

# Will NMFS keep your secrets?



By David Frulla and Shaun Gehan

Life at sea depends on effective communications and locating devices. On the other hand, despite changes in technology and management structures, fishermen prefer their secrets — from landings data to favored fishing spots — remain secret. No one is particularly fond of the increasing amounts of data and tracking the government requires.

NMFS' proposed confidentiality guidelines, therefore, have drawn significant interest. They propose an update of rules governing the protection of information NMFS gathers, incorporating changes made by the 2006 Magnuson-Stevens Reauthorization Act. Comments were due by Aug. 21, 2012.

As important as these issues are, most reviewing the proposal have more questions than answers about how well NMFS will protect trade secrets and other sensitive business information. Eighty percent of the rule's problem results from the law itself. The other 20 percent is within NMFS' power to address.

The basic Magnuson-Stevens rule is: "Any 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." The

problem is that the text continues with the dreaded word "except."

The statute contains eight exceptions, most of which are relatively standard. For instance, NMFS can share information with federal and council employees, state agencies, and law enforcement personnel. They are required to maintain confidentiality. However, by law, "information... required to be submitted to the Secretary for any determination under a limited access program" is not confidential and can be disseminated to the public.

Congress never defined "limited access program." Most expansively, this could include any limited entry fishery, which these days is virtually every one. More narrowly, and based on the law's history, the better choice, is "limited access privilege programs," or what the rest of the world calls "catch shares." NMFS did not choose this justifiable, narrow interpretation.

Rather, NMFS proposed to define a limited access program as "a program that allocates privileges, such as a portion of a total allowable catch, an amount of fishing effort, or a specific fishing area, to a person." This definition covers a lot more than catch share programs, conceivably including any allocation relating to quotas, days at sea, or areas to be fished. Unnecessarily broad, this definition threatens to swallow the law's basic confidentiality protections.

The second area of concern is partly attributable to the broad wording Congress used, exempting information submitted "for *any* determination under a limited access program." Certainly this means that annual catch information, by vessels in limited access programs, is not confidential. Nor, likely, are average landings

upon which initial allocations are made. Such information relates to determinations of initial shares or whether vessels stay within allocated harvest limits.

What other types of information NMFS will release and how it will do so is less clear. No mention, for instance, is made of whether VMS data, which is in part used to determine compliance with access area or days-at-sea programs is public. Nor is it clear whether NMFS would only release the information based on a Freedom of Information Act request or would just publish it online. These concerns are pertinent because NMFS chose an overly broad definition of determination — "a grant, denial, or revocation of privileges, approval or denial of a transfer of privileges, or other similar NMFS regulatory determination applicable to a person." A more limited reading would be much more protective of sensitive business and personal information.

There is much more to the proposal. For instance, data gathered during cooperative research projects fall under the new category of "observer information." How and when that information can be disclosed are not questions the guidelines clearly answer. Likewise, NMFS proposes releasing information on protected species interactions that do not clearly appear authorized by Magnuson. If you care about the confidentiality of the information the government requires you submit, you should take note and comment on NMFS' proposal. **NF**

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