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MEMORANDUM FOR: William T. Hogarth, Ph.D.
Assistant Administrator for Fisheries

FROM: James W. Balsiger
Administrator, Alaska Region

SUBJECT: Conclusions of the Alaska Region on the
Confidentiality of Observer Data

On August 14, 2002, staff from the Alaska Region (AKR), Alaska Fisheries Science Center (AFSC), and NOAA General Counsel, Alaska Region (GCAK and GCEL) met in Seattle to examine the issues surrounding the confidentiality of observer data and to develop a regional position. This memorandum summarizes the conclusions of that meeting and contains: (1) A summary of the AKR/AFSC position and principles with regard to observer data confidentiality, (2) A discussion of existing Magnuson-Stevens Act language regarding confidentiality objectives, and (3) draft language for a possible Magnuson-Stevens Act amendment to clarify the confidentiality status of observer data.

GUIDING PRINCIPLES FOR THE TREATMENT OF OBSERVER DATA

In the Alaska Region, observer data is critically important information that is relied on by NMFS for a variety of purposes including stock assessment, inseason management of fisheries, compliance monitoring, and bycatch estimation. Observer data is also relied on by the Council and public to provide the analytical information necessary to develop fishery management plans (FMPs) and FMP amendments.

With respect to the treatment of observer data, the AKR/AFSC has developed four guiding principles. The perspective of the AKR/AFSC is that it is necessary to:

1. Preserve a working relationship with the fishing industry.
2. Enhance the ability to collect unbiased data.
3. Maintain a viable working environment for observers and enhance their ability to collect sensitive information.

4. Protect legitimate industry trade and business secrets to the extent required by law.

To achieve these four principles, we believe that some forms of observer data must remain confidential. At the same time, we recognize that the public, the industry and the United States Coast Guard, among other constituents have an interest in obtaining access to data that pertains to the management of a public resource. Section 402(b)(2) of the Magnuson-Stevens Act authorizes the release of observer data if it serves the interests of conservation and management. Therefore, these four principles must be balanced against various constituencies' interests in information regarding how commercial fisheries in federal waters are managed.

We further believe that decisions about how to balance the objectives of data confidentiality against the public interest in information must necessarily be made at the regional level on a fishery-by-fishery basis and after consultation with the Council. We believe that blanket national requirements for data confidentiality would be inappropriate because fisheries vary so much among regions. Determinations about what constitutes a "legitimate trade and business secret," or what type of data release might result in competitive harm or what type of data release might be necessary to carry out a specific management program, must necessarily be made on a fishery-by-fishery basis. As you are aware, each Region has its own management needs and programs. While similar data or information may be collected by different regional observer programs, we do not find that a substantial similarity of data types exists. We have data collection forms and procedures that are unique to the Alaska Region. Each industry and fleet has unique views or considerations regarding whether competitive harm or proprietary interest exist in the particular data types.

In consideration of the above, we believe determinations of what should be considered confidential or subject to disclosure should best be made in consultation with the appropriate Council and after the affected industry and public have had opportunity to comment. This would provide notice to observers, vessel or processor owners, and the public and an opportunity to comment on whether the data should be released both at the Council level during hearings and at the agency rule-making level.

OBSERVER DATA CONFIDENTIALITY UNDER THE MAGNUSON-STEVENS ACT

Subsection 402(b) of the Magnuson-Stevens Act provides the following language on data confidentiality:

(b) CONFIDENTIALITY OF INFORMATION.--

(1) Any information submitted to the Secretary by any person in compliance with any requirement under this Act shall be confidential and shall not be disclosed, except--

(A) to Federal employees and Council employees who are responsible for fishery management plan development and monitoring;

(B) to State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

(C) when required by court order;

(D) when such information is used to verify catch under an individual fishing quota program;

(E) that observer information collected in fisheries under the authority of the North Pacific Council may be released to the public as specified in a fishery management plan or regulation for weekly summary bycatch information identified by vessel, and for haul-specific bycatch information without vessel identification; or

(F) 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.

(2) 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, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (1)(E).

While on its face this provision appears to require nondisclosure of observer information except in limited cases, an existing NOAA Administrative Order (NAO 216-100) provides for disclosure of observer information (except to the extent such information is protected under FOIA). GCAK advises us that the NAO is based on a premise that because observers were Federal employees who were themselves "collecting" the data, as opposed to "submitting" it, the information they collected was not subject to the nondisclosure provisions of the statute. One possibility is to revise our current interpretation of the statute, and interpret the NAO as inapplicable to the observer program in the Alaska Region because of the unusual structure of the observer program in the region, as described below.

As you know, in the Alaska Region, the relationship between the observers and NMFS is unique, in that vessel owners hire and pay for observers through observer providers. Observers are employees of observer providers, rather than Federal employees. NMFS does not have a contractual relationship with observers or observer providers. Instead, NMFS controls collection of observer data by regulations covering fishing vessels, observers and observer providers.

Thus, one possibility would be to amend the NAO to provide for confidentiality of observer data submitted by other than federal employees. However, this leads to the anomalous result that observer data collected in the Alaska Region would be protected from disclosure (except to the extent disclosure serves the interests of conservation and management), while identical data collected in other regions is subject to disclosure (unless protected by a FOIA exemption). It also would not permit the release of any observer data in the Alaska region, a result that we believe would also not well serve NMFS, the industry, or the public.

In order to correct this anomaly, and to provide a mechanism for reflecting the varying needs and interests of the Councils, the public and industry in different regions, we propose a legislative change that would treat all observer data the same, regardless of the employment relationship of the observer. Under this legislative proposal, NMFS regions and the Councils would be authorized to determine what observer data should be subject to disclosure on a fishery-by-fishery basis instead of a blanket confidentiality provision for all observer data.

PROPOSED STATUTORY LANGUAGE ON OBSERVER DATA CONFIDENTIALITY

For the reasons set out above, we do not believe it serves conservation and management goals to treat all observer data as not confidential as is the current policy and interpretation of the MSA. We also do not believe those goals are served by making all observer data confidential. While under the current NAO some observer data still would be confidential under the exemptions provided by FOIA, we are concerned that FOIA does not provide us with the authority to make confidential all data we believe should be confidential to achieve the four objectives that we identified above. Therefore, we have developed draft language for a statutory change to the MSA that would provide NMFS the authority to make determinations about observer data confidentiality through regulation on a case-by-case basis after consulting with the appropriate Council.

We propose the following amendment to section 402(b) of the Magnuson-Stevens Act that would read as follows:

Section 402(b) (16 U.S.C. 1881(a)(b)) is amended -

1. by inserting "or" after "program;" in subparagraph (D);
2. by striking subparagraph (E);
3. by redesignating subparagraph (F) as subparagraph (E);
4. by redesignating paragraph (2) as paragraph (3);
5. by inserting immediately after paragraph (1) the following:

"(2) Any information submitted to the Secretary by an observer as part of the observer's duties shall be confidential and shall not be disclosed, except -

(A) to Federal employees and Council employees who are responsible for fishery management plan development and monitoring;

(B) to State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

(C) when required by court order;

(D) when such information is used to verify catch under an individual fishing quota program;

(E) as authorized by a fishery management plan or regulation under the authority of the North Pacific Council to allow disclosure to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification; or

(F) as authorized by the Secretary, after consultation with the appropriate Council, through regulations providing for the release of such information that is beneficial to implementation of an FMP and that does not undermine the ability of observers to collect unbiased information;"

and

6. by striking "(1)(E)" at the end of paragraph (3), as redesignated, and inserting "(2)(E)".

The proposed language would assert blanket confidentiality over observer data as a matter of law but still would provide NMFS the ability to provide for the release of certain observer data in regulation on a fishery-by-fishery basis after consulting with the appropriate Council and affected members of industry and the public.

KLind: August 26, 2002

rev: Lisa Lindeman 9/6/02

rev: ssalveson with comments from AFSC 9/9/02

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