



Mid-Atlantic Fishery Management Council

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P. Weston Townsend, Chairman | Michael P. Luisi, Vice Chairman
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April 25, 2024

Karl Moline
Office of Science and Technology
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Moline:

The Mid-Atlantic Fishery Management Council offers the following comments on the proposed rule published in the Federal Register on March 11, 2024, regarding confidentiality of information under the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

General Comments on the Rulemaking Process

The Council appreciates the agency's efforts to clarify and streamline the regulations and procedures concerning confidential information. We recognize that certain revisions are needed to bring the regulations in line with the 1996 and 2006 amendments to the MSA and to address questions and issues that have arisen in the years since the existing regulations were implemented. We are concerned, however, that NMFS has not allowed adequate time and opportunity for review of the proposed rule given the scope of regulatory changes being considered. Furthermore, NMFS' request that clarifying questions be included in comments rather than resolved through staff-to-staff discussion has limited the Council's and public's ability to comment meaningfully on this action. As such, we recommend that NMFS provide an initial response to questions or comments seeking clarification and then re-open the comment period for additional comments after any clarifying questions have been addressed (this process is noted as an option by the Federal Register's *Guide to the Rulemaking Process*).

Specific Comments on the Proposed Rule

The proposed rule would replace the term "statistics" with "information" in § 600.130 and all regulations under 50 CFR subpart E.

Comment: The Council supports this change as being consistent with the MSA and is generally how the Council has approached this issue.

The proposed rule would add provisions to authorize release of confidential information to a Council's Scientific and Statistical Committee (SSC) and advisory panels (APs).

Comment: The Council supports this addition. While we have generally not seen a need for our SSC or AP members to access CI in the past, establishing a process for such disclosure is consistent with the statutory authorization that allows a Council to use confidential information for making its recommendations on fishery conservation and management. In addition, we recommend that access to confidential information should be granted for regional stock assessment purposes, including stock assessment working groups. Some members of stock

assessment working groups are not Federal, State, or Council/Commission employees or contractors and thus are not covered by the proposed rule.

The proposed rule modifies the wording at § 600.415(d), which affects Council staff access. Where the regulations currently read “Upon written request by the Council Executive Director, access to confidential data will be granted...,” the revised regulations in the proposed rule read “A Council Executive Director may request access for...”

Comment: Without further clarity on the rationale for this change or its potential implications for Council staff, we recommend maintaining the existing regulatory language regarding Council staff CI access.

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. Under this proposed rule, NMFS would be required to establish internal control procedures for maintenance of, and access to, any confidential information.

Comment: The Council generally supports the development of updated internal control procedures for the maintenance of and access to confidential information. We encourage NMFS to specify in the final rule and in the revised regulatory text that the control procedures established pursuant to § 600.410 will be developed through a public process in consultation with the Councils and with opportunities for public review and comment. While NMFS' presentation to the Council notes “We will provide opportunities for engagement during development of the internal control procedures and they will be shared publicly,” the discussion in the proposed rule states only “NMFS will make these procedures available to the public.” The lack of specificity on even the advertised engagement makes it impossible to provide meaningful comments on whether the process for developing these internal control policies might be sufficient.

Under the proposed rule, the definition of “confidential information” would be modified to explicitly exclude certain vessel-specific observer information related to interactions with species protected under the Marine Mammal Protection Act (MMPA). The proposed rule states that this information is critical for deliberations by Take Reduction Teams (TRTs), which are established under the MMPA and must meet in public. Discussion in the proposed rule notes: “...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.”

Comment: The Council disagrees with the proposed rule's characterization of MMPA confidentiality requirements. Existing regulations at 50 CFR Part 229 (Authorization for Commercial Fisheries Under the MMPA) establish broad confidentiality requirements for commercial fisheries information submitted under the MMPA. Specifically, 50 CFR 229.11 states that “Proprietary information collected under **this part** [emphasis added] is confidential and includes information, the unauthorized disclosure of which could be prejudicial or harmful, such as information or data that are identifiable with an individual fisher.” This requirement applies to observer information collected under 229.7 and self-reported information collected under 229.6. We also note that self-reported MMPA data is also only *approximate* geographic

location (the word approximate was omitted from the proposed rule's discussion), not exact location as collected by observers. Further, 16 U.S.C. 1387(d)(8) seems to have equal if not greater protection of data collected via observers regarding marine mammals. We encourage the agency to review the relevant regulations and statutes to ensure alignment of proposed changes with existing confidentiality requirements.

A more appropriate way to address the agency's concerns would be to allow individual TRT members to access confidential information through a process similar to the one proposed for SSC and Advisory Panel members, with equivalent restrictions on public disclosure of non-aggregated observer information. We believe such an exemption for TRT members would be permissible under the regulations at 50 CFR 229.11(a)(5), which provide for the disclosure of confidential MMPA information to "other individuals or organizations authorized by the Assistant Administrator to analyze this information, so long as the confidentiality of individual fishers is not revealed."

The proposed rule notes: "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."

Comment: An example of these circumstances would be necessary to meaningfully comment on this aspect of the proposed rule.

The proposed rule references a certification that it would not have a significant economic impact on a substantial number of small entities.

Comment: Any vessel with a federal fishing permit that might have observers is potentially affected if there are changes to how their data are treated (confidentially or not) and should be included in a description of the potential entities affected.

Thank you for your consideration of these comments. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Moore". The signature is fluid and cursive, with a large initial "C" and a stylized "Moore".

Christopher M. Moore, Ph.D.
Executive Director
Mid-Atlantic Fishery Management Council

cc: Wes Townsend