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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 070719377-2189-01]

RIN 0648-AV81

Confidentiality of Information; Magnuson-Stevens Fishery Conservation and Management Reauthorization Act

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

ACTION: Proposed rule.

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 or MSA). The purposes of these revisions are to make both substantive and non-substantive changes necessary to comply with the MSA as amended by the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) and the 1996 Sustainable Fisheries Act (SFA). In addition, revisions are necessary to address some significant issues that concern NMFS' application of the MSA confidentiality provision to requests for information.

DATES: Written comments on the proposed rule must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA-NMFS-2012-0030, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2012-0030 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Mail: Submit written comments to Karl Moline, NMFS, Fisheries Statistics Division F/ST1, Room 12441, 1315 East West Highway, Silver Spring, MD 20910.
- Fax (301)713-1875; Attn: Karl Moline

Instructions: Comments must be submitted by one of the above methods 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 will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. 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 or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Karl Moline at 301-427-8225.

SUPPLEMENTARY INFORMATION:

I. Background

The Magnuson-Stevens Act authorizes the Secretary of Commerce (Secretary) to regulate domestic fisheries within the 200-mile U.S. Exclusive Economic Zone (EEZ). 16 U.S.C. 1811. Conservation and management of fish stocks is accomplished through Fishery Management Plans (FMPs). Eight regional fishery management councils (Councils) prepare FMPs and amendments to those plans for fisheries within their jurisdiction. Id. 1853. The Secretary has exclusive authority to prepare and amend FMPs for highly migratory species in the Atlantic Ocean. Id. 1852(a)(3), 1854(g).

Information collection is an important 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 Magnuson-Stevens Act, any Fishery Management Plan a Council or the Secretary prepares 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 Magnuson-Stevens Act sets forth information confidentiality requirements at section 402(b), 16 U.S.C. 1881a(b). Under the Act as amended, the Secretary must maintain the confidentiality of any information that is submitted in compliance with the Act and any observer information. The MSA includes exceptions to these confidentiality requirements. Some exceptions allow for the sharing of confidential information with specified entities provided that these parties treat the information as confidential, while others 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. 1881a(b)(3).

Section 402(b)(3) of the Act 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). The revisions were non-substantive.

NMFS now proposes substantive and non-substantive revisions to its regulations at 50 CFR part 600 subpart A, subpart B, and subpart E in order to implement confidentiality requirements amendments, which were included in the 1996 SFA and the 2006 MSRA. NMFS proposes additional revisions to address some significant issues that have arisen in the day-to-day application of the MSA confidentiality provisions to information requests. These proposed revisions seek to balance the mandate to protect confidential information with exceptions that authorize disclosure of information to advance fishery conservation and management, scientific research, enforcement, and transparency in fishery management actions.

The proposed rule is informed by other statutes that NMFS administers, including the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the Freedom of Information Act (FOIA). Development of this proposed rule required NMFS to interpret several statutory provisions, including provisions for release of information in aggregate or summary form, a limited access program exception, and provisions regarding observer

information. Accordingly, NMFS highlights these elements of the proposed rule in the discussion below and seeks public comment on options and alternatives for these and other aspects of the proposed rule.

Below, NMFS provides information on three types of proposed changes. NMFS begins with proposed changes that concern the expanded scope of the confidentiality requirements. Next, NMFS presents changes that concern exceptions allowing for the disclosure of confidential information. Lastly, NMFS presents changes necessary to improve the clarity of the regulations.

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

Because statutory amendments have broadened the scope of the MSA's confidentiality requirements, NMFS proposes corresponding regulatory changes. At the MSA's enactment, its confidentiality requirements applied to "[a]ny statistics submitted to the Secretary" in compliance with an FMP. Public Law 94-265, Title III, 303(d) (1976). Congress broadened the confidentiality requirements through the 1996 SFA, Public Law 104-297 (1996), in two respects. First, the 1996 SFA substituted the word "information" for "statistics." *Id.* 203. As a result, the statute's confidentiality requirements protected "any information submitted to the Secretary" in compliance with an FMP. The 1996 SFA also expanded the confidentiality requirements to apply not just to information submitted in compliance with an FMP, but to information submitted in compliance with "any requirement or regulation" under the Act. *Id.* Accordingly, NMFS' proposed rule would update the confidentiality regulations under 50 CFR part 600 to reflect the changes to the law made in 1996.

In addition, this proposed rule would implement further broadening of the confidentiality requirements made by the 2006 MSRA, Public Law 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. Public Law 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).

Specifically, NMFS proposes making the following changes to its regulations in order to implement these amendments to the scope of the MSA confidentiality requirement:

1. Replacing the term “statistics” with “information” in 50 CFR 600.130 and in all regulations under 50 CFR subpart E;
2. Outlining procedures to preserve the confidentiality of all information submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission by any person in compliance with the requirements of the Magnuson-Stevens Act. (§ 600.410(b));
3. Deleting the definition of “confidential statistics” and adding a definition for “confidential information”(§ 600.10); and
4. Adding a definition for observer employer/observer provider (§ 600.10).

Fisheries observer programs are predominantly contractors hired through private observer employer/observer provider companies. These companies provide qualified persons to perform observer duties on vessels engaged in fishing for species managed under the MSA. NMFS proposes the definition to ensure that observer employer/observer provider companies properly handle information that is required to be maintained as confidential under the MSA.

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 allow NMFS to share confidential information with other entities provided that the recipients will maintain it as confidential, while other exceptions allow for the disclosure of confidential information even if the confidentiality will not be maintained by the recipients. 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 significant issues that concern application of exceptions to the confidentiality requirements and the aggregation and summarization provision. NMFS presents these changes in the following order: first, substantive changes addressing disclosure of confidential information without requiring the recipient to keep it confidential; next, 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 Disclosed Information May Not Remain Confidential

The following changes would implement exceptions that authorize the disclosure of confidential information without further restrictions on its disclosure. Public comments on these provisions, numbered 1-4 below, are especially important, because they propose disclosures where NMFS does not require the recipients to maintain confidentiality.

1. Exception for release of information required to be submitted for a determination under a limited access program: 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). The scope of this exception depends on how the terms “limited access program” and “determination” are defined, and because the statute offers no definitions, NMFS now proposes definitions for these terms. NMFS’ interpretation of this exception is important for fisheries managed under limited access programs, because disclosure of information could advance the transparency of the decision-making process and provide those seeking privileges, and privilege holders, with information that may be necessary for an appeal of a determination under a limited access program. However, because MSA section 402(b) generally requires confidentiality, NMFS must consider carefully the breadth of its interpretation of the exception under 402(b)(1)(G). NMFS seeks public comment on the below proposed approaches to “limited access program,” “determination,” and the information to be covered under the exception, and alternative approaches that NMFS might consider.

Proposed Definition for “Limited Access Program”

As explained above, the MSA does not define “limited access program” as that term appears in section 402(b), and the interpretations of the term could range across a wide spectrum. At one end of the spectrum, NMFS could broadly interpret “limited access program” under section 402(b) as meaning “limited access system,” which is defined at MSA section 3(27). If NMFS takes this approach, the definition would allow very broad disclosure, applicable to any fishery in which participation is limited to “those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.” See 16 U.S.C.

1802(27) (defining limited access system); see also id. 1853(b)(6) (setting forth requirements for establishing limited access system). At the other end of the spectrum, NMFS could more narrowly interpret “limited access program” as only MSA section 303A limited access privilege programs (LAPPs). 16 U.S.C. 1853a. See also id. 1802(26) (defining “limited access privilege”).

While NMFS encourages comments on the full range of interpretations available for the term, at this time NMFS does not propose to interpret “limited access program” as meaning either a “limited access system” or a “limited access privilege program.” Taking into account these terms, different potential interpretations of section 402(b)(1)(G), and prior and ongoing work in developing LAPP and LAPP-like programs, NMFS proposes a moderately broad interpretation, defining the term “limited access program” to mean a program that allocates 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. Information required to be submitted for a determination for such programs could be disclosed.

This interpretation of limited access program would include specific types of programs defined under the MSA, such as section 303A LAPPs and Individual Fishing Quotas (MSA 3(23)). It would also include other management programs not specifically mentioned in the Act, such as programs that allocate a TAC, or a portion of a TAC, to a sector or a cooperative, and programs 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; the definition of “limited access program” could apply to them as well, allowing disclosure of information submitted for determinations under such programs.

Proposed Definition for “Determination”

It is also possible to interpret “determination” under MSA 402(b)(1)(G) in many different ways. On the one hand, “determination” could mean any decision that NMFS makes for a fishery managed under a limited access program. Alternatively, it could mean those determinations that are more specific to limited access programs, like NMFS’ allocation and monitoring of fishing privileges. Privileges allocated and monitored under limited access programs include limited access privileges, individual fishing quotas, a sector’s annual catch entitlement, and other exclusive allocative measures such as a grant of an exclusive privilege to fish in a geographically designated fishing ground.

NMFS proposes the latter approach: defining “determination” to mean 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. “Person” is already defined under MSA section 3(36), and a determination that generally concerns a fishery, such as a stock assessment, would not be considered a “determination under a limited access program.” This approach seeks to enhance the transparency of NMFS’ administration of limited access programs and enable parties to have information necessary for appealing determinations.

It is important to note that the statutory exception in MSA 402(b)(1)(G) applies regardless of whether NMFS actually has made a determination. Therefore, NMFS’ proposed rule would allow for release of information required to be submitted for a determination, even if NMFS has not made one. Information could be disclosed under the exception if there are sufficient facts suggesting that NMFS will use the information to make a determination, such as where participants in a limited access program submit information to NMFS for it to determine

whether the participants have fished within their allocated privileges. The information would be immediately releasable even if NMFS has not made its determination.

Similarly, prior landing information would be releasable if a Council had submitted an FMP or plan amendment for a limited access program for Secretarial approval and NMFS issued a notice in the Federal Register stating that it will use prior landings data for initial allocation determinations under a proposed limited access program. However, the exception would not be applicable where a Council is merely considering developing a limited access program. In that case, there would be insufficient facts to support a conclusion that information was submitted to NMFS for it to make a determination under a limited access program.

NMFS believes that the proposed rule approach will enhance accuracy in limited access program implementation. For example, by making catch histories available before making initial allocation determinations, fishermen can verify the accuracy of the information.

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

NMFS has considered several issues related to the scope of information to be covered under the limited access program exception to the confidentiality requirements. Specifically, NMFS has considered tailoring information releases to the relevant determination, maintaining medical and other information as confidential, releasing limited access program information submitted prior to the MSRA, and releasing information that was initially submitted for non-limited access program reasons. NMFS solicits public comment on its proposed approaches to these four issues, as described below, and also on other potential approaches for addressing the scope of information to be covered under the exception.

NMFS proposes that information releases be tailored for release at the level of the relevant limited access program determination. Thus, information submitted by a specific vessel for a determination about that vessel would be released at the vessel level. However, information submitted by a sector for a determination related to all vessels that operate in the respective sector would be released at the sector level. For example, the Georges Bank Cod Hook Sector is required to submit information on the vessel catch or effort history, and NMFS uses this information to determine whether the Sector is complying with its approved Sector Operations Plan. In this instance, information would be released at the sector level. There may, however, be instances where NMFS uses a sector's data to make determinations about each vessel within the sector. In such cases, information would be released at the vessel level.

NMFS has considered that medical and other personal information may be used for certain determinations under limited access programs and therefore would be within the scope of the confidentiality exception contemplated by subparagraph 402(b)(1)(G). For example, shareholders under the North Pacific Sablefish and Halibut Individual Transferable Quota (ITQ) program must submit such information to support an application for a medical transfer under the regulations. In such cases, NMFS would consider whether Exemption Six of the Freedom of Information Act 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 Exemptions to information that is otherwise releasable under subparagraph 402(b)(1)(G).

NMFS is considering the treatment of information previously maintained as confidential. Prior to the enactment of the MSRA, a number of fisheries were managed under limited access

programs. NMFS required information to be submitted for determinations under these programs. Accordingly, development of these confidentiality regulations requires consideration of whether the confidentiality exception in MSA section 402(b)(1)(G) applies to information submitted prior to the passage of the MSRA.

Congress did not expressly say whether MSA 402(b)(1)(G) applies to information submitted prior to enactment of the 2006 MSRA. NMFS believes there are two approaches to this issue. NMFS could apply the exception to all limited access program information submitted to NMFS, regardless of when the information was submitted. Under this approach, NMFS could release information pursuant to this exception even if the information had been submitted prior to enactment of the MSRA. This approach reflects an application of current law, in that the limited access program exception would be applied to NMFS' post-MSRA handling of information. Alternatively, NMFS could apply the exception only to information which has been required to be submitted at a point after enactment of the MSRA. This approach recognizes that when people submitted information pre-MSRA, they may have had a different understanding of what information NMFS could release than that which the current law permits.

NMFS is inclined to apply the exception for limited access program information without regard to when a person submitted information to the agency. Applying the current law in a manner favoring disclosure would enhance transparency as to the historical distribution of resources under limited access programs and allow prospective purchasers of fishing permits to have greater access to permit catch histories. Although NMFS is disinclined to adopt an approach that would apply the exception for limited access information based on the timing of the submission of the information, the agency is interested in public comment on this approach and other potential approaches. NMFS also specifically seeks comment on how the preferred

approach or others would affect business or other interests, including comments on expectations of, or reliance on, confidentiality protections.

In addition, NMFS notes that non-limited access program fisheries may, through appropriate Council or Secretarial action, transition to limited access programs. In these situations, information submitted under a non-limited access program fishery may later be relevant for determinations regarding privileges under a newly established limited access program. 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 limited access programs be treated as within the scope of the confidentiality exception under subparagraph 402(b)(1)(G). NMFS seeks public comment on this proposed approach and other approaches to this issue.

2. Exception for release of information required under court order: Magnuson-Stevens Act section 402(b)(1)(D) provides an exception for the release of confidential information when required by court order. 16 U.S.C. 1881a(b)(1)(D). Information disclosed under this exception may become part of a public record. To clarify when this section applies, NMFS proposes definitions for “court” and “order” which make clear that the exception applies only to orders issued by a federal court (§ 600.425(d)). In developing these definitions, NMFS considered whether an order from a state court was within the scope of MSA section 402(b)(1)(D). Unless expressly waived by Congress, sovereign immunity precludes state court jurisdiction over a federal agency. In NMFS’ view, Congress has not waived sovereign immunity through MSA section 402(b)(1)(D). Therefore, under this proposed rule, NMFS would not honor state court orders as a basis for disclosure of confidential information. State court orders would be handled

under 15 CFR part 15, subpart A, which sets forth the policies and procedures of the Department of Commerce regarding the production or disclosure of information contained in Department of Commerce documents for use in legal proceedings pursuant to a request, order, or subpoena.

3. Exception for release of information to aid law enforcement activity: This proposed rule would add text to address sections 402(b)(1)(A) and (C) of the Magnuson-Stevens Act, which provide that confidential information may be released to federal and state enforcement personnel responsible for fishery management plan enforcement. (§ 600.425(e)). The proposed rule would allow enforcement personnel to release confidential information during the enforcement of marine natural resources laws. In such cases, previously confidential information may become part of a public record.

4. Exception for release of information pursuant to written authorization: Section 402(b)(1)(F) of the Magnuson-Stevens Act 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). Through this rulemaking, NMFS proposes procedures to ensure that the written authorization exception is utilized only by the person who submitted the information. To that end, NMFS proposes that a person who requests disclosure of information under this exception 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.

Generally, the holder of the permit for a vessel, or the permit holder’s designee, will be considered the person who submitted information in compliance with the requirements of the MSA. In cases where requirements to provide information are not tied to a permit, the person

who is required to submit the information and is identified in the information as the submitter may execute the written authorization for that information. In most cases, the identity of the submitter of information will be the person who signed the document provided to NMFS. For example, the regulation that implements the MSA financial interest disclosure provision requires that persons nominated for appointment to a regional fishery management council file a signed financial interest form. 16 U.S.C. 1852(j). As the person who is required to submit and sign the financial interest form, a Secretarial nominee would be considered the submitter of the form and, as such, would be able to authorize its disclosure. NMFS intends to develop and make available a model “authorization to release confidential information” form.

In the context of the observer information provisions of MSA section 402(b), the written authorization exception is subject to different interpretations. The exception applies when the “person submitting” information requests release of such information. MSA section 402(b)(2) provides for disclosure of observer information under the written authorization exception but does not identify who the “person submitting” that information is. Accordingly, to apply the written authorization exception to observer information, the submitter of observer information must be identified.

A further complication is that observer programs collect and create different types of observer information for fishery conservation and management. The primary category of observer information is information that is used for scientific and management purposes. Among other things, the Magnuson-Stevens Act requires that fishery management plans specify pertinent data on fishing and fish processing to be submitted to the Secretary, 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. 16 U.S.C. 1853(a)(5). The Act also

requires establishment of standardized bycatch reporting methodology. Id. 1853(a)(11). To obtain this and other information, FMPs may require that vessels subject to the plan carry one or more observers. Id. 1853(b)(8).

In addition, NMFS' regional observer programs have established administrative procedures through which observers create information for program operation and management. Information created through these administrative procedures is used to review observer performance, evaluate the observer's data and collection methodology, and to assess any reports of non-compliance with fishery regulations. More generally, observer programs use this information to evaluate the overall effectiveness of the observer program. Program administrative procedures generally require observers to maintain an official logbook (also referred to as field notes, a journal or diary) 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 and their general recollection of the fishing trip to answer post-trip debriefing 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 is interested in public comment on different options for applying the written authorization exception to observer information. As discussed above, it is unclear what observer information is submitted and who acts as the "person submitting" observer information. One

approach would be to treat the permit holder as the person who submits both types of observer information. That is, the permit holder would be the person who submits observer information collected for scientific and management purposes and observer information created for administration of the observer program. A second option would be to treat the observer, or the observer's employer, as the person who submits both types of observer information. A third option would be to treat the permit holder as the submitter of observer information collected for scientific and management purposes but not as the submitter of observer information that is created for program administration (e.g, field notes, journals, or diaries). Under this option, there would be no submitter of observer information that is created for program administration. Rather, this information would be treated as internal program information and not subject to the written authorization exception.

In light of the ambiguity in the statute, and recognizing the different purposes for the two types of observer information, NMFS is proposing to apply the third approach and is disinclined to adopt the other two options. However, NMFS will consider the other two options following public comment.

Under NMFS' proposed approach, permit holders would be considered the submitters of information collected for scientific and management purposes and would therefore be allowed to authorize release of that information. On the other hand, there would be no "submitter" of observer information created for administration of the observer program and it would be treated as internal program information. As such, this information would not be subject to disclosure to the permit holder under the written authorization exception or under FOIA. In withholding debriefing reports, NMFS would apply FOIA Exemption Three, which, as explained above,

authorizes the withholding of information that is prohibited from disclosure under another Federal statute. Here, MSA section 402(b)(2) requires the withholding of observer information.

NMFS believes that this approach is consistent with the definition of “submit.” Observers submit information collected for scientific and management purposes to the respective observer programs but do so on behalf of the permit holder that is required to carry an observer. Observer information compiled for administration of the observer program, including information set forth in observer logbooks, journals, or diaries and the information in observer debriefing reports, is not “submitted” information. Rather, this information is created through program administrative procedures and should be treated as internal program information.

In addition, NMFS believes that the third approach is consistent with the purpose of the written authorization exception, which is to provide permit holders and other submitters of information with access to information that concerns their business and that was obtained by NMFS through a person’s compliance with a requirement or regulation under the Magnuson-Stevens Act.

B. Proposed Changes Requiring the Protection of Business Information in Releases Allowed by Aggregation and Summarization Exception

NMFS proposes regulatory definitions to ensure protection for business information. 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). Under this provision, the Secretary, acting through NMFS, may aggregate and summarize information that is subject to the Act's confidentiality requirements into a non-confidential form.

The application of the provision's language directly corresponds to the level of protection afforded to information that is subject to the MSA confidentiality requirements. Current agency regulations include a definition of "aggregate or summary form" that allows for the public release of information subject to the confidentiality requirements if the information 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." § 600.10. The regulations also state that the Assistant Administrator for Fisheries will not release information "that would identify the submitter, except as required by law." Id. § 600.425(a). As a result, information may be disclosed in any aggregate or summary form that does not disclose the identity of a submitter. These regulations focus on protection of submitters' identity, but this approach does not provide any specific protection for submitters' "business" information.

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 has historically interpreted the two different elements of MSA 402(b)(3) – "identity of any person" and "business of any person" – to mean submitters' identifying information, including that which would identify them personally and that which would identify their businesses. NMFS has reassessed the application of MSA section 402(b)(3) and, based on this reassessment, believes that Congress intended the MSA confidentiality provision to protect a broader scope of information than that which would identify submitters. Therefore, NMFS proposes to revise the regulatory definition of "aggregate or summary form" to protect against the disclosure of the "business of any person" and proposes to add a specific definition for

“business of any person” that would provide broader protection for information submitted in compliance with the MSA and any observer information.

The statutory language “business of any person” is ambiguous, and NMFS acknowledges that it could be subject to different interpretations. As explained above, NMFS has historically interpreted this language to mean only the identity or name of a person’s business such as “ABC Fishing Company.” NMFS believes that a broader interpretation is more consistent with congressional intent and legal rules for interpretation of statutes. Therefore, NMFS proposes to clarify “business of any person” by defining it at § 600.10 as meaning financial and operational information. Financial information would include information in cash flow documents and income statements, and information that contributes to the preparation of balance sheets. Operational information would include 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. 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 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. NMFS intends to develop, and make available for public comment, aggregation guidelines based on the definition for aggregate or summary form and other elements of the final MSA confidentiality rule. NMFS' preferred option is to adopt an approach that requires protection of submitters' business information. Accordingly, the agency is disinclined to continue to allow for the disclosure of aggregated or summarized information that protects only submitters' identifying information. However, NMFS seeks specific public comment on the proposed definitional changes and other potential options to aggregation and summarization of information subject to the confidentiality requirements.

Exclusion of Observer Information from Definition of Protected Business Information

In developing this proposed rule, NMFS considered whether its definition for "business of any person" should include observer information that concerns interactions with protected species. As discussed above, NMFS may release MSA confidential information in "aggregate or summary form," which would "not directly or indirectly disclose the identity or business of any person." By excluding observer information that concerns interactions with protected species from the definition of "business of any person," observer information could be released publicly in aggregate or summary form as long as it would not directly or indirectly result in disclosure of the identity of the vessel involved in the interaction. Thus, in most cases, NMFS would be able to disclose specific details of interactions with protected species.

Release of observer information that concerns interactions with protected species would advance implementation of statutory mandates under the MMPA and the ESA. For example, this information is critical for deliberations by Take Reduction Teams (TRT) 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 protected species, TRTs may be unable to develop targeted plans to reduce bycatch of protected species.

Detailed information on interactions with protected species may also facilitate implementation of the ESA. NMFS may need to present detailed information about commercial fisheries interactions with species listed under the ESA in a biological opinion. See § 402.14(g)(8) (requirements for biological opinions). Furthermore, both the MMPA and the ESA require that NMFS use the best available scientific information when making determinations. 16 U.S.C. 1386(a) (MMPA stock assessments) and 16 U.S.C. 1536(c)(1) (ESA biological assessments).

For these reasons, NMFS proposes that the definition of “business of any person” exclude the following observer information on protected species interactions: species of each marine mammal or ESA-listed species incidentally killed or injured; the date, time, and geographic location of the take; and information regarding gear used in the take that would not constitute a trade secret under FOIA, 5 U.S.C. 552(b)(4). While excluding observer information that concerns interactions with protected species from the definition of “business of any person” would advance MSA, ESA, and MMPA mandates, NMFS recognizes that it would also result in the public disclosure of specific information collected by observers during fishing operations.

For example, the location of an interaction with a protected species would, in some cases, identify where a vessel fished.

Because observer information that concerns interactions with protected species could also be viewed as a vessel's operational information, NMFS seeks public comments on this proposed approach and other potential approaches to this issue. Although NMFS is disinclined to define "business of any person" to include observer information that concerns interactions with protected species, the agency will consider viable approaches other than its proposed interpretation.

C. 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 protect the information.

1. Adding procedures that authorize the sharing of observer information between observer employer/observer providers for observer training or to validate the accuracy of the observer information collected. (§ 600.410(c)(4)).

2. Adding procedures that authorize the disclosure of confidential information in support of homeland and national security activities. (§ 600.415(c)(3)).

3. Adding procedures that authorize the disclosure of confidential information to State employees responsible for fisheries management. (§ 600.415(d)).

4. Adding procedures that authorize the disclosure of confidential information to State employees responsible for FMP enforcement pursuant to a Joint Enforcement Agreement with the Secretary. (§ 600.415(e)).

5. Adding procedures that authorize the disclosure of confidential information to Marine Fisheries Commission employees. (§ 600.415(f)).

6. Revising procedures under which confidential information can be disclosed to Council members for use by the Council for conservation and management purposes. (§ 600.415(g)(2)). 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 the Assistant Administrator, NOAA Fisheries (AA), to grant a Council access to confidential information upon written request by the Council Executive Director. In determining whether to grant access, the AA 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, NMFS proposes to clarify and revise § 600.415(d)(2)(ii) by removing the “public disclosure” text.

7. Adding procedures to authorize release of confidential information to a Council’s scientific and statistical committee (SSC). (§ 600.415(g)(3)). 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). To carry out these responsibilities, SSC members may need to evaluate confidential information. NMFS may release confidential information to Federal and State employees appointed to a Council's SSC 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. Because all members of a Council's SSC 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 that are not Federal or State employees be granted access to confidential information.

NMFS proposes to add this procedure 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 has in development and amendment of any FMP, NMFS believes that establishing a process for releasing confidential information to an SSC is consistent with the statutory authorization that allows a Council to use confidential information for fishery conservation and management. NMFS recognizes the concern that members of a SSC, 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 the AA to approve any request from a Council Executive Director that confidential information be

released to the Council for use by SSC members who are not Federal or State employees. In making a decision regarding such a request, the AA must consider whether those SSC members might gain personal or competitive advantage from access to the information.

8. Adding procedures that authorize the release of observer information when the information is necessary for proceedings to adjudicate observer certifications. (§ 600.425(b)).

IV. 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 limited access program 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.

V. Classification

The NOAA Fisheries Assistant Administrator has determined that this proposed rule is consistent with 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:

Under section 402(b)(3) of the MSA, the Secretary of Commerce is required to prescribe by regulation procedures necessary to maintain the confidentiality of information submitted in compliance with the Act. These regulations are set forth 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

requirements of the Magnuson-Stevens Act as amended by the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act and the 1996 Sustainable Fisheries Act. Specifically, 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 includes proposed revisions to implement the 1996 Sustainable Fisheries Act and to update the regulations to reflect NMFS' policy on the release of MSA confidential information in an aggregate or summary form.

This proposed action applies only 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 apply to private companies that provide observer staffing support to NMFS and to industry sponsored observer programs. Nine private companies currently provide observers on a seasonal or ongoing basis to support the collection of information in 42 fisheries. The proposed regulations require observer providers to take steps to maintain the confidentiality of information. To satisfy this requirement, observer providers must have a secure area for the storage of confidential information. Compliance costs would include purchase of a lockable filing cabinet and enhanced managerial supervision. These costs would be minimal and all observer providers that currently contract with NMFS 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, Information.

Dated: May 17, 2012

Alan D. Risenhoover,
Acting Deputy Assistant Administrator
For Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 600 is proposed to be amended 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. In § 600.10,
 - a. Remove definitions of “Confidential statistics” and “Data, statistics, and information”;
 - b. Revise the definition of “Aggregate or summary form” and;
 - c. Add new definitions for “Business of any person”, “Confidential information”, and “Observer employer/observer provider” in alphabetical order, to 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 that 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 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, 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.

(3) Business of any person does not include the following observer information related to interactions with species protected under the Marine Mammal Protection Act and the Endangered Species Act: the date, time, and location of interactions, the type of species, and the gear involved provided that information regarding gear would not constitute a trade secret under the Freedom of Information Act, 5 U.S.C. 552(b)(4).

* * * * *

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.

* * * * *

Observer employer/observer provider means any person that provides observers to fishing vessels, shoreside processors, or stationary floating processors under a requirement of the Magnuson-Stevens Act.

* * * * *

§ 600.130 [Amended]

3. In § 600.130 the word “statistics” is removed and the word “information” is added in place, wherever it occurs.

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

Subpart E—Confidentiality of Information

Sec.

600.405 Types of information covered.

600.410 Collection and maintenance of information.

600.415 Access to information.

600.420 Control system.

600.425 Release of confidential information.

600.430 Release of information in aggregate or summary form.

Subpart E--Confidentiality of Information

§ 600.405 Types of information covered.

NOAA is authorized under the Magnuson-Stevens Act and other statutes to collect and maintain information. This part applies to confidential information as defined at § 600.10.

§ 600.410 Collection and maintenance of information.

(a) General. (1) Any information required to be submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission in compliance with any requirement or regulation under the Magnuson-Stevens Act shall be provided to the Assistant Administrator.

(2) Appropriate safeguards set forth in NOAA Administrative Order 216-100 and other NOAA/NMFS internal procedures apply to the collection, maintenance, and disclosure of any confidential information.

(b) Collection agreements with States or Marine Fisheries Commissions. (1) The Assistant Administrator may enter into an agreement with a State or a Marine Fisheries Commission authorizing the State or a Marine Fisheries Commission to collect confidential information on behalf of the Secretary.

(2) To enter into a cooperative collection agreement with a State or a Marine Fisheries Commission, NMFS must determine that:

(i) The State has confidentiality protection authority comparable to the Magnuson-Stevens Act and that the State will exercise this authority to prohibit public disclosure of the identity or business of any person.

(ii) The Marine Fisheries Commission has enacted policies and procedures comparable to the Magnuson-Stevens Act and that the Commission will exercise such policies and procedures to prohibit public disclosure of the identity or business of any person.

(c) Collection services by observer employer/observer provider. Before issuing a permit, letting a contract or grant, or providing certification to an organization that provides observer services, the Assistant Administrator shall determine that the observer employer/observer provider has:

(1) Enacted policies and procedures to protect confidential information from public disclosure;

(2) Entered into an agreement with the Assistant Administrator that prohibits public disclosure of confidential information and identifies the criminal and civil penalties for unauthorized use or disclosure of confidential information provided under 18 U.S.C. 1905 and 16 U.S.C. 1858; and

(3) Required each observer to sign an agreement with NOAA/NMFS that prohibits public disclosure of confidential information and identifies the criminal and civil penalties for unauthorized use or disclosure of confidential information provided under 18 U.S.C. 1905 and 16 U.S.C. 1858.

(4) Observer employers/observer providers that fulfill the requirements of this subsection may share observer information among observers and between observers and observer employers/observer providers as necessary for the following:

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

§ 600.415 Access to information.

(a) General. NMFS will determine whether a person may have access to confidential information under this section only when in receipt of a written request that provides the following information:

- (1) The specific types of information requested;
- (2) An explanation of why the information is necessary to fulfill a requirement of the Magnuson-Stevens Act;

(3) The duration of time that access will be required: continuous, infrequent, or one-time;
and

(4) An explanation of why aggregated or summarized information available under § 600.430 would not be sufficient.

(b) NOAA enforcement employees are presumed to qualify for access to confidential information without submission of a written request.

(c) Federal employees. Confidential information under this section will only be accessible by the following:

(1) Federal employees who are responsible for FMP development, monitoring, or enforcement. This includes persons that need access to confidential information to perform functions authorized under a federal contract, cooperative agreement, or grant awarded by NOAA/NMFS.

(2) NMFS employees and contractors that perform research that requires access to confidential information.

(3) Federal employees for purposes of supporting homeland and national security activities at the request of another federal agency only if:

(i) Providing the information supports homeland security or national security purposes 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)); and

(ii) The requesting agency has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the requesting agency has confidentiality policies and procedures to protect the information from public disclosure.

(d) State fishery management employees. Confidential information may be made accessible to a State employee responsible for fisheries management only by written request and only if the employee has a need for confidential information to further the Department of Commerce's mission, and the State has entered into a written agreement between the Assistant Administrator and the head of the State's agency that manages marine and/or anadromous fisheries. The agreement shall contain a finding by the Assistant Administrator that the State has confidentiality protection authority comparable to the Magnuson-Stevens Act and that the State will exercise this authority to prohibit public disclosure of the identity or business of any person.

(e) State enforcement personnel. Confidential information will be accessible by State employees responsible for enforcing FMPs, provided that the State for which the employee works has entered into a Joint Enforcement Agreement and the agreement is in effect.

(f) Marine Fisheries Commission employees. Confidential information may be made accessible to Marine Fisheries Commission employees only upon written request of the Commission and only if the request demonstrates a need for confidential information to further the Department of Commerce's mission, and the executive director of the Marine Fisheries Commission has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the Marine Fisheries Commission has enacted policies and procedures comparable to the Magnuson-Stevens Act and that the Commission will exercise such policies and procedures to prohibit public disclosure of the identity or business of any person.

(g) Councils. A Council, through its Executive Director, may request that access to confidential information be granted to:

(1) Council employees who are responsible for FMP development and monitoring.

(2) Council members for use by the Council for conservation and management purposes. Such a request must be approved by the Assistant Administrator. In making a decision about a request, the Assistant Administrator will consider the information described in paragraph (a) of this section and the possibility that Council members might gain personal or competitive advantage from access to the information.

(3) Council scientific and statistical committee members, who are not federal or State employees, if necessary for the Council's evaluation of statistical, biological, or economic information relevant to such Council's development and amendment of any FMP. Such a request must be approved by the Assistant Administrator. In making a decision about a request, the Assistant Administrator will consider the information described in paragraph (a) of this section and the possibility that Council members might gain personal or competitive advantage from access to the information.

(4) A contractor of the Council for use in such analysis or studies necessary for conservation and management purposes, with approval of the Assistant Administrator and execution of an agreement with NMFS as described in NOAA Administrative Order 216-100 or other NOAA/NMFS internal procedures.

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

(1) Enforcement employees of a State which 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.

(i) Prohibitions. Persons having access to confidential information under this section may be subject to criminal and civil penalties for unauthorized use or disclosure of confidential information. See 18 U.S.C. 1905, 16 U.S.C. 1857-1858, and NOAA/NMFS internal procedures.

§ 600.420 Control system.

(a) NMFS must maintain a control system to protect any information submitted in compliance with any requirement or regulation under the Magnuson-Stevens Act. The control system must:

- (1) Identify those persons who have access to confidential information;
- (2) Contain procedures to limit access to confidential information to authorized users; and
- (3) Provide handling and physical storage protocols for safeguarding of the information.

(b) Require persons authorized to access confidential information to certify that they:

- (1) Are aware that they will be handling confidential information, and
- (2) Have reviewed and are familiar with the procedures for handling confidential

information.

§ 600.425 Release of confidential information.

(a) NMFS will not disclose to the public any confidential information except when:

(1) Authorized by an FMP or regulations under the authority of 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.

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

(b) Information is required to be submitted to the Secretary for any determination under a limited access program. This exception applies to confidential information that NMFS has used, or intends to use, for a regulatory determination under a limited access program. For the purposes of this exception:

(1) Limited Access Program means a program that allocates 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 grant, denial, or revocation of privileges; approval or denial of a transfer of privileges; or other similar regulatory determinations by NMFS applicable to a person.

(c) 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 consisting of one or more judges who seek to adjudicate disputes and administer justice. 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.

(d) 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.

(e) The Secretary has obtained written authorization from the person submitting such information to release it to persons for reasons not otherwise provided for in Magnuson-Stevens Act subsection 402(b) and such release does not violate other requirements of the Act. NMFS will apply this exception as follows:

(1) When a permit-holder is required to submit information in compliance with requirements of the Act, the permit-holder or designee may execute the written authorization for release of that information. Otherwise, the person who is required to submit the information and is identified in that information as the submitter may execute the written authorization for that information.

(2) For observer information, a permit-holder may execute a written authorization for release of observed catch, bycatch, incidental take data, economic data, recorded biological sample data, and other information collected for scientific and management purposes by an observer while carried aboard the permit-holder's vessel.

(3) A permit-holder or designee or other person described under paragraph (f)(1) of this section must provide a written statement authorizing the release of the information and specifying the person(s) to whom the information should be released.

(4) A permit-holder or designee or other person described under paragraph (f)(1) of this section must prove identity by a statement of identity 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 must be in the following form:

(i) 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)".

(ii) 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)".

(5) The Secretary must determine that a release under paragraph (f) of this section does not violate other requirements of the Magnuson-Stevens Act and other applicable laws.

§ 600.430 Release of information in aggregate or summary form.

The Secretary may disclose in any aggregate or summary form information that is required to be maintained as confidential under these regulations.

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