

Magnuson-Stevens Act (MSA) Data Confidentiality Proposed Rulemaking

NOAA Fisheries - Overview Briefing
Mid-Atlantic Fishery Management Council Meeting

(*Laura Keeling, Brett Alger, Keith Hagg, Brett Wiedoff)

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Why are the regulations being updated?

MSA section 402(b)(3) 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.” 16 U.S.C. §1881a(b)(3).

- Regulations at 50 CFR subpart E were last updated in 1992
- **NOAA Administrative Order 216-100** - Protection of Confidential Fisheries Statistics - updated in 1996
- Updates are warranted to bring our regulations in line with:
 - 1996 Sustainable Fisheries Act (SFA) and 2006 MSA Reauthorization Act (MSRA)
 - 2015 Illegal, Unreported, and Unregulated (IUU) Fishing Act Amendments to the Moratorium Protection Act
 - Contemporary monitoring and reporting programs (ex. camera-based electronic monitoring)
 - Streamline procedures for managing confidential information by the fishing industry, Regional Fishery Management Councils, states, commissions, and other entities that need such information for fishery conservation and management purposes

Technical and Procedural Elements in the Proposed Rule

Scope

- 1996 SFA - changed text from 'confidential statistics' to 'confidential information';
- 2006 MSRA - information submitted to the Secretary plus State FMAs, Marine Fisheries Commissions, clarify that the regulations apply to info under NOAA Fisheries' custody and control

Procedures for protection of information

- Initiates a process to improve existing procedures for maintenance of confidential information and replace them with a framework to be developed after the final rule

Procedures to implement exceptions

- MSA 402(b)(1) & (2) exceptions (e.g., Council access to confidential information)

Collection

- Updates procedures for how States and Observer/EM Service Providers can collect confidential information

Substantive Interpretations in the Proposed Rule

- Definition of confidential information (and not confidential)
- Define “business of any person” and protect that information from aggregate or summary form disclosures
- Define elements of the limited access program (LAP) exception
- Clarify who may submit a written authorization for release of confidential information and how such authorizations apply to observer information

What Is MSA Confidential Information

Any observer information as defined under 16 U.S.C. 1802(32) or any information **required to be 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 MSA.

What Is Not MSA Confidential Information

To address the 2015 Amendments to the Moratorium Protection Act:

1. Fishing effort, catch information, and other forms of vessel-specific information that the U.S. must provide to a Regional Fishery Management Organization in order to satisfy information sharing obligations;
2. Any information collected by NOAA Fisheries under the MSA regarding foreign vessels.

What Is Not MSA Confidential Information

Observer information related to interactions with species protected under the Marine Mammal Protection Act (MMPA): 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);

However

- The Endangered Species Act (ESA) does not contain provisions regarding the public use of information unlike the MMPA.
- NOAA Fisheries would continue to treat interactions with ESA-listed species as confidential information.

What information would be subject to the LAP exception?

Under the Limited Access Program exception, NOAA Fisheries may disclose confidential information “when such information is **required to be submitted** to the Secretary for **any determination under a limited access program.**”

The proposed rule would define the following elements of the LAP exception:

- **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.
- **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.
- **Required to be submitted** is interpreted such that the “exception applies at the level of confidential information that NOAA Fisheries has used, or intends to use, for a regulatory determination under a LAP.”

Applying the MSA written authorization exception

What is the 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).

How does this exception apply to observer information?

- Proposed rule clarifies that **observer information is submitted by the person who is subject to the observer coverage requirement.**
 - That person can apply the written authorization exception to authorize release of observer information but not other information collected for program management purposes (e.g., post-trip observer debriefing reports)

How does the proposed rule address aggregate and summary releases?

Under MSA 402(b)(3), the Secretary may aggregate or summarize confidential information and release publicly if in a form that does not directly or indirectly disclose the identity or **business of any person** who submits such information

- Proposed rule would revise definition for "aggregate or summary form" to explicitly address "business of any person" and define it as meaning financial and operational information, e.g., fishing locations, gear employed, catch.
- **This change would provide broader protection for fishing information that is submitted through logbooks or collected through observers or electronic monitoring.**

Updating NOAA Fisheries' Internal Control Procedures

- The internal control procedures would address at least the following:
 - Data Aggregation Standards (i.e., Rule of Three)
 - To create consistency in decision-making for releasing aggregated data
 - Accessing confidential information by third-parties
 - To facilitate Councils, Commissions, contractors, and others accessing data
 - Processes for permit holders requesting information
 - To improve data access for vessel owners/operators (e.g., observer data)
- We will provide opportunities for engagement during development of the internal control procedures and they will be shared publicly

Thank you. Questions?

Public comments must be received on or before
Thursday, April 25, 2024

<https://www.regulations.gov/docket/NOAA-HQ-2023-0146>

For further questions please contact:
nmfs.msa.confidentiality@noaa.gov