



MARINE MAMMAL COMMISSION

25 June 2012

Mr. Karl Moline
Fishery Statistics Division F/ST1
National Marine Fisheries Service
1315 East West Highway, Room 21441
Silver Spring, MD 20910

Dear Mr. Moline:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule on confidentiality of information collected under the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (77 Fed. Reg. 30486). The Commission offers the following recommendations and rationale.

RECOMMENDATION

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed rule governing confidentiality of information collected under the Magnuson-Stevens Fishery Conservation and Management Act but exclude from the definition of "business of any person" information that is collected by observers as part of their official duties and that is necessary to—

- (1) protect and conserve species in accordance with the requirements of the Marine Mammal Protection Act and Endangered Species Act;
- (2) protect and conserve species in accordance with other federal and state statutes passed to promote conservation of protected species;
- (3) describe or understand how protected species are caught incidentally or how to avoid such takes.

RATIONALE

Section 403(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act authorizes the Service to make public any information submitted in compliance with any of its 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" (emphasis added). The proposed rule would modify existing regulations to maintain confidentiality of that information in light of amendments to the Act (i.e., the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 and the Sustainable Fisheries Act of 1996) passed since the current rules were written. Among other things, the proposed rule would add a definition for "business of any person." The new definition expands withheld information to include not only the identity and names of individual businesses, but also certain operational characteristics of individual businesses, such as when and where they fish, the type of gear used, the species caught, and the size of the catch. The Service could continue to make such operational information available to the public in

aggregate form provided that it did not directly or indirectly reveal those operational characteristics for any individual fishermen or vessel.

Although some information submitted by fishery observers could be considered operational, the Service plans to exclude certain observer information related to the incidental catch of protected species from the definition of “business of any person.” To support this exclusion, the Service noted that at times information on individual interactions with protected species is necessary to meet the requirements of the Marine Mammal Protection Act or the Endangered Species Act. As examples, the Service noted the importance of such information for developing measures to minimize incidental take of marine mammals in fisheries and for developing reasonable and prudent alternatives in section 7 consultations under the Endangered Species Act. The Service also noted that its decision on this matter is not final and that it will reconsider the inclusion of such information in the definition based on comments received.

The Marine Mammal Commission appreciates the Service’s efforts to make fishery observer information publicly available and when necessary meet various requirements of the Marine Mammal Protection Act and the Endangered Species Act. The Commission also believes that few cases would require revealing the operational characteristics of a particular individual business. However, in those rare cases, the national interest is better served by making that information available rather than withholding information about fisheries that are, after all, exploiting a public resource. In the Commission’s view, fishermen should accept the disclosure requirement as a responsibility that comes with the privilege of commercial fishing.

The Service also proposed to exclude the following protected species information collected by observers: “the 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)” (page 30492). The Commission supports the exclusion of this information, but considers the listed information to be too narrow. Other protected species statutes, such as the Migratory Bird Treaty Act and various state endangered species laws, also may require public release of information on interactions of other protected species with fisheries. The proposed definition, however, appears to address only those species receiving protection under the Marine Mammal Protection Act and Endangered Species Act.

In addition, other types of information collected by observers may be essential for assessing and mitigating fishery interactions and, at times, may require public release. Examples include the type of bait; photographs, videos, or other information indicating how an animal was caught or injured during fishing; efforts related to handling or release of the animal; the types of tissue samples collected from an animal; comments by the observer or vessel captain describing events related to an incidental take; the catch of other target and other non-target species in the same haul as the take; or how the gear was set, tended, or hauled. It is difficult to categorically list all possible information that may be important for assessing fishery interactions with a protected species. For that reason, the Service will need to judge appropriate information for release to the public on a case-by-case basis. To that end, the Commission believes that the Service should exclude any scientific or management information that (1) is collected by observers or provided to them in the course of their official duties and (2) may help in understanding and mitigating fishery interactions with protected species.

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Based on the above considerations, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed rule governing confidentiality of information collected under the Magnuson-Stevens Fishery Conservation and Management Act but exclude from the definition of “business of any person” information that is collected by observers as part of their official duties and that is necessary to—

- (1) protect and conserve species in accordance with the requirements of the Marine Mammal Protection Act and Endangered Species Act;
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- (3) describe or understand how protected species are caught incidentally or how to avoid such takes.

Please contact me if you have questions regarding the Commission’s recommendation or rationale.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director