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Karl Moline
National Marine Fisheries Service (NMFS)
Fisheries Statistics Division
F/ST1, Room 12441
1315 East West Highway
Silver Spring, Maryland 20910

October 21, 2012

Re. Confidentiality of Information Proposed Rule RIN 0648-AV81

Dear Mr. Moline,

Thank you for the opportunity to comment on NMFS' proposed rule on Confidentiality of Information. Association for Professional Observers (APO) is an organization that advocates for the welfare of fisheries observers and science driven fisheries monitoring programs. As fisheries observers, we understand the difficulties other observers endure to provide NMFS with the data necessary to manage the fisheries. We place our trust in NMFS to use the data and information we collect for the good of the public. We trust that NMFS will use our information for purposes to further the protection of marine resources and the marine environment for current and future generations. NMFS is faced with the great challenge of being in charge of this public resource in the face of diminishing resources, both financial and living, increased demands for its monitoring, and having to balance the sometimes short-term desires of the fishing industry with long term public good. NMFS is also faced with having to comply with laws that are sometimes flawed.

Over the years, we have noticed several challenges that have contributed to a diminishing quality in our nation's observer programs. This rule is taking *our* fishery observer programs into the wrong direction – one of secrecy from the public, while being coerced to give preferential treatment to the fishing industry. We should all continue to remember in our decision-making and demands we make, that the nation's ocean resources, as well as beyond our trivial borders, are the world's public resource, *owned by none*, and fishing them is a privilege, not a right. It is our joint

responsibility to arrive at sound decisions that, first and foremost, benefit future generations. This requires openness and honesty in our discussions, which NMFS has lacked on the subject of this rule.

NMFS Lacks Adequate Stakeholder Input into the Preparation of this Rulemaking

In 2007, the reauthorization of the Magnuson Stevens Act (MS Act)¹ placed a blanket of secrecy over all information that observers collect, with some provisions to allow for public disclosure. NMFS had an opportunity to involve various stakeholders to use the available provisions to most effectively comply with this flawed legislation while satisfying our mandate to responsibly manage the nation's public fisheries resources with transparency – a characteristic of an open democratic government.

Instead NMFS has remained silent, secretly working behind closed doors. I was told by a NMFS staffer² when this rule was published that the reason NMFS didn't reach out to stakeholders during the development of this rule was because it would have taken even longer to arrive at this rulemaking. However, involving stakeholders and the public in fisheries management decisions is a mandate, not an option. Can NMFS please clarify its role with respect to MS Act Section 2(c)(3)? That section requires NMFS to be "responsive to the needs of, interested and affected States and citizens;" and must draw "upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement" and must be "workable and effective".

The subject of updating NMFS' observer information confidentiality guidelines has been languishing for at least 10 years, so NMFS has had ample opportunity to involve stakeholders before this. In 2002, the NMFS Alaska Region outlined "four guiding principles" for the release of observer data that appear to give preferential treatment to the fishing industry³. It also preferred case-by-case decisions on public disclosure of observer data and that it be made at the Council level. It's long been known that appointed Council members are overwhelmingly from fisheries that stand to profit from the management decisions they make.⁴

At the International Fisheries Observer Conference in 2007, the APO discussed with NMFS the possibility of holding a workshop with observer information users to grapple with the implications of the 2007 confidentiality provisions of the MS Act. We had hoped that NMFS would sit down and discuss the varying information needs of non-governmental scientists and organizations and that NMFS could then bring this to internal discussions in developing its confidentiality policies. NMFS frequently sponsors informational workshops when making substantive changes to regulations. Why did NMFS not perform this type of public outreach for this important issue?

¹ Magnuson-Stevens Act, as amended 2007

http://www.nmfs.noaa.gov/msa2005/docs/MSA_amended_msa%20_20070112_FINAL.pdf

² Chris Rilling, personal communication, June 2012

³ Memo to NMFS Headquarters from NMFS Alaska Region, Jim Balsiger, August 2002

http://www.apo-observers.org/docs/Balsiger_Aug%202002_1.pdf

⁴ Eagle, J., S. Newkirk, B.H. Thompson. 2003. Taking stock of the regional Fishery Management Councils. Pew Science Series on Conservation and the Environment.

http://www.apo-observers.org/docs/pew_science_taking_stock.pdf

NMFS also practices an outreach process known as “front-loading”, where NMFS facilitates meetings with stakeholders to discuss proposed legislation in detail before it is published for public comment. The purpose of this is to allow early participation of stakeholders to 1) discuss in detail the proposed rules and; 2) offer response based on their needs and concerns. If practiced fairly, this can facilitate stakeholder involvement with fishery management decisions, as the MS Act mandates. However, if NMFS gives preferential treatment in this process to select stakeholders, at the exclusion of others, this can lead to biased decision-making. Can NMFS describe the role of this process in NMFS outreach practices and list which stakeholders front-loaded their needs into this rule before it was published?

NMFS held closed internal workshops on the subject in 2008⁵ as a follow up to its 2003 internal workshop on the same subject⁶. NMFS has practiced what this rule proposes since at least 2009⁷ and has planned the proposed draconian definition of business information since at least 2002⁸. The only reason we know this is because, in 2009, APO resorted to a Freedom of Information Act (FOIA) request to obtain NMFS’ observer program FOIA policies and observer information aggregation practices - in other words, a FOIA request for NMFS’ FOIA policy.

Even after this rule was published NMFS wouldn’t discuss or answer questions regarding the implications of this rule. APO was told to put our questions in these comments. Only then would NMFS produce an answer, void of discussion, when it produced its final rule⁹. What is NMFS’ rationale for not discussing the implications of the rule when the rule has a contact number for more information? To ask us to comment on something we don’t understand and then refuse explanation is akin to refusing public comments. Can NMFS justify why it has not involved the public in the development of this very important rule?

Beyond that, here are my specific comments and questions:

General:

1. This proposal would severely limit our ability to advocate for fisheries observers and for the ability of the public to monitor the effectiveness of the nation’s fisheries observer programs. Likewise we fear that this proposed rule sets the stage to prevent non-governmental institutions and organizations to have adequate access to observer data and information. This information is necessary to analyze fishery impacts on the marine environment and to allow public participation in the federal government’s fishery management decision-making processes.

⁵ NMFS, National Confidentiality Workshop, January 15-17, 2008; Synthesis of regional data confidentiality procedures and suppression procedures.
http://www.apo-observers.org/docs/Agenda_Attendees_Summary_of_regional_procedures.pdf

⁶ NMFS Data Confidentiality Workshop, April 29-May 1, 2003
http://www.apo-observers.org/docs/Agenda_list_of_attendees_logistics_emails.pdf

⁷ Memo from NMFS Headquarters to NMFS National Fishery Science Center Directors, July 2, 2009.
http://www.apo-observers.org/docs/NMFS_Guidelines_Rauch_Mar_2008_Cyr_Jul_2009.pdf

⁸ Memo to NMFS Headquarters from NMFS Alaska Region, Jim Balsiger, August 2002
http://www.apo-observers.org/docs/Balsiger_Aug%202002_1.pdf

⁹ K. Moline, C. Rilling, personal communication, June 2012.

2. NOAA has many great scientists, with whom to consult but they are also bound by the Obama Administration's "Open Government Directive"¹⁰ and 2009 Freedom of Information Act memo, which calls for "A Presumption of Openness"¹¹. We suggest NMFS withdraw this proposal and start over, but this time with openness and honesty, ensuring stakeholder input. This would greatly restore the public trust in NMFS science and its ability to manage the nation's public marine resources.
3. In this regard, we suggest, after NMFS withdraws this proposal, that it hold public hearings, round-table discussions, and/or workshops on this important subject so that the public can better understand *and discuss* the implications of NMFS' preferred options, the conflicting definitions in the various statutes, NMFS' responsibilities, and the varying demands from the public that make this such a difficult rulemaking.
4. This proposed rule produced no reasoning for the extent of the confidentiality provisions in this rule, just that it needs to be so. Nor is it explained anywhere how this rule allows the public to participate in fishery management decisions in a meaningful way or critique Council action, if observer information is not available in a format needed. The public hasn't been given specific examples of how public access to observer information has harmed anyone. Can NMFS please describe the current data aggregation practices, and provide a list of examples of how individuals, or entities as the case may be, have been harmed by current aggregation practices that necessitate these changes?
5. In NMFS' 2009 memo, its current observer information aggregation guidelines are vaguely outlined. It states that, "Information from at least *three participants in the fishery* must be aggregated to a spatial/temporal level to protect not only the identity of a person or a business but also any business information." However the MS Act mentions nothing of business information. How does NMFS justify adding this restriction? Is a "participant" in a fishery the same as a "permit holder"? Has there been any observed fishing operation, where the observer information has been totally omitted from the data pool to protect some aspect of that fishing operation's privacy or their business' privacy (including observer information from experimental fisheries and cooperative research)? If so, can NMFS please explain why the information was omitted and how the information would be treated differently under the proposed rule?

III.A. Proposed Changes Concerning Exceptions to Confidentiality Requirements – Proposed Changes Concerning Exceptions to Confidentiality Requirements Where Disclosed Information May Not Remain Confidential.

2. Exception for release of information required under court order

The MS Act doesn't distinguish State and Federal court orders. Please justify this distinction.

¹⁰ Executive Office of the President of the United States. 2009. *Memorandum for the Heads of Executive Departments and Agencies. Open Government Directive. December 8, 2009.*
http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf

¹¹ Office of Attorney General. 2009. *Memorandum for Heads of Executive Departments and Agencies. Freedom of Information Act. March 19, 2009.*
<http://www.justice.gov/ag/foia-memo-march2009.pdf>

NMFS proposes to not honor state court orders for the release of observer information. The MS Act authorizes court orders for disclosure of information, but doesn't specify state or federal court¹², nor does any other document. If Congress had intended for NMFS to not honor state court orders for information, they would have added this into the MS Act, when it was reauthorized in 2007. Where is the discussion, the evidence or other justification for NMFS' rationale to not honor state court orders? How would this proposal affect a state's ability to obtain and release federal fisheries observer information it obtained through a court order? Would they be bound by NMFS' yet undetermined information aggregation practices and to what extent? How can the public comment on this or know whether or not this proposal would cause harm when these significant variables remain undetermined? How would the proposed rule differ from past practices and what is NMFS' rationale for changing it?

3. Exception for release of information to aid law enforcement activity

The public needs to monitor the effectiveness of NMFS enforcement.

NMFS states in this proposal, that it would allow, "enforcement personnel to release confidential information *during* the enforcement of marine natural resources laws"(emphasis added). Please clarify and list exactly what sort of information would be available to the public under this proposal while a vessel, processing plant, fishery participant and/or permit holder is under investigation for crimes and/or noncompliance to fisheries regulations. Certain information should always be available to monitor NMFS enforcement practices. Such information should tabulate closed and open cases/source of report (observer, crew, NMFS enforcement, etc.)/NMFS region/type and extent of infraction being investigated. Much, if not all, of observer information detailing vessel compliance to regulations is described in observers' field diaries and debriefing notes, which NMFS is now proposing to remain secret (by rendering it "internal program information"). It's important to be able to have access to information regarding violations reported by observers to gauge effectiveness of NMFS enforcement of vessel compliance to fisheries laws. Under this proposal, to what extent would the information in observers field diaries and logbooks be available to the public? How does this proposed action differ from current practices?

4. Exception for release of information pursuant to written authorization

The implications of defining "submitter" (of observer information) will impact much more than just Section 402(b)(1)(F) of the MS Act.

NMFS cites the MS Act, Section 402(b)(1)(F) to introduce its concern and rationale for defining "submitter" of observer information. It proposes separating two types of observer information for the purpose of assigning the defined submitter (one who "submits the observer information"). However, the outcome of these definitions

¹²Magnuson Stevens Fishery Conservation and Management Act, as Amended 2007. *Section 402(b)(1)(d)*
http://www.nmfs.noaa.gov/msa2005/docs/MSA_amended_msa%20_20070112_FINAL.pdf

impact every aspect of this rule, not just 402(b)(1)(F) or whether fishermen have access to his/her own information. Whoever is defined as “submitter” will also define to what extent observer information is excluded from public disclosure and many other sections of the MS Act. It also sets precedence for other statutes where “submitter” is yet undefined. Using this section and rationale to bring about a much broader implication seems like an underhanded approach.

NMFS wrongfully defines fishing industry permit holders as the “submitter” of observer information.

NMFS lists the first category of observer information as that used for *scientific and management purposes*. The second category is that used in *observer program administration and management*. It proposes three options to define “submitter” for the purposes of assigning a submitter to these two types of observer information: 1) Permit holders as submitter of both categories of observer information; 2) Observers or the Observers’ Employers as submitters of both categories of observer information; and 3) Permit holders as submitter of the first category of observer information and “No Submitter” for the second category of observer information (NMFS’ preferred option), which would render the second category “internal program information” and thus not available for public disclosure under FOIA or other MS Act provisions. None of these options are acceptable.

This term of “submitter” is not clear in any statute or even NOAA’s own Administrative Order 216-100¹³, yet has been used to guide release of observer information. NMFS rightly proposes to clarify its definition but for the wrong reason. With this rule, NMFS wants to codify the definition of submitter to coincide with how it has wrongfully practiced the definition for years – defining fishing industry permit holders the “submitter”. This implies that permit holders have the authority over release of observer information through the MS Act, which would be a conflict of interest since permit holders have a financial stake in whether observer information is released or not.

Marine resources are public resources. US taxpayers publicly fund NMFS’ fisheries research and observer programs (all or in part) and in some cases US fisheries are highly subsidized by US taxpayers. Observers collect the information on NMFS’ behalf, which acts on behalf of the public (including fishermen). NMFS is therefore mandated to make available to all its counselors, and the public, the best scientific information, in the format needed, to sustainably manage marine resources, *an MS Act mandate*. Therefore, if NMFS must define “submitter” it would logically fall in the hands of the public domain as the submitters. To avoid abuse of private information, this wording and other statutes would still allow NMFS authority to protect the privacy and business of the individuals involved (with exceptions, as we propose further below, in experimental fisheries and cooperative research that influence changes in legislation). Since this definition of “submitter” is not clear in any of the statutes, we propose that NMFS add the following language to the proposed rule in

¹³ NAO 216-100: Protection of Confidential Fisheries Statistics
http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_216/216-100.html

this section to treat observer information as a special type of information, yet rightfully keep it in the public domain:

“For the purposes of allowing for conservation and management of fisheries and marine resources as required by the MS Act and other statutes, “observer information” will remain in the public domain, with provisions to protect the privacy of individual human beings involved and the name of their vessel or processing plant on which the information was collected.” This wording would make clear that NMFS would protect the privacy of an individual human being mentioned in the information and the identity of his/her vessel or processing plant. This was the original intent of the law. Since permit holders are not required to submit observer information (nowhere is this written), only to not impede NMFS’ mandate to collect the information (and observers as its agents), permit holders should not be considered the submitters of any observer information. An unsustainable fishing practice should not be hidden. Likewise, if a fishery is sustainable let it be an example to the world by allowing the public access to the information to show us how it achieved this.

Why None of NMFS’ Options for the Definition of “Submitter” are Acceptable

The first option appears to give permit holders complete authority over the release of all observer information, which, as mentioned above, would be a conflict of interest.

The second option is impractical because observers and their employers, like any business, are transient. This option would introduce instability into the release and handling of the information. It would be an undue burden on both observers and their employers. In some cases, having the observers’ employers as the submitter would constitute a conflict of interest, much like designating permit holders would, as some observer employers are in direct business with permit holders.

NMFS’ preferred option constitutes a conflict of interest for the first category of information, as mentioned, and violates the public trust by rendering the second type of information secret in its designation as “internal program information”. Under all these options the public would possibly be prevented necessary access to the best scientific information available, the use of which are MS Act mandates (Section 2(c)(3); Section 301(2); Section 303(b)(5); Section 316(a); Section 405(d); Section 408; and P.L. 109-479, sec. 120 as well as several discretionary measures of the MS Act). This rule would also prevent the public’s ability to monitor the effectiveness of observer programs.

Reasons permit holders should not be designated the submitters of observer information:

As mentioned above, permit holders have a financial stake in whether or not observer information gets released to the public and most likely would not release the information to necessary advisors unless it benefitted them personally. Designating permit holders as the submitters could possibly have a deleterious effect on non-governmental advisors and other groups that use observer information to advise NMFS and the Council on managing public marine resources. If permit holders were designated “submitter” is there any instance where a permit holder might not authorize information, even if it were aggregated to protect its own individual privacy

(i.e. single human being)? In the case of a vessel that belongs to a corporation, sector, coop or other entity, to which an unlimited number of vessels may belong, and one member of the entity didn't authorize release of the information, and other members did, would the one who didn't provide authorization be able to veto the others' authorization? In other words, would NMFS be protecting the business information of the entire entity (see our objection to NMFS' proposed definition of business information below)? When a fishing association, in its attempt to monitor its members adherence to bycatch limits, wishes to have access to observer information, and one member refuses authorization of it's information, this could hinder the ability of these associations to steer its members toward sustainable practices.

Reasons for keeping the second type of observer information in the public domain:

1. NMFS offers conflicting rationale for keeping the second category of observer information secret.

The MS Act authorizes the release of confidential information, under section 402(b)(1)(F) if there is, "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". NMFS has explained to others and myself that the purpose of this section, and NMFS' preference for Option 3, is to prevent vessels from having access to observer field diaries. We were told that if observers know that a vessel will have access to their logbooks subsequent to their assignment, this would have a chilling effect on the observers' candor in reporting events in their field diary. However, this rule conflicts with that rationale, because on page 30491 of the proposed rule, NMFS states that it believes Option 3 is consistent with Section 402(b)(1)(F) of the MS Act which is to *authorize* release of this information. Please explain this apparent conflict between what is stated in this rule and what was told to others and myself, regarding the rationale for this proposed action.

2. Field diaries are professional documents, are recorded as such and should be treated as a public document, as observers and the public are told.

Observers are professionally trained to document events in their field diaries and to collect unbiased information. The information in observers' field diaries contains a narrative of biological observations, how data is collected, the problems encountered and the solutions employed – much like any other scientific data collection project or program. Furthermore, observers are warned that their field diaries are a public and legal document. The only chilling effect that observers receive regarding what to record in their logbooks comes from NMFS, both in training and in their field manuals: "Do not use it as a personal journal..." "...it is a public document.." and "the contents of the logbook and your name may be released."¹⁴

¹⁴ NMFS. 2012. 2012 Observer Sampling Manual. North Pacific Groundfish Observer Program. http://www.afsc.noaa.gov/FMA/Manual_pages/MANUAL_pdfs/manual2012.pdf

NMFS is legally required to release logbook information under the Privacy Act to vessel operators and permit holders to which the information pertains. Can NMFS explain why and how an observer's name would be released, since observers have privacy rights as well? NMFS is also required to release the information to the permit holder in legal proceedings if the logbook contains information regarding his/her vessel's noncompliance.

If NMFS is trying to protect observers from harm resulting from their logbook entries, or trying to encourage them to report with more candor, they should find other ways to do this.

3. An increase in demand for monitoring and decrease in Congressional budgetary support demands vigilant monitoring of the nation's observer program implementation, management and effectiveness to make the best use of limited resources.

Public release of the observer information in the second category is required to allow the public to monitor the effectiveness and the value of its fisheries monitoring programs. The management and administration of observer programs require public monitoring because: 1) observer hiring conditions are precarious under the current contract system, with little job security or other protections for observers; 2) NMFS remains aloof to observer welfare issues yet observer welfare would logically be directly related to the quality of data they collect; 3) NMFS has in recent years lowered the hiring requirements; 4) NMFS staff at the program management level appear to have authority in some cases to ignore resource protection rules; and, concurrently, 5) NMFS is aggressively pushing to implement Electronic Monitoring (EM) as a means of replacing observers, with little scientific review regarding data sacrifices and value in comparison with live observers (please see comments on EM below). Data users require assurance that observer programs are managed properly and producing quality data. The public needs to know they are getting the best use of their taxes in the administration and management of NMFS observer programs.

4. Observer information in the second category contains valuable information that is recorded nowhere else.

Observer information in this category includes employment conditions, fishing operations and the conditions they must endure while carrying out their duties. Observers also collect valuable anecdotal information that has led to innovative approaches to fishery problems and observer program sampling protocol changes, as well as information that are gathered nowhere else, such as seabird mortality from vessel strikes.

Observers are primarily biologists. Their duties and the information they gather are sometimes in conflict with crew on board the vessels they monitor. Information such as vessel safety problems, reports of interference, harassment and assault, details of fishing violations, marine pollution violations, conflicts with contractors/observer providers and conflicts with program management are some of the information that observers collect in this category and the public has a right to this information.

5. Monitoring observer employer performance is important to data quality.

The information in the second category makes it possible to monitor contractor performance. Observers' employment is unique, in that they are employees of a contractor, but NMFS is considered their "boss". NMFS dictates the observers' duties, has hiring requirements, manages their data and can "decertify" them from being employed as an observer in the future. Yet contractors are vetted to hire observers, monitor their conduct and can fire them at will and none of this is monitored by NMFS. The situation is even more tenuous for observers hired as independent contractors. Monitoring observer welfare and contractor performance is critical to an effectively managed program and keeping this information secret doesn't allow the public to do this. A well-supported corps of observers is likely to result in a higher level of data quality and longer retention of professional observers, a goal that is fiscally responsible, because it saves on training and loss of data from mistakes.

6. Monitoring the impact of NMFS' hiring requirements is important to data quality and human rights.

In recent years, regional observer programs have lowered the hiring requirements of observers, in contrast to NMFS National Standards, which require a BS degree in biological sciences. The Hawaii, Northeast, and Southeast programs allow "exceptions" to be made to the national standards but the number of exceptions made and the reasons are not clear.

This year a highly qualified and educated observer in one of the Southeast observer programs was fired without cause and his job re-advertised, the company (and NMFS) requiring just an AA degree. In the Hawaii program, many observers are hired through the Alu Like program, which doesn't require a high school degree. These applicants were given a pamphlet¹⁵ that listed the harsh conditions they must endure, which included a hostile environment, job interference, and harassment – all violations of the law. Instead of explaining to new applicants that these are possible conditions but are *violations of the law that will be prosecuted*, it is implied up front that they are conditions that they must endure if they want the job.

It follows that an observer with less education would have fewer employment opportunities elsewhere and would be less likely to report cases of abuse. Observers frequently report to the APO a fear of random demotion by their contractor or simply not getting rehired if they should complain. This has the effect of eroding pride in one's work, the quality of data collected and overall program success.

7. Monitoring NMFS observer program management is necessary to prevent abuse of authority and maintain program effectiveness.

Sometimes the problems are with NMFS observer program staff and require outside intervention. Southeast NMFS observer programs are currently under inquiry by the NOAA's Office of Inspector General for gross mismanagement by NMFS observer program staff, where observers faced intolerable and unsafe vessel conditions,

¹⁵ A fishery observer – a unique species

http://www.apo-observers.org/docs/A_Fisheries_Observer_A_Unique_Species.jpg

contractor abuses, and NMFS officials ignored reported fishing violations¹⁶. If it weren't for one courageous observer coming forward¹⁷, the APO, the public and, we're assuming, upper levels of NMFS would never have known the level of mismanagement of its programs. This case is still unresolved over a year later and NMFS Enforcement has yet to interview this observer concerning several reported fisheries violations. This example clearly indicates the need for these documents to remain in the public domain.

8. Monitoring NMFS observer program management could be used as an important public fisheries resource certification or evaluation tool.

Releasing observer welfare information leads to a more informed public, which has shown more interest in knowing the origin of commercial fish products, and indeed has the right to know. Just as some consumers would not buy products from a company that has poor labor practices, some may not want to purchase fish in a fishery that has a poorly managed monitoring program or encourages poor labor practices for the observers upon whom fishery managers depend. This is an effective public resource tool that allows the public to make the best use of taxpayer resources by demanding efficient and well-managed observer programs to sustainably manage the fisheries.

9. Observers should have access to information that pertains to them.

Observers also have an interest in the information that is collected pertaining to them. Just as fishermen have access to observer information that pertains to them, observers too should have access to information pertaining to them. Performance evaluations are an invaluable tool that observers use to improve their performance. Some observers have claimed that they have been falsely accused of wrong doing or were fired without cause and have a right to know what is discussed about them through NMFS internal e-mails, reports and memos, where their name and details about their work are mentioned. Likewise, NMFS asks fishermen to submit surveys about the observers working on their boat or plant. Under the preferred option, would observers have access to information that pertains to them, including information that fishermen write to NMFS about them?

For all these reasons, can NMFS explain to what extent the public would have access to the above information? If access to the information would not be granted, can NMFS justify how it would avoid the problems mentioned and how the public can monitor observer program management and effectiveness and ensure observers receive professional treatment from contractors, NMFS and fishermen? How would the public track vessel safety, vessel compliance to fishery regulations and all the other important biological information that observers collect in their field diaries and report in debriefing?

¹⁶ Mitchell, E. and J. Ruch. 2011. National Marine Fisheries Service Southeast Observer Programs – Region-wide Mismanagement and Illegal Activities. Letter to the DOC Office of Inspector General, December 1, 2011.

http://www.apo-observers.org/docs/NOAA_IG_Investigation_Request_Southeast_Dec_11.pdf

¹⁷ Statement by Jonathan Lee Combs, November 18, 2012

http://www.apo-observers.org/docs/Statement_by_Jonathan_Lee_Comb_sent_to_APO.pdf

III.B. Proposed Changes Concerning Exceptions to Confidentiality Requirements – Proposed Changes Requiring the Protection of Business Information in Releases Allowed by Aggregation and Summarization Exception – Application of Protection Beyond Identity to Financial and Operational Information

In this section, NMFS proposes “that Congress intended the MSA confidentiality provisions to protect a broader scope of information than” just the identity of the submitter or their business information..”. NMFS says that it “historically interpreted this language to mean only the identity or name of a person’s business, such as “ABC Fishing Company””. NMFS proposes to use a broader interpretation to mean also the business’ financial and operational information, which includes just about any information needed by anyone complying with the MS Act.

NMFS must disclose it’s past and present practices of information aggregation and include how this rule and the definition of business information will change these practices.

First, in order to know the implications of these definitions, NMFS must disclose how these definitions will change their observer information aggregation policies and practices. NMFS only states that it, “intends to develop, and make available for public comment, aggregation guidelines based on..” the definition of business information in this proposed rule.

In APO’s 2009 FOIA request mentioned above, data aggregation practices were discussed. Most observer data users have heard of the “Rule of Three” – an unpublished NMFS guideline that generally states NMFS must aggregate the information from at least three *individual* vessels fishing in an area (of variable size), with that of vessels in the next larger spatial/temporal unit until the minimum of over three vessels in an area is achieved. The purpose of this was to protect the privacy of *the individual participants in a fishery* from whose vessel the information originated.

However, what we found from our 2009 FOIA request was that decisions about data disclosure were made on a case-by-case basis, with little regard for national standards and that the Alaska region of NMFS preferred this¹⁸. The Hawaii region joked that their Rule of Three required drinking “3 or more beers before making decisions regarding data confidentiality”.¹⁹ It appears that NMFS makes up their rationale as they go along and had wide latitude to release the data or not, depending on the request. It wasn’t until 2009 that NMFS headquarters arrived at national guidelines²⁰, much of which is offered in this proposal.

¹⁸ Memo to NMFS Headquarters from James Balsiger, NMFS Alaska Region
http://www.apo-observers.org/docs/Balsiger_Aug%202002_1.pdf

¹⁹ Pacific Islands Science Center and Regional Office Procedures for Maintaining Data Confidentiality. National Confidentiality Workshop, Seattle, Washington, January 15-17, 2008
http://www.apo-observers.org/docs/All_Regions_Confidentiality_Issues_2008.pdf

²⁰ Memo from NMFS Headquarters to NMFS National Fishery Science Center Directors, July 2, 2009.
http://www.apo-observers.org/docs/NMFS_Guidelines_Rauch_Mar_2008_Cyr_Jul_2009.pdf

Prior to the second meeting in February 2008, I was told²¹ that NMFS was considering, for the purpose of data aggregation, to change the “Rule of Three”. A working group was formed to deal with it and they were considering expanding, not only from individual to entity-level aggregation, but also considering expanding the spatial area of aggregation units and the minimum number of entities within a unit (i.e. changing to “rule of four” or “five”).

NMFS states in this rule that it intends to publish its aggregation practices after this rule is final. These are critical variables and are at the heart of any outside analysis of fishery management decisions. These variables are essential for the public’s ability to effectively comment on this rule. For this reason we again ask that NMFS withdraw this proposal until these critical variables are known. When NOAA Administrative Order 216-100 is updated, will this be available for comment? How will NMFS announce its aggregation practices and how will this differ from its update of the NOA 216-100?

NMFS’ expansion of business information to include operational and financial information prevents adequate analyses of fishing impacts on the marine environment.

NMFS claims “Congress intended the MSA confidentiality provisions to protect a broader scope of information than that which would identify submitters” and “a broader interpretation is more consistent with congressional intent and legal rules for interpretation of statutes”. Based on this, NMFS intends to change the definition of business information to include financial and operational information, defined 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 US fish processors”.

NMFS should exclude observer information from the definition of protected business information. First, it hasn’t been determined who “submitters” are, which will significantly effect the outcome of this portion of the rule. NMFS offers no information to back up its claim of Congressional broader intent. Where is the evidence that demonstrates this? NMFS’ proposal to include operational and financial information in the definition of “business of any person” would prevent just about anyone from gathering the necessary information to study fishery impacts on the marine environment. It would also prevent analyses needed to monitor essential fish habitat and create and amend fishery management plans. MS Act Section 303(a)(5), and several other sections mentioned above, lists the information needed to complete a Fishery Management Plan and it includes everything in NMFS’ proposed definition of operational information that would be excluded! In fact the implications of making operational and financial information confidential are so vast that it might even prevent adequate analyses for compliance to the MS Act altogether. NMFS should justify how this definition will allow for complying to every aspect of the MS Act and how this changes from its past definition. Please provide justification for this significant change beyond the assertion that Congress intended it to be so. Also can

²¹ Jennifer Ferdinand, NMFS Alaska Fisheries Science Center (personal communication, January 14, 2008)

NMFS explain the implications of its proposal to protect financial information with regard to fisheries economics studies? What's the point of having an observer program if nothing is accessible to non-governmental expertise and analysts?

NMFS should define and clarify "Trade Secret".

On page 30492, NMFS includes a list of information that would be available regarding protected species, with the caveat that it, "would not constitute a trade secret." Can NMFS list the information that would constitute a trade secret? "Trade Secret" is not defined anywhere. The Trade Secrets Act (18 USC 1905), says that it protects "trade secrets, processes, operations, style of work or apparatus (type of fishing gear?), identity, confidential statistical data, and financial information". If their 'trade secret' involves protected species interactions or other unsustainable practice, that information should be examined and critiqued. For instance, the development and use of certain trawl doors, "canyon busters", imply an apparatus that is clearly destructive to the marine environment. Yet none of these gear changes are monitored for their impact on the marine environment. Observers in some programs collect details on gear, such as mesh size. It seems likely that this would be an excellent way to monitor fishery impacts. Yet, this remains elusive to the public, and likely to NMFS also, regarding how extensively certain equipment is employed and their impact upon the marine habitats. Trade secrets could also be interpreted as a secret fishing spot. Depending on how NMFS aggregates the information this proposal could render any analysis useless.

Exclusion of Observer Information From Definition of Protected Business Information

The accessible information in this section is overly constrictive.

1. NMFS rightfully excludes Observer Information from the definition of protected business information with respect to protected species takes and interactions for reasons outlined in the rule. However, the observer information NMFS intends to exclude is overly narrow, limiting available information to "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..". **This should instead read "any information collected by observers on protected species."** Please list all the types of information that observers collect on protected species, where they collect it (i.e. logbooks or field diaries, protected species forms), and NMFS' justification for not including it in it's list of observer information on protected species interactions that are excluded from the definition of business information. There are countless other types of information that observers collect that assist scientists in reducing fishery interactions with protected species. As proposed, this rule would prevent access to information on seabird vessel strikes, mitigation monitoring information, biological observations of species interactions with fishing gear and the vessel, information on violations against protected species, photos, and details of the gear involved in gear interactions. It also prevents release on any live and uninjured species interactions. Knowing what gear does and doesn't cause

- harm is equally important.
2. NMFS states in this proposed rule, “Thus, in most cases, NMFS would be able to disclose specific details of interactions with protected species. Can NMFS please elaborate on “in most cases” and provide a list of information that, under this rule, NMFS would not be able to disclose and to whom would the information be available.

C.7. Proposed Changes Allowing Disclosure of Confidential Information Where Limitations Apply to Further Disclosure – *Adding procedures to authorize release of confidential information to the Council’s scientific and statistical Committees.*

Members of all groups advising NMFS and the Council should all have equal access to observer information and the authority should come from NMFS, not the Councils.

Can NMFS please describe its current practice for observer information access to the many expert teams who advise NMFS and the Council and how this proposal would differ from current practice? Can NMFS provide a list of advisory teams that might use observer data that currently advise the councils? How would non-governmental and tribal organizations have access to observer information in each of these advisory teams or groups? Why did NMFS single out the SSC? NMFS should not require non-governmental SSC members to gain authorization from the Councils. A large proportion of appointed council members have a direct financial interest in the fisheries they’re supposed to manage.²² Yet much of this rule allows the Council preferential access to observer information or has authority to release it. This is a conflict of interest. The authority of observer information release should come from NMFS, acting on behalf of the public.

Observer Information in Cooperative Research should remain in the public domain.

Observer information includes that collected in cooperative research. How would NMFS make available this type of information to the public since virtually all of these “persons” would involve fewer than 3 vessels (or whatever criteria NMFS uses for aggregating information)? Since these projects, like experimental fisheries, often influence future legislation, which is supposed to be a public process, researchers and permit holders should accept disclosure of information, with ample time after publication, but before legislation development. Any development of ensuing legislation should be a transparent process, allowing the public full access to the data. How would this rule impact non-governmental, tribal and educational institutions and organizations regarding their ability to engage in collaborative research and share data? It seems likely that some in a project would have access to the data and some would not.

Other Concerns Not Included in this Rule

Information from Experimental Fisheries should remain in the public domain.

²² Eagle, J., S. Newkirk, B.H. Thompson. 2003. Taking stock of the regional Fishery Management Councils. Pew Science Series on Conservation and the Environment.
http://www.apo-observers.org/docs/pew_science_taking_stock.pdf

This rule fails to discuss public access to observer information in experimental fisheries. Most exempted fishing permits involve 3 or fewer vessels and later influence amendments to fisheries regulations or fishery management plans. Yet even according to current practices, the information from these vessels is likely not available to the public for peer review or outside analysis.

In order for the public to participate in improving the sustainability of a fishery with regard to these experimental fisheries, full disclosure is needed. If a vessel receives an exempted fishing permit, granting them access to areas that other vessels don't have, that vessel should accept complete disclosure of information as a condition for gaining the privilege to fish that permit. The public should have the right to examine the observer information in order to critique the experiment.

For example, in 2008, one permit holder, Pete Dupuy, received an exempted fishing permit to fish longline gear off California. One of the conditions was to have 100% observer coverage. Four years later, "Pete's Fishery", as it is affectionately known, is still operating, but the observer information is completely unavailable to the public because it is just one vessel. The purpose of the fishery was to demonstrate to the public that it is a sustainable replacement for the swordfish drift gillnet fishery, which is known to have high bycatch. Yet that fishery is still in existence. For one permit holder, countless taxpayer funded meetings were held and documents²³ prepared to help push this individual through the hoops past overwhelming public objection. Yet observer information in this highly subsidized fishery isn't available to the public.

How will Electronic Monitoring observer information be available to the public?

The Magnuson Stevens Act also includes "any information collected observed, retrieved, or created by...electronic monitoring (EM) systems" in its definition of observer information. How exactly is NMFS going to aggregate and apply this rule to EM observer information? While EM may prove to be a useful and necessary tool for management, full disclosure of data quality sacrifices should be presented during the decision making process.

Thank you for the opportunity to comment. This was a very difficult rule to comment on because of its vast implications and critical omissions. I'm sure it was much more difficult to write. We regret to tell you that it's severely flawed and we should all start over but this time together with stakeholder input.

Sincerely yours,

Elizabeth Mitchell, President
Ebol Rojas, Vice President
Association for Professional Observers

²³ NMFS Southwest Regional Office, California Pelagic Longline Fishery, <http://swr.nmfs.noaa.gov/fmd/longline/Default.htm>
NMFS Southwest Regional Office, California/Oregon Drift Gillnet Fishery
<http://swr.nmfs.noaa.gov/psd/codgftac.htm>