAA Administrative Order (NAO) 216-100. These regulatory procedures are outdated, inefficient, and redundant. Further, it is not necessary to document non-regulatory internal control procedures in the Code of Federal Regulations. Accordingly, NMFS proposes to remove § 600.415(a), which provides procedures for determining whether to grant a request to access confidential data, and § 600.420, which provides procedures to maintain the confidentiality of identifying information in such data. In addition, NMFS proposes to rescind NAO 216-100 which further details NMFS’ policies and procedures for access to and maintenance of confidential data. NMFS proposes to replace the regulatory procedures under § 600.415(a) and § 600.420, and the policies and procedures in NAO 216-100, with updated control procedures. Specifically, under this proposed rule, NMFS would be required to establish internal control procedures for maintenance of and access to any confidential information that satisfy the requirements that are proposed under §

600.410(b). NMFS will make these procedures available to the public and distribute them to NMFS Regional Offices and Science Centers, as well as to Fishery Management Councils, states, commissions, and any other partner organizations that may manage confidential information. There may be a need for NMFS, Regional Offices or Science Center to develop internal control procedures that are only applicable to a specific region, data collection program, and/or fishery. Again, NMFS will make these procedures available to the public.

*Confidential Information Collected by State Fishery Management Agencies or Marine Fisheries Commissions (§ 600.410(c))*

This new subsection would revise and expand a procedure that allows collection of confidential information by a state or Commission. Under the proposed procedure, NMFS may enter into an agreement with a state for the collection of confidential information by the state on behalf of the Secretary if NMFS determines that the state has authority comparable to the MSA for the protection of information and that the state will exercise such authority to protect confidential information. In addition, NMFS could enter into such an agreement with a Marine Fisheries Commission if NMFS determines that the Commission has policies and procedures comparable to the MSA for the protection of information and that the Commission will apply them to protect confidential information.

*Protection of Confidential Information Collected and/or Processed by Observer Information Services*

*Observer Providers (§ 600.410(d))*

At present, all at-sea and shoreside observer deployments are staffed by

contracting companies referred to as observer providers. Given the role that observer providers have in the collection of observer information - which must be maintained as confidential - NMFS proposes to add a definition of observer provider and establish procedures for the protection of confidential information collected by them. Under this proposed rule, “observer provider” would be defined as “any person that collects observer information by placement of observers on or in fishing vessels, shoreside processors, or stationary floating processors under a requirement of the MSA or as part of a cooperative research initiative.” MSA Section 402(b)(2)(C) prohibits the disclosure of observer information except as authorized by any regulations issued by the Secretary which would allow certain limited dissemination of information between observers, observer employers, and the Secretary pursuant to a confidentiality agreement that prohibits other types of dissemination. Under this authority, NMFS proposes to allow the collection of observer information by an observer provider pursuant to a confidentiality agreement that: (i) specifies procedures that the observer provider will apply to protect confidential information from public disclosure; and (ii) requires that the observer provider, and each observer and each of its other employees who will handle confidential information, acknowledge the requirement to maintain the confidentiality of observer information and the civil penalties for unauthorized use or disclosure of such information under 16 U.S.C. 1858. In addition, as explained further below, a confidentiality agreement with an observer provider may allow for the sharing of observer information between and among observer providers, and observers, for observer training or preparation of observers for deployments to specific vessels, or to validate the accuracy of the observer information collected.

## Electronic Monitoring Service Providers (§ 600.410(d))

Increasingly, fisheries-dependent data are being collected through electronic monitoring systems (EM systems), such as cameras and other hardware systems that monitor vessel operations and fishery catch. Information collected through EM systems - referred to as EM information - is a form of observer information under the MSA, and, therefore, subject to the Act's confidentiality requirements. NMFS may procure services from an EM service provider, or award financial assistance to such companies, for the collection and/or analysis of EM information. Accordingly, to maintain the confidentiality of EM information, NMFS proposes to define "electronic monitoring service provider" and establish procedures for the protection of confidential information managed by such entities. The proposed rule would define "electronic monitoring service provider" as any person who manages observer information collected by an EM system required under an MSA regulation. Under the proposed rule, NMFS may allow for the management of confidential information by an EM service provider pursuant to a confidentiality agreement that: (i) Specifies procedures that the provider will apply to protect confidential information from public disclosure; and (ii) requires that the electronic monitoring service provider, and each of its employees who will handle confidential information, acknowledge the requirement to maintain the confidentiality of observer information and the civil penalties for unauthorized use or disclosure of such information under 16 U.S.C. 1858. A confidentiality agreement between NMFS and an EM service provider may be reflected in the terms and conditions of any NMFS issued contract or financial assistance award.

This procedure would apply only to an EM service provider that is providing

services to NMFS under a contract, or performing functions that require the handling of confidential information under a NMFS financial assistance award. In this context, NMFS, as a party to, or the issuer of, the funding instrument can effectuate protection of confidential information. That is not the case for all industry funded EM programs. In some cases, a vessel owner may procure EM services directly with an EM service provider and can effectuate confidentiality protection through their contact with the provider. As noted above, the confidentiality exception at MSA section 402(b)(2)(C) provides for limited dissemination of confidential information between observers, observer employers, and NMFS pursuant to a confidentiality agreement that prohibits other types of dissemination. Because MSA section 402(b)(2)(C) is specific to observer providers, NMFS would apply a different approach to handling confidential information by EM service providers. NMFS believes that this approach is appropriate in programs when a vessel contracts directly with an EM service provider. In these specific EM programs, industry funded EM service providers are responsible for storage and maintenance of the vessel owner's information.

#### *Scope of Subpart E Regulations*

In making the above-described changes, the proposed rule would revise § 600.405 to specify that regulations under subpart E apply to confidential information that is under NMFS' custody and control. The MSA provides that "[a]ny information submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this Act shall be confidential and shall not be disclosed" except in certain enumerated circumstances. 16 U.S.C. 1881a(b)(1). The MSA further provides that "[t]he Secretary shall, by regulation, prescribe such

procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act...”. Id. at 1881a(b)(3). As such, these regulations are to prescribe procedures to preserve the confidentiality of information: a) “submitted” to the Secretary, a State fishery management agency, or a marine fishery commission; b) in compliance with a statutory or regulatory requirement; and, c) the requirement must come from the MSA and not some other source of authority. Accordingly, these regulations do not apply to certain fishery information that collected and submitted voluntarily or pursuant to other authority. These regulations also do not apply in circumstances when information is collected pursuant to a MSA program but not actually submitted to the Secretary, State agency or marine fishery commission.

For information that a person submits to NMFS, a State Fisheries Management Agency, or a State Marine Fisheries Commission, NMFS will apply the MSA confidentiality requirements only if the submission has a nexus to a collection of information mandated under a statutory or regulatory provision of the MSA. In some instances, NMFS may obtain MSA-required information not through direct reporting requirements, but through collection agreements with states or Commissions. In such cases, NMFS will apply MSA confidentiality to that information because it is submitted in compliance with a requirement of the MSA. However, where there is no underlying MSA requirement and a person voluntarily submits information, NMFS will not apply MSA confidentiality. This would be the case for recreational fishing information collected through state and NMFS- conducted surveys. Because those surveys are voluntary, MSA confidentiality does not apply to information provided in response to

them.

Second, these regulations, and any internal control procedures for the protection of confidential information developed pursuant to them, would apply only to information that is within NMFS' custody and control. NMFS will treat information as subject to its custody and control, when it physically obtains the information, which, for electronically submitted information, is when the information enters a NMFS Federal Information Security Management Act domain. Accordingly, MSA confidential information that resides with a State Fisheries Management Agency, or a State Marine Fisheries Commission will not be subject to the procedures to protect the confidentiality of information under these proposed regulations. Rather, recognizing that this information is collected and held by a state government or an interstate compact of state governments, NMFS will continue to work with these entities in a non-regulatory fashion to reach mutual agreement as to how to maintain the confidentiality of information submitted to them pursuant to an MSA requirement. These regulations do not independently apply to third parties (such as observer providers or electronic monitoring service providers) that collect information for NMFS pursuant to a grant, contract, or cooperative agreement. However, NMFS will apply the regulatory provisions as appropriate through individual terms in the relevant grant, contract, or cooperative agreement.

Nothing in these proposed regulations would apply to confidential information that is collected and maintained by an EM service provider that contracts directly with the fishing industry. In the procedural directive "Information Law Application for Data and Supporting Guidance in Electronic Monitoring Programs for Federally Managed U.S. Fisheries" (May 10, 2022) (Info Law/EM Programs PD), NMFS stated that because EM

information is a form of observer information under the MSA, the confidentiality requirements of the MSA apply to that information. However, because confidential information that is collected and maintained by third parties is not under NMFS' custody and control, it is not subject to these proposed regulations, nor any subsequent internal policies or procedures for the protection of confidential information that NMFS issues to implement these proposed regulations.

These regulations, if adopted, would apply only to information that is required to be submitted, such as vessel catch information, including information collected by an EM service provider that contracts directly with the fishing industry. Any confidential information retained by a third-party EM service provider whether or not submitted to NMFS should be subject to the contractor's procedures for protection of vessel owner information that is subject to the MSA's broader statutory prohibition on the release of observer information. See Info Law/EM Programs PD at II.1B.

### **III. Proposed Changes Concerning Exceptions to the Confidentiality Requirement**

The MSA's confidentiality requirements are also subject to a number of exceptions that apply if certain conditions are satisfied. Some exceptions simply allow NMFS (or others) to disclose information. Other exceptions allow entities to be provided with access to confidential information if certain conditions are satisfied and only if access is subject to a confidentiality agreement. In addition, a provision of the MSA authorizes the Secretary to aggregate or summarize information that is subject to the Act's confidentiality requirements into a non-confidential form "which does not directly or indirectly disclose the identity or business of any person who submits such information." 16 U.S.C. 1881a(b)(3). Non-confidential aggregate or summary form information may be

released to the public.

NMFS proposes regulatory changes to address issues that concern application of exceptions to the confidentiality requirements and the aggregation and summarization provision in the MSA. NMFS presents these changes in the following order: First, substantive changes addressing instances where otherwise confidential information may be disclosed without restrictions or treated as non-confidential; second, substantive changes addressing disclosure of aggregated or summarized confidential information; and finally, non-substantive changes regarding the sharing of confidential information with other entities provided that it remains confidential.

*A. Proposed Changes Concerning Exceptions to Confidentiality Requirements, Where Information Can Be Disclosed Without Restrictions or Treated as Non-Confidential*

The following proposed changes address the MSA confidentiality exceptions for a limited access program, law enforcement, and written authorization for release of information. In addition, the rulemaking proposes to define confidential information as not including information collected from foreign fishing vessels or provided to an RFMO pursuant to section 608 of the FMPA (*see* proposed § 600.10 definitions of *Confidential Information* and *Information sharing obligation of a Regional Fishery Management Organization (RFMO)*). As explained in section II, that proposed definition also provides that observer information on marine mammal interactions is not confidential information.

1. Limited access program (LAP) exception: While MSA section 402(b) generally provides for confidentiality of information, section 402(b)(1)(G) provides an exception for information that is "required to be submitted to the Secretary for any determination under a limited access program." *Id.* 1881a(b)(1)(G). To facilitate the implementation of

this statutory provision, NMFS proposes definitions for the terms “limited access program” and “determination.” NMFS notes that information subject to the limited access program exception will be considered non-confidential and, as such, could be made available publicly.

#### Proposed Definition for “Limited Access Program” (LAP)

The MSA defines, and has provisions for, a “limited access system” (LAS) and “limited access privilege program” (LAPP), *see* 16 U.S.C. 1802(26), (27), 1853(b)(6), and 1853a, but does not define a LAP. To develop a proposed definition for that term, NMFS considered what limited access management approaches may necessitate a specific confidentiality exception for disclosure of information that is required to be submitted for fishery decision-making. NMFS believes the need is most evident for fisheries in which exclusive fishing privileges, such as a portion of a fishery’s total allowable catch (TAC), are allocated to persons based on their historical catch, or other applicable historical fishery participation. In these fisheries, generally referred to as “catch share programs,” the availability of information that NMFS used or intends to use to allocate exclusive fishing privileges promotes transparency and is integral to pursuit and administration of appeals of such determinations. To this end, NMFS is proposing that LAP be defined to include specific types of programs defined under the MSA, such as section 303A LAPPs and Individual Fishing Quotas as defined at MSA (3)(23). *Id.* 1853a, 1802(23), (26). It would also include other management programs that allocate exclusive fishing privileges not specifically mentioned in the Act, such as programs that allocate TAC, or a portion of the TAC, to a sector or a cooperative or that grant an exclusive privilege to fish in a geographically designated fishing ground. The Act does

not preclude the development of other management programs that are similar to LAPPs but fall outside the section 303A requirements and provisions. Thus, proposed § 600.420(c)(1) includes all of the above in defining “limited access program” to mean a program that allocates exclusive fishing privileges, such as a portion of the total allowable catch (TAC), an amount of fishing effort, or a specific fishing area to a “person” (as defined by the MSA). This definition is consistent with the NOAA Catch Share Policy, Policy 01-121 (2017), available at <https://media.fisheries.noaa.gov/dam-migration/01-121.pdf>.

#### Proposed Definition for "Determination"

Having defined “limited access program” consistent with the Agency’s policy definition of catch share program, NMFS considered what actions taken thereunder should be subject to a specific confidentiality exception. Here again, what sets catch share programs apart from other fishery management strategies is the exclusive allocation of fishing privileges; thus, NMFS believes that the exception should apply to information that underlies allocations and other subsequent decisions by NMFS that apply to a person’s privileges. Accordingly, proposed § 600.420(c)(2) would define "determination" to mean a decision that is specific to a person and exclusive fishing privileges held or sought under a limited access program. These decisions are: allocations, approval or denial of a lease or sale of allocated privileges or annual allocation, and end-of-season adjustments. *Id.* "Person" is defined under MSA section 3(36), 16 U.S.C. 1802(3)(36), and a determination that concerns a fishery as a whole, such as an annual catch limit, would not be considered a "determination under a limited access program."

Under this approach, participants in catch share fisheries can evaluate and verify

the accuracy of information that underlies allocations and make more informed decisions on whether to pursue an appeal of any privileges allocated to them. NMFS believes this approach will also facilitate transparency and accountability in NMFS' administration of catch share programs.

#### Additional Issues Regarding the Scope of Information Releasable under the Limited Access Program Exception to the Confidentiality Requirements

Consistent with MSA section 402(b)(1)(G), the proposed rule, if adopted, would allow for release of information required to be submitted for a LAP determination, even if NMFS has not yet made a determination. For example, participants in a LAP may be required to submit information to NMFS for the Agency to determine whether the participants have fished within their allocated privileges. Under the proposed rule, that information could be released even if NMFS has not yet made its determination.

Historical landings or catch information could also be releasable to a potential LAP participant and, as such, the proposed regulation specifies that the releasable information includes "information that was submitted before the fishery was a LAP and that NMFS subsequently uses or intends to use for a LAP determination." For example, a Council could transmit an FMP amendment to NMFS for review that includes a new LAP. If NMFS has not yet determined whether to implement the recommended FMP amendment through the issuance of a final rule in the *Federal Register*, NMFS may decide that releasing such information would be helpful in order to provide sufficient time for vessel owners to verify or correct information that will be used for initial allocations. Conversely, the exception would not be applicable for a Council's consideration of whether to establish a LAP. In that case, there would be insufficient facts

that demonstrate NMFS' intent to use historical landings for a determination under a LAP.

When the LAP exception is applicable, NMFS proposes that information be treated as non-confidential at the level used, or that NMFS intends to use, for a limited access program determination. For example, if NMFS uses vessel landings for a given 3-year period for allocations, the aggregated catch across the 3-year period would be subject to disclosure. Conversely, a vessel's yearly, monthly, or trip-by-trip landings would not be subject to the exception because information at that scale was not used for allocation determinations. NMFS further proposes to apply the same approach for any vessel-trip-specific observer information collected for scientific and management purposes that NMFS uses or intends to use for a LAP determination.

NMFS has considered that medical and other personal information may be used for certain determinations under limited access programs and, therefore, could be within the scope of the confidentiality exception contemplated by subparagraph 402(b)(1)(G). For example, such personal information may be required for a determination on whether a person is unable to fish and, therefore, can transfer their privileges to another person. While such information may not be confidential under the explicit MSA statutory prohibition, it may be treated as confidential or non-releasable pursuant to other statutes such as FOIA. In such cases, NMFS would consider whether Exemption Six of the FOIA applies to the information. 5 U.S.C. 552(b)(6). Exemption Six authorizes the withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." *Id.* There may be other instances where NMFS applies applicable

FOIA or other statutory limitations to information that otherwise may be disclosable under subparagraph 402(b)(1)(G). For example, NMFS may use information on company ownership as part of determining eligibility for allocations or whether a person can transfer their privileges consistent with applicable quota share caps. In such cases, NMFS would consider applying FOIA Exemption Four, which protects confidential business information, as appropriate.

In addition, NMFS notes that non-LAP fisheries may, through appropriate Secretarial action, transition to LAPs. In these situations, information submitted under a non-limited access program fishery may later be relevant for determinations regarding privileges under a newly established LAPs. For the same reasons discussed above, and to promote efficiency and reduce reporting requirements on the regulated industry, NMFS proposes that information previously submitted under non-limited access program fisheries that it uses or intends to use for determinations under newly established LAPs be treated as within the scope of the confidentiality exception under subparagraph 402(b)(1)(G).

2. Law enforcement exception: This proposed rule, if adopted, would add text to address sections 402(b)(1)(A) and (C) of the Magnuson-Stevens Act, id. 1881a(b)(1)(A), (C), which provides that confidential information may be released to Federal and state enforcement personnel responsible for fishery management plan (FMP) enforcement. (§ 600.420(e)). FMPs must be consistent with other applicable laws, including but not limited to the Endangered Species Act and the Marine Mammal Protection Act. Thus, the proposed rule allows for disclosure of confidential information to State and Federal employees for the enforcement of marine resources laws. Administrative and judicial

enforcement systems have procedures to address confidential information. In some instances, however, that material may remain confidential or it may become part of the public record.

3. Written authorization exception: Section 402(b)(1)(F) of the MSA allows for the release of confidential information "when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act." 16 U.S.C. 1881a(b)(1)(F). This exception, when read in conjunction with the introductory text at section 402(b) of the MSA, applies generally to any person that is required to submit information in compliance with any requirement or regulation under the MSA. *Id.* at 1881a(b). *See* section I for definition of "person" under the MSA, 16 U.S.C. 1802(36).

The person or persons that are subject to MSA submission of information requirements are not uniform and depend on the specific permitting and fishery reporting requirements associated with the applicable FMP. Recognizing this variability, the proposed rule clarifies that the person subject to the applicable submission of information requirement is the person authorized to release that information. For example, if an MSA regulation requires the owner or operator of a vessel to submit catch and fishing activity information in a logbook, either the vessel owner or operator could provide written authorization for release of the logbook information. To provide flexibility, the proposed rule allows the person(s) authorized to provide written authorization to designate another person(s) to exercise that authority.

For information collected by a human observer pursuant to 16 U.S.C. 1853(b)(8),

NMFS notes that regional observer programs collect and/or create information for: (1) conservation and management purposes, and (2) program management and administration. The proposed rule would retain NMFS' current practice of allowing the person(s) subject to an observer requirement (*e.g.*, owner or operator of a fishing vessel or processing facility) to provide written authorization for release of information collected by observers for conservation and management purposes to include, among other things, data on fishing and fish processing, including but not limited to the type and quantity of fishing gear used, catch in numbers of fish or weight thereof, areas in which fishing was engaged in, and economic information, *see id.* section 1853(a)(5), and data on the amount and type of bycatch occurring in the fishery, *see id.* section 1853(a)(11). In the context of fishing sectors and cooperatives, the permit holder, vessel owner, or vessel operator of each individual vessel within a sector or a cooperative would be able to authorize release of observer information collected from his or her respective vessel, if they are subject to an observer coverage requirement.

Information created for observer program management and administration would not be subject to the written authorization exception. Such information includes field notes, journals, diaries, incident reports, or other information required under a program's administrative procedures. This type of information is used to review observer performance, evaluate the observer's data and collection methodology, document vessel safety concerns and accommodations, and assess any reports of non-compliance with fishery regulations. More generally, observer programs use this information to evaluate the overall effectiveness of the programs. For example, program administrative procedures generally require observers to maintain an official logbook (also referred to as

field notes, a journal or diary which may be retained and submitted in either a hard copy or through digital media) that includes technical information related to collection and sampling methodologies and notes that concern their work while deployed on a vessel. Following completion of a fishing trip, observers use their logbooks to answer post-fishing trip questions during a debriefing process. Debriefings are generally conducted by NMFS personnel at NMFS facilities, although some observer programs may have debriefings conducted at observer provider offices by observer provider supervisory personnel. NMFS, or the observer provider as appropriate, compiles the observer's responses into a post-trip debriefing report. Observer providers that are tasked with administration of observer debriefings are required to provide debriefing reports to NMFS.

NMFS believes the above approach is consistent with the written authorization exception, which provides for the person "submitting" information to NMFS to authorize release of that information. Observers submit information collected for scientific and management purposes to the respective observer programs essentially on behalf of the person that is required to carry an observer. Allowing this person to authorize release of the information collected by the observer on their behalf is consistent with the purpose of the exception, which is to provide a person that is subject to an information submission requirement with access to information that concerns their business. On the other hand, information compiled for management and administration of the observer program is not required to be "submitted" to NMFS by statute or regulation. It is created as a result of program administrative procedures and should be treated as internal program information. As such, this information would not be subject to disclosure under the

written authorization exception or under FOIA. In withholding debriefing reports, for example, NMFS would apply MSA section 402(b)(2), which prohibits disclosure of observer information and would apply FOIA Exemption Three, which, as explained above, authorizes the withholding of information that is prohibited from disclosure under another Federal statute.

NMFS also proposes to take the same approach on the handling of catch monitor information collected at shoreside processors. Information that a catch monitor collects at a shoreside facility is not, by definition, observer information because such catch monitors are not carried on a vessel. See 16 U.S.C 1802(32) (quoted above, defining an observer as a person who is “carried on a vessel”). Nonetheless, when such data collection is required pursuant to the MSA, NMFS will take a similar approach as with observer information for purposes of the written authorization exception. NMFS would allow a shoreside processor (owner, operator, or other person subject to the information submission requirement) to execute written authorization for access to and release of information that is collected for conservation and management purposes, but not information collected for observer program management and administration.

After finalization of this rulemaking, NMFS intends to streamline its processes for a person that is subject to an information submission requirement to authorize release of information pursuant to the written authorization exception. These improvements would create more uniformity and efficiencies across regions and provide details to persons who are subject to MSA information reporting requirements on how they can use the written authorization exception.

To prevent an unauthorized disclosure of confidential information, NMFS

proposes at § 600.420(f) that a person or their designee who submits a written authorization prove their identity by a statement consistent with 28 U.S.C. 1746, which permits statements to be made under the penalty of perjury as a substitute for notarization.

4. Section 608 of the FMPA, as amended by the 2015 IUU Fishing Enforcement Act, provides that the MSA confidentiality provisions shall not apply with respect to the FMPA --

for obligations of the United States to share information with a regional fisheries management organization (as that term is defined by the United Nations Food and Agriculture Organization Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing [PSMA]); or to any information collected by the Secretary regarding foreign vessels.

16 U.S.C. 1826i(b)(2)(A)-(B). The term “Regional Fisheries Management Organization” (RFMO) means “an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures.” PSMA at Art. 1(i). Section 606(d)(2)(B) of the FMPA, 16 U.S.C. 1826g(d)(2)(B), includes substantively the same provision as in section 608(b)(2).

Consistent with the above statutory provisions, NMFS proposes to define confidential information so as not to include fishing effort, catch information and other forms of vessel-specific information that the United States must provide to an RFMO to which the United States is a member in order to satisfy any information sharing obligations of the respective RFMO. NMFS proposes at § 600.10 to define an information sharing obligation of an RFMO as a measure, or part thereof, which creates a

binding requirement on the United States to report certain information by virtue of its membership in the respective RFMO.

Additionally, NMFS proposes to define confidential information so as not to include any information collected by NMFS under the MSA regarding foreign vessels. *Id.*

*B. Proposed Changes Allowing Disclosure of Confidential Information Where Limitations Apply to Further Disclosure*

NMFS proposes the following changes concerning confidentiality requirement exceptions that allow for information to be shared with other entities, provided that specified precautions are undertaken to protect the information. Some are updates to the regulations to reflect statutory amendments to the MSA confidentiality provisions. Other changes are proposed to facilitate Council use of confidential information for performance of their functions and those of Council subsidiary bodies.

1. Adding proposed § 600.410(d)(3) related to MSA section 402(b)(2)(C), which authorizes the sharing of observer information between and among observer providers, and observers, for observer training or preparation of observers for deployments to specific vessels, or to validate the accuracy of the observer information collected. *Id.* 1881a(b)(2)(C). Under these procedures, NMFS could make observer information available to observer providers to prepare an observer for a deployment on a specific vessel so that they have greater awareness of the possible circumstances on a vessel that could affect their health and safety while deployed. Any relevant observer information could be made available between and among observer providers and observers but otherwise held confidentially. This could include observer reports of violence, harassment, intimidation, or illicit or reckless behavior by a vessel's crew or operator, and

other types of negative or positive experiences while onboard a vessel. In addition, observer reports of vessel conditions to include its accommodations and facilities could also be made available.

2. Adding proposed § 600.415(a)(1)(ii) related to MSA section 402(b)(1)(H), which authorizes the disclosure of confidential information in support of homeland and national security activities.

3. Adding proposed § 600.415(a)(3) related to MSA section 402(b)(1)(C), which authorizes the disclosure of confidential information to state employees responsible for FMP enforcement pursuant to a Joint Enforcement Agreement with NMFS.

4. Adding proposed § 600.415(a)(2) related to MSA section 402(b)(1)(B), which authorizes the disclosure of confidential information to state or Marine Fisheries Commission employees as necessary to further the mission of the Department of Commerce.

5. Revising a provision under which confidential information can be disclosed to Council members for use by the Council for conservation and management purposes (§ 600.415(a)(4)(ii)). Under MSA section 402(b)(3), the Secretary may approve a Council's use of confidential information for conservation and management purposes. 16 U.S.C. 1881a(b)(3). NMFS' current confidentiality regulations implement this authority under § 600.415(d)(2). That regulation authorizes NMFS to grant a Council access to confidential information upon written request by the Council Executive Director. In determining whether to grant access, NMFS must consider, among other things, the "possibility that the suppliers of the data would be placed at a competitive disadvantage by public disclosure of the data at Council meetings or hearings." *Id.* During development of this

proposed action, a question was raised regarding whether this text allows public disclosure of information that was released to a Council under this procedure. As MSA section 402(b)(3) provides for disclosure of information for use by a Council, and not to the public at large, NMFS is proposing to delete the text about public disclosure.

6. Adding provisions to authorize release of confidential information to a Council's scientific and statistical committee (SSC) (§ 600.415(a)(4)(iii)), and advisory panels (APs) (§ 600.415(a)(4)(iv)). Under the Magnuson-Stevens Act as amended by the 2006 MSRA, Councils must establish, maintain, and appoint the members of an SSC. 16 U.S.C. 1852(g)(1)(A). Members appointed by Councils to SSCs shall be Federal or state employees, academicians, or independent experts. Id. 1852(g)(1)(C). The role of the SSC is, among other things, to assist the Council in the development, collection, evaluation and peer review of statistical, biological, economic, social, and other scientific information as is relevant to the Council's development and amendment of any FMP. Id. 1852(g)(1)(A). Furthermore, the SSC is required to provide its Council ongoing scientific advice for fishery management decisions, including, among other things, recommendations for acceptable biological catch and preventing overfishing and reports on stock status and health, bycatch, and social and economic impacts of management measures. Id. 1852(g)(1)(B). The Magnuson-Stevens Act further provides that each Council shall establish “advisory panels as are necessary or appropriate to assist it in carrying out its functions under [the] Act.” Id. 1852(g)(2). As with SSCs, APs serve an important role in providing recommendations to a Council on development of FMPs and Plan Amendments, specifications, management measures and other conservation and management matters.

To carry out their responsibilities, SSC and AP members may need to evaluate confidential information. NMFS may release confidential information to Federal and state employees appointed to a Council's SSC or APs as provided under Magnuson-Stevens Act section 402(b)(1)(A) and (B). However, the existing confidentiality regulations do not address release of confidential information to academicians or independent experts appointed to an SSC or AP. Because all members of a Council's SSC or APs may need to evaluate confidential information, NMFS proposes to add procedures through which a Council can request, through its Executive Director, that members of the Council's SSC or AP that are not Federal or state employees be granted access to confidential information. NMFS proposes to add these procedures pursuant to Magnuson-Stevens Act section 402(b)(3), which authorizes the Secretary to approve the release and use of confidential information by a Council for fishery conservation and management. Given the statutory role that a Council's SSC and any of its APs have in development and amendment of any FMP, NMFS believes that establishing a process for releasing confidential information to an SSC or AP is consistent with the statutory authorization that allows a Council to use confidential information for making its recommendations on fishery conservation and management. NMFS recognizes the concern that members of an SSC or an AP, who are not Federal or state employees, may gain personal or competitive advantage through access to confidential information. To address this concern, the proposed procedures would require NMFS to approve any request from a Council Executive Director that confidential information be released to the Council for use by SSC or AP members who are not Federal or state employees. In making a decision regarding such a request, NMFS must consider whether those SSC or AP members might

gain personal or competitive advantage from access to the information.

7. Adding proposed § 600.420(b) related to MSA 402(b)(2)(B), which authorizes the release of observer information when the information is necessary for proceedings to adjudicate observer certifications.

8. Disclosure to agencies of state, Federal, or foreign governments, the Food and Agriculture Organization (FAO) of the United Nations, or the Secretariat, or equivalent, of a body made pursuant to an international fishery agreement.

Section 608 of the FMPA, as amended by the 2015 IUU Fishing Enforcement Act, provides that, subject to MSA confidentiality provisions except as provided in section 608(b)(2) (discussed in section III(A)(4)), the Secretary may disclose, as necessary and appropriate, information, including information that is collected jointly under the MSA and a statute that implements an international fishery agreement, to any other Federal or state government agency, the FAO, or the Secretariat or equivalent of an international fishery management organization or arrangement made pursuant to an international fishery agreement (IFA) if such government, organization, or arrangement, respectively, has policies and procedures to protect confidential information from unintended or unauthorized disclosure. 16 U.S.C 1826i(d)(1). The FMPA does not define “international fishery agreement” but the term “international fishery management agreement” is defined under its implementing regulations as “any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.” 50 CFR 300.201. To implement section 608 of the FMPA, proposed section 600.415(a)(6) provides that NMFS may disclose confidential information to employees of state or Federal government agencies, the FAO, or the Secretariat or equivalent of a body made

pursuant to an international fishery agreement (IFA) (defined the same as “international fishery management agreement” at 50 CFR 300.201) provided that NMFS determines (in coordination with the U.S. Head of Delegation for disclosures to the FAO, RFMOs, or other relevant international body) that: i) the disclosure is necessary and appropriate under section 608 of the High Seas Driftnet Fishing Moratorium Protection Act (16 U.S.C. 1826i), and; ii) the applicable government agency, FAO, or Secretariat or equivalent of a body made pursuant to an IFA will apply policies and procedures to protect confidential information from unintended or unauthorized disclosure. Data sharing under proposed § 600.415(a)(6) may include disclosures to scientific committees and other subsidiary bodies of an organization or arrangement made pursuant to an IFA. NMFS intends to develop a protocol that reflects the requirements of proposed § 600.415(a)(6) in its internal control procedures under § 600.410(b).

NMFS notes that section 606 of the FMPA (Enforcement), 16 U.S.C. 1826g(d)(2), includes a disclosure authorization that is the same as that in section 608, 16 U.S.C 1826i(d)(1), except in two respects. First, section 606 additionally allows for disclosure of information to a foreign government. *Id.* at 1826g(d)(2). Second, in addition to being necessary and appropriate, a disclosure under section 606 must be necessary to ensure, administer, or assist with at least one of five enumerated compliance and enforcement purposes. *Id.* at 1826g(d)(2)(A)(ii)(I)-(V). Given the overlap of section 606 with section 608, NMFS proposes that the procedures for implementation of section 608 also apply to disclosures under section 606, except for disclosures to a foreign government. In such cases, the proposed § 600.415(a)(7) requires that the disclosure meet the requirements of § 600.415(a)(6) and be necessary to ensure, administer, or assist with

at least one of five enumerated compliance enforcement purposes.

In the course of negotiating binding provisions for information sharing under a bilateral or multilateral treaty or other agreement, NMFS, working with other U.S. government representatives as appropriate, will ensure that the information sharing provisions are necessary and appropriate for the scientific, management, or enforcement purposes of the agreement, and that the body receiving the information has or will have policies and procedures in place to prevent unintended disclosure. NMFS, coordinating with the relevant Head of Delegation for the United States, as needed for disclosures to the FAO, RFMOs, or other relevant international body, will confirm that the above two conditions have been met prior to the United States agreeing to and/or providing information pursuant to information sharing provisions under the agreement or measures adopted pursuant to the agreement.

#### **IV. Proposed Changes Requiring the Protection of Business Information in Releases of Information in Aggregate or Summary Form**

The MSA at section 402(b)(3) provides that "the Secretary may release or make public any information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Act in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information." 16 U.S.C. 1881a(b)(3). Current regulations at 50 CFR 600.10 and 400.425(a) focus on protection of a submitter's identity, but do not address a submitter's business information. Section 600.10 includes a definition of "aggregate or summary form" that allows for the public release of confidential information if it is "structured in such a way that the identity of the submitter cannot be determined either from the present release of the data

or in combination with other releases." The regulations also state that the AA will not release information "that would identify the submitter, except as required by law." Id. § 600.425(a).

*Application of Protection Beyond Identity to Financial and Operational Information*

NMFS reviewed the legal and policy basis for this approach as part of its development of revised regulations for implementation of the 2006 MSRA and the 1996 SFA. It appears that NMFS historically interpreted the two different elements of MSA 402(b)(3) --"identity of any person" and "business of any person"-- to mean a submitter's name or the name of their business. Based on its reassessment of MSA section 402(b)(3), NMFS proposes to revise the regulatory definition of "aggregate or summary form" to explicitly address "business of any person" and to add a specific definition for that term.

The MSA does not define "business of any person," and NMFS acknowledges that it could be subject to different interpretations. After considering the types of information that may be collected, generated, or used in commercial activities related to fishing, and the commonly understood meaning of "business of any person," NMFS proposes to define that term at § 600.10 as meaning financial and operational information. Financial information would include ownership information, information in cash flow documents and income statements, and information that contributes to the preparation of balance sheets. Operational information would include data such as, fishing locations, time of fishing, type and quantity of gear used, catch by species in numbers or weight thereof, number of hauls, number of employees, estimated processing capacity of, and the actual processing capacity utilized, by U.S. fish processors. By providing these definitions, NMFS limits releases to an aggregate or summary form

which does not disclose the specified financial and operational information of a person.

When responding to FOIA requests for MSA confidential information, NMFS takes into consideration FOIA Exemption Three, 5 U.S.C. 552(b)(3), and other relevant FOIA exemptions, such as Exemption Six which applies to privacy information. FOIA Exemption Three applies to information that is exempted from disclosure by another statute. NMFS interprets MSA section 402(b) to exempt from disclosure information that would directly or indirectly disclose the identity or business of any person. As explained above, this proposed rule, if adopted, would require NMFS to consider both factors--not just identity--when applying the aggregate or summary form provisions of the regulations. While this could result in more information being withheld, NMFS believes that detailed and useful information will continue to be disclosed under the aggregate or summary form provisions.

*Observer Information on Interactions with Marine Mammals and Endangered Species Act (ESA)-listed species*

In developing this proposed rule, NMFS considered whether its definition for "confidential information" should include observer information that concerns interactions with marine mammals and ESA-listed species. As explained below, NMFS proposes to exclude from the definition of "confidential information" vessel-specific observer information on interactions with marine mammals, while interactions with ESA-listed species would be "confidential" within the scope of that definition.

Release of observer information that concerns interactions with marine mammals would advance implementation of statutory mandates under the Marine Mammal Protection Act (MMPA). For example, this information is critical for deliberations by

Take Reduction Teams (TRTs) that are convened under section 118(f)(6)(A) of the MMPA. 16 U.S.C. 1387(f)(6)(A)(i). TRTs established under the MMPA must meet in public and develop plans to reduce incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. See *Id.* at 1387(f)(6)(D) (public meetings) and 1387(f) (development of take reduction plans). Specific details about interactions with marine mammals that occurred during commercial fishing operations are critical to developing a plan. *Id.* 1387(f). This information is often available only through observer records. Without detailed observer information on interactions with marine mammals, TRTs may be unable to develop targeted take reduction plans to reduce bycatch of marine mammals pursuant to the statutory mandate.

Furthermore, the MMPA requires fishermen to report all incidental mortality and injury of marine mammals, including the species killed or injured, the date, time, and geographic location of such occurrence (16 U.S.C. 1387(e)), and this self-reported information is not subject to the MSA confidentiality requirements.

For these reasons, NMFS proposes in § 600.10 that the definition of "confidential information" exclude the following observer information on marine mammal protected species interactions: species of each marine mammal incidentally killed or injured; the date, time, and geographic location of the take; and information regarding fishing practices and gear used in the take that would not constitute a trade secret under FOIA, 5 U.S.C. 552(b)(4).

However, because the ESA does not include similar specific mandates relative to managing fisheries interactions with ESA-listed species, vessel-specific observer information on interactions with ESA species would be treated as confidential

information under this proposed rule. If the ESA-listed species were marine mammals, then the information would be treated per the MMPA confidentiality requirements at 16 USC 1387(d)(8), implemented at 50 CFR 229.11. Nonetheless, NMFS' implementation of the ESA is facilitated by the use of detailed information on interactions with listed species. For example, NMFS may need to analyze detailed information about commercial fisheries interactions with species listed under the ESA as part of implementation of its Section 7 consultation for MSA-managed fisheries. See 402.14(g)(8) (requirements for biological opinions). Where such information is confidential for MSA purposes, NMFS will only use it internally and any public facing documents will present that information in a non-confidential aggregate or summary form that does not disclose submitter identity or their business information.

However, NMFS notes that it will use, and may publicly disclose, vessel-specific information on interactions with ESA-listed species where that information is only collected under the ESA and as such not MSA confidential information. For example, under NMFS' sea turtle observer requirement issued under the ESA, NMFS determines on an annual basis the commercial and recreational fisheries that may be required to carry an observer to monitor potential interactions with sea turtles (50 CFR 222.401-404). Because the ESA does not have confidentiality of information requirements, vessel-specific interactions with ESA-listed species collected by observers who are deployed only under the ESA sea turtle rule are not treated as confidential information. In the context of information collected only under the ESA, the MSA confidentiality requirements are inapplicable. NMFS may develop rules similar to the ESA sea turtle rules that provide for deployment of observers under the ESA to monitor take of species

listed under that authority. More broadly, NMFS intends to explore whether there are other options for release of ESA species interaction data notwithstanding the MSA confidentiality requirements.

However, even if MSA confidentiality does apply, NMFS can use vessel-specific information on interactions with ESA-listed species internally and in a manner that is protective of submitter identity and their business information. Under MSA 402(b)(1)(A), employees of NMFS and Councils who are responsible for FMP development, monitoring, or enforcement may access confidential information. FMPs must be consistent with the ESA and other applicable law. Thus, consistent with applicable control procedures for protection of confidential information, NMFS has and will continue to ensure access to MSA confidential information for compliance with ESA mandates. This includes internal use of MSA confidential information for Section 7 consultations when developing FMPs and plan amendments, for monitoring requirements that apply under Biological Opinions, and any other actions needed to implement the ESA.

In addition, NMFS intends to develop specific strategies and techniques for aggregation of vessel-specific information on interactions with ESA species. In many instances, NMFS has sufficient data for release of ESA interaction information in an aggregate or summary form that does not directly or indirectly disclose the identity or business of any person. However, when such events are rare, typically employed spatial and temporal aggregation methods do not yield results that satisfy a generally applicable level of aggregation necessary to protect confidential information. NMFS believes that the rarity of interactions with ESA-listed species should be taken into account when

structuring that information in an aggregated manner and determining whether any aggregate form would disclose a submitter's identity or business.

Lastly, as discussed above and as a proposed change to 50 CFR 600.410, NMFS intends to revise its internal control procedures in accordance with the statutory changes and with this proposed regulation. As part of these control procedures, NMFS will include "procedures for aggregating confidential data and responding to requests for non-confidential information." NMFS will make these procedures available to the public..

## **V. Proposed Changes Clarifying NMFS' Confidentiality Regulations**

NMFS proposes the following non-substantive changes intended to improve the clarity and accuracy of the regulations.

1. Removing the existing language at § 600.410(a)(2) that states "After receipt, the Assistant Administrator will remove all identifying particulars from the statistics if doing so is consistent with the needs of NMFS and good scientific practice."

Through experience, NMFS has found that maintaining identifying information is necessary for programmatic needs, including FMP monitoring, quota share allocations, capacity modeling, and LAP development. Accordingly, NMFS would no longer require the removal of identifiers from confidential information when NMFS uses the information to complete programmatic actions. However, NMFS would preserve the confidentiality of identifying information unless an exception allows for release.

2. The authorization to disclose information under section 402(b)(1)(B), as amended by the MSRA and codified in the United States Code, appears to have a typographical error. Prior to the MSRA, section 402(b)(1)(B) authorized the release of confidential information to "State or Marine Fisheries Commission employees pursuant

to an agreement with the Secretary that prevents the public disclosure of the identity or business of any person." Section 402(b)(1)(B) as amended by the MSRA provides that confidential information may be disclosed "to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity of business of any person."

NMFS believes that this was a typographical error, and that Congress intended the text to say "identity or business," consistent with how that phrase appears in section 402(b)(3).

As such, this proposed rule uses the phrase "identity or business" with regard to the section 402(b)(1)(B) text.

## **VI. Classification**

The NMFS Assistant Administrator has determined that this proposed rule is consistent with section 402(b) of the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, as follows:

The confidentiality of information requirements under MSA section 402(b) are implemented at 50 CFR part 600, subparts B and E. Certain terms used in these

regulations are defined under 50 CFR part 600, subpart A. This proposed action would revise 50 CFR part 600, subparts A, B and E to conform with the Magnuson-Stevens Act as amended by the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act and the 1996 Sustainable Fisheries Act and with 2015 amendments to the Moratorium Protection Act related to MSA confidentiality of information. Consistent with those amendments, this proposed action requires the confidentiality of information collected by NMFS observers, revises exceptions that authorize the disclosure of confidential information, and adds three new disclosure exceptions. In addition, this action proposes updates to reflect NMFS' policy on the release of MSA confidential information in an aggregate or summary form.

This proposed action applies to agency policies and procedures for the handling of information required to be maintained as confidential under MSA section 402(b).

Adoption of the proposed revisions would not have a significant economic impact on a substantial number of small entities. The proposed revisions would also apply to private companies that provide observer staffing and electronic monitoring (EM) services to support NMFS and industry-sponsored programs. Nine private companies currently provide observers on a seasonal or ongoing basis to support the collection of information in 42 U.S. fisheries. In addition, there are 10 EM service providers operating in U.S. fisheries; 6 of them also provide observer staffing support. Of the 10 EM service providers, 1 directly contracts with NMFS to conduct monitoring and the others are considered industry-sponsored programs.

The proposed regulations require observer providers and EM service providers to take steps to maintain the confidentiality of information including the means to secure

and store confidential information. The costs to meet this requirement are minimal and all observer providers, and EM service providers, that currently contract with NMFS or provide observers under industry-sponsored programs already have appropriate measures in place. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

### **Lists of Subjects in 50 CFR Part 600**

Confidential business information, Fisheries.

Dated: March 5, 2024.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 600 as follows:

1. The authority citation for part 600 continues to read as follows:

**Authority:** 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. Amend § 600.10 by:

a. Removing the definitions of “Confidential statistics” and “Data, statistics, and information”;

- b. Revising the definition of “Aggregate or summary form”; and
- c. Adding, in alphabetical order, definitions for “Business of any person”, “Confidential information”, “Electronic Monitoring Service Provider”, “Information sharing obligation of a Regional Fishery Management Organization (RFMO)”, “Observer provider”, and “Regional Fishery Management Organization.”

The revisions and additions read as follows:

**§ 600.10 Definitions.**

\* \* \* \* \*

*Aggregate or summary form* means information structured in such a way that the identity or business of any person (defined at 16 U.S.C. 1802(36)) who submitted the information cannot be directly or indirectly determined either from the present release of the information or in combination with other releases.

\* \* \* \* \*

*Business of any person means:* (1) Financial information such as ownership information, cash flow documents, income statements, or information that contributes to the preparation of balance sheets; or

(2) Operational information such as fishing locations, time of fishing, specific gear configuration, catch by species in numbers or weight thereof, number of hauls, number of employees, estimated processing capacity of, and the actual processing capacity utilized, by U.S. fish processors.

\* \* \* \* \*

*Confidential information* includes any observer information as defined under 16 U.S.C. 1802(32) or any information submitted to the Secretary, a state fishery

management agency, or a Marine Fisheries Commission by any person in compliance with any requirement or regulation under the Magnuson-Stevens Act. Confidential information does not include:

(1) Observer information related to interactions with species protected under the Marine Mammal Protection Act: the date, time, and location of interactions, the type of species, and the fishing practices and gear involved provided that information regarding fishing practices and gear would not constitute a trade secret under the Freedom of Information Act, 5 U.S.C. 552(b)(4);

(2) Fishing effort, catch information, and other forms of vessel-specific information that the United States must provide to a Regional Fishery Management Organization (RFMO) to which the United States is a member in order to satisfy any information sharing obligations of the respective RFMO;

(3) Any information collected by NMFS under the MSA regarding foreign vessels.

\* \* \* \* \*

*Electronic Monitoring Service Provider* means any person who manages observer information collected by an electronic monitoring system required under an MSA regulation.

\* \* \* \* \*

*Information sharing obligation of a Regional Fishery Management Organization (RFMO)* means a measure, or part thereof, which creates a binding requirement on the United States to report certain information by virtue of its membership in the respective RFMO.

\* \* \* \* \*

*Observer provider* means any person that collects observer information by placement of observers on or in fishing vessels, shoreside processors, or stationary floating processors under a requirement of the MSA or as part of a cooperative research initiative.

\* \* \* \* \*

*Regional Fishery Management Organization (RFMO)* means an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures.

\* \* \* \* \*

**§ 600.130 [Amended]**

3. In § 600.130, remove the word “statistics,” wherever it appears, and add in its place the word, “information.”

4. Subpart E to part 600 is revised to read as follows:

**Subpart E—Confidentiality of Information**

Sec.

600.405 Applicability.

600.410 Protection of confidential Information.

600.415 Access to confidential information

600.420 Release of confidential information.

600.425 Release of information in aggregate or summary form.

**Subpart E -- Confidentiality of Information**

**§ 600.405 Applicability.**

This subpart applies to confidential information as defined at § 600.10 and that is under NMFS’ custody and control.

**§ 600.410 Protection of confidential information.**

(a) *General.* This section requires control procedures related to confidential information and provides procedures for the protection of certain confidential information submitted to NMFS and State Fishery Management Agencies or Marine Fisheries Commissions pursuant to a statutory or regulatory requirement imposed pursuant to the Magnuson Stevens Fishery Conservation and Management Act.

(b) *Confidential information collected by NMFS.* NMFS must establish internal control procedures for the maintenance of and access to any confidential information. The control procedures should include, but are not limited to the following:

(1) Requirements for information system management and data storage to prevent unauthorized access to or disclosure of confidential information;

(2) Procedures for NMFS employees to access confidential information;

(3) Procedures for providing access to confidential information by states, Councils, and Marine Fisheries Commissions;

(4) Procedures for evaluating whether members of a Council, or a Council Scientific and Statistical Committee (SSC), plan team, or Advisory Panel (AP) could gain personal or competitive advantage from access to confidential information under § 600.415(a)(4);

(5) Procedures for evaluating requests by contractors, grantees, cooperative agreement recipients and other external individuals and organizations to access confidential information;

(6) Procedures for vessel owners to access and request confidential information, including historic information associated with a fishing permit;

(7) Standardized sharing agreements that acknowledge the confidentiality and

protection of information from public disclosure;

(8) Template for written authorization for release of confidential information for purposes of § 600.420(f);

(9) Procedures for aggregating and summarizing confidential data and responding to requests for non-confidential information;

(10) Any other procedures as necessary to maintain the confidentiality of information.

(c) *Confidential information collected by State Fishery Management Agencies or Marine Fisheries Commissions.* NMFS may enter into an agreement with a state or a Marine Fisheries Commission for the collection of confidential information on behalf of the Secretary provided that NMFS, as part of the agreement, determines that:

(1) The state has confidentiality of information authority comparable to the Magnuson-Stevens Act and that the state will exercise this authority to prohibit public disclosure of confidential information;

(2) The Marine Fisheries Commission has established policies and procedures comparable to the Magnuson-Stevens Act and that the Commission will exercise such policies and procedures to prohibit public disclosure of confidential information.

(d) *Observer and Electronic Monitoring Services.* (1) Regarding observer providers, NMFS may allow the collection of observer information by an observer pursuant to a confidentiality agreement that:

(i) Specifies procedures that the observer provider will apply to protect confidential information from public disclosure; and

(ii) Requires that the observer provider, and each observer and each of its other

employees who will handle confidential information, acknowledge the requirement to maintain the confidentiality of observer information and the criminal and civil penalties for unauthorized use or disclosure of such information provided under 16 U.S.C. 1858.

(2) Electronic monitoring service providers. NMFS may allow the handling of observer information by an electronic service provider pursuant to a confidentiality agreement that:

(i) Specifies procedures that the electronic monitoring service provider will apply to protect confidential information from public disclosure; and

(ii) Requires that the electronic monitoring service provider, and each of its employees who will handle confidential information, acknowledge the requirement to maintain the confidentiality of observer information and the civil penalties for unauthorized use or disclosure of such information provided under and 16 U.S.C. 1858.

(3) As part of any agreement with an observer provider under paragraph (d)(1) of this section, NMFS may allow the sharing of observer information among and between observers and observer providers for:

- (i) Training or preparation of observers for deployments on specific vessels; or
- (ii) Validating the accuracy of the observer information collected.

**§ 600.415 Access to confidential information.**

Confidential information may be accessed by the following persons subject to any specified conditions and procedures:

(a) Federal employees;

(1) Responsible for Fishery Management Plan (FMP) development, monitoring, or enforcement, including persons that need access to confidential information to

perform functions authorized under a Federal contract, cooperative agreement, or grant awarded by NOAA/NMFS; or,

(2) At the request of another Federal agency, if providing the information supports homeland security and national security activities, including the Coast Guard's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)).

(b) State or Marine Fisheries Commission employees as necessary to further the mission of the Department of Commerce, subject to an agreement with NMFS that prohibits public disclosure of confidential information;

(c) State enforcement personnel who are responsible for enforcing FMPs, provided that the state for which the employee works has entered into a Joint Enforcement Agreement with NOAA and the agreement is in effect;

(d) Councils. A Council Executive Director may request access for the following:

(1) The Council's employees who are responsible for FMP development and monitoring;

(2) Members of the Council for use by the Council for conservation and management, but only if NMFS determines that access will not result in any Member having a personal or competitive advantage;

(3) Members of the Council scientific and statistical committee (SSC) established under section 302(g) of the Magnuson--Stevens Act who are not Federal or state employees, if necessary for the SSC to assist and advise the Council as provided under the Act, but only if NMFS determines that access will not result in any Member

having a personal or competitive advantage;

(4) Members of the Council's advisory panel (AP) established under section 302(g) of the Magnuson--Stevens Act, if necessary for the AP to provide information and recommendations on, and assist in the development of FMPs and amendments thereto, but only if NMFS determines that access will not result in any Member having a personal or competitive advantage;

(5) A contractor of the Council for use in such analysis or studies necessary for conservation and management purposes but only if approved by NMFS and subject to a confidentiality agreement.

(e) Vessel Monitoring System Information. Nothing in these regulations contravenes section 311(i) of the Magnuson-Stevens Act which requires the Secretary to make vessel monitoring system information directly available to the following:

(1) Enforcement employees of a state with which NMFS has entered into a Joint Enforcement Agreement and the agreement is in effect;

(2) State management agencies involved in, or affected by, management of a fishery if the state has entered into an agreement with NMFS that prohibits public disclosure of the information.

(f) Employees of state or Federal government agencies, the Food and Agriculture Organization (FAO) of the United Nations, or the Secretariat or equivalent of a body made pursuant to an international fishery agreement (IFA) (defined the same as international fishery management agreement at 50 CFR 300.201), provided that NMFS determines (in coordination with the U.S. Head of Delegation for disclosures to the FAO,

RFMOs, or other relevant international body) that:

(1) The disclosure of confidential information is authorized, necessary and appropriate under section 608 of the High Seas Driftnet Fishing Moratorium Protection Act (16 U.S.C. 1826i); and

(2) The applicable government agency, FAO, or Secretariat or equivalent of a body made pursuant to an IFA will apply policies and procedures to protect confidential information from unintended or unauthorized disclosure.

(g) Employees of agencies or entities described under paragraph (a)(6) or any foreign government provided that NMFS determines that:

(1) Disclosure of confidential information is authorized, necessary and appropriate for a compliance or enforcement purpose enumerated under section 606 of the High Seas Driftnet Fishing Moratorium Protection Act (16 U.S.C. 1826g(d)(2)(A)); and

(2) The applicable agency, entity, or foreign government will apply policies and procedures to protect confidential information from unintended or unauthorized disclosure.

**§ 600.420 Release of confidential information.**

NMFS will not disclose to the public any information made confidential pursuant to the Magnuson Stevens Fishery Conservation and Management Act, except the agency may disclose information when:

(a) Authorized by regulations issued by the Secretary to implement recommendations contained in an FMP prepared by the North Pacific Council to allow disclosure of observer information to the public of weekly summary bycatch information

identified by vessel or for haul--specific bycatch information without vessel identification.

(b) Observer information is necessary in proceedings to adjudicate observer certifications.

(c) Information is required to be submitted to the Secretary for any determination under a limited access program (LAP). This exception applies at the level of confidential information that NMFS has used, or intends to use, for a regulatory determination under a LAP. This includes information that was submitted before the fishery was a LAP and that NMFS subsequently uses or intends to use for a LAP determination. For the purposes of this exception:

(1) Limited Access Program means a program that allocates exclusive fishing privileges, such as a portion of the total allowable catch, an amount of fishing effort, or a specific fishing area, to a person.

(2) Determination means a decision that is specific to a person and exclusive fishing privileges held or sought under a limited access program. These decisions are: allocations, approval or denial of a lease or sale of allocated privileges or annual allocation, and end of season adjustments.

(d) Required to comply with a Federal court order. For purposes of this exception:

(1) Court means an institution of the judicial branch of the U.S. Federal Government. Entities not in the judicial branch of the Federal Government are not courts for purposes of this section.

(2) Court order means any legal process which satisfies all of the following conditions:

(i) It is issued under the authority of a Federal court;

(ii) A judge or magistrate judge of that court signs it; and

(iii) It commands NMFS to disclose confidential information as defined under § 600.10.

(e) Necessary for enforcement of the Magnuson--Stevens Act, or any other statute administered by NOAA; or when necessary for enforcement of any state living marine resource laws, if that state has a Joint Enforcement Agreement that is in effect.

(f) A person that is subject to a Magnuson-Stevens Act submission of information requirement, or their designee, provides written authorization to the Secretary authorizing release of such information to other persons for reasons not otherwise provided for in section 402(b) of the Act and such release does not violate other requirements of the Act. That person or their designee must prove identity, and authorization to act if serving as a designee, by a statement consistent with 28 U.S.C. 1746, which permits statements to be made under penalty of perjury as a substitute for notarization. The statement of identity, and authority to serve as a designee, must be in the following form:

(1) If executed outside the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”.

**§ 600.425 Release of information in aggregate or summary form.**

NMFS may disclose in any aggregate or summary form information that is

required to be maintained as confidential under these regulations.

5. In § 600.725, add paragraph (x) to read as follows:

**§ 600.725 General prohibitions.**

\* \* \* \* \*

(x) Disclose confidential information without authorization.

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