



# NET GAINS ALLIANCE

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Submitted via regulations.gov

cc: Dr. Richard Spinrad, NOAA Administrator  
Janet Coit, NOAA Fisheries Assistant Administrator  
Samuel D. Rauch, III, NOAA Fisheries Deputy Assistant Administrator for Regulatory Programs

**Re: NOAA–HQ–2023–0146, Proposed Rule to revise the regulations governing confidentiality of information under the Magnuson-Stevens Fishery Conservation and Management Act.**

Dear Mr. Moline:

Thank you and your team for preparing this proposed rule and providing a 45-day public comment period. The Net Gains Alliance (NGA) was created in 2017 to improve the collection, management, and use of data and information for the sustainable management of fisheries and marine ecosystems. Over the past seven years, our non-partisan organization has partnered with industry, state and federal agencies, and technology vendors to demonstrate that fisheries data modernization is possible and can provide social, economic and environmental benefits for people and nature alike. We offer these comments from our experience and perspective as an organization focused on fisheries data and information.

The current proposed rule is very similar to what NMFS proposed in 2012. In the last twelve years, technology has advanced rapidly and competing demands on the ocean have increased. The latest proposal barely acknowledges the changes in sensors, data science, software, cloud services, and federal information security laws since 2012, or how the world of fisheries science and ocean management has changed since the 1976 Magnuson Act (MSFCMA) language to which this rule is responding. NMFS could have written a rule enabling more flexibility within the MSFCMA's framework to use data and information to support fisheries conservation and

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management. Instead, this proposal describes a data-informed future only in the preamble and anchors the rule itself squarely in the past.

### **Hiding fisheries data hurts fisheries conservation and management**

Timely, accurate fisheries data is essential to NMFS’s mandate to use the best available scientific information available. When catch and location data is highly restricted, fisheries can be overlooked in ocean decisions, such as allocating funding for climate adaptation, siting offshore wind, or setting protected areas under the Biden Administration’s 30 x 30 initiative. Without data on industry trends, such as capacity estimates, U.S. fisheries can lose out on investment opportunities. NGA has repeatedly reported on the ways overly restrictive data policies penalize U.S. fishermen and have a chilling effect on agency staff who are threatened with civil and criminal penalties for potentially disclosing catch information that, in fact, is no secret at all within the fisheries community. With the advent of AIS platforms, like marinetraffic.com, fishing vessel locations have become information that is publicly available or easily ascertainable through public sources. This rule offers nothing to alleviate that culture of fear nor a pathway to making fisheries information visible, useful, and used. Below we describe two specific changes to address these issues.

### **NMFS should support staff in using the best available science**

MSA establishes both civil penalties (16 USC 1858) and criminal penalties (16 USC 1859):

#### 16 USC 1858(a)

The amount of the **civil penalty** shall not exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate offense. ...

#### 16 USC 1859(b)

Any offense described in subsection (a)(1) of this section is punishable by a fine of not more than \$100,000, or imprisonment for not more than 6 months, or both; except that if in the commission of any such offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any observer described in section 1857(1)(L) of this title or any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title), or places any such observer or officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than \$200,000, or imprisonment for not more than 10 years, or both. Any offense described in subsection (a)(2) of this section is punishable by a fine of not more than \$200,000.

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The civil penalties refer to a long list of prohibited acts in 16 USC §1857, including the broad coverage in 16 USC §1857(1)(A) “to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.” The criminal penalties in 16 USC 1859(b) reference a smaller subset of violations, including physical assault and illegal fishing by foreign vessels. Per the law, some violations are more severe than others and worthy of criminal charges.

However, the current language in 50 CFR § 600.735 (Penalties) brings both criminal and civil provisions to bear on all prohibited acts and adds in civil forfeiture provisions.

Any person committing, or fishing vessel used in the commission of a violation of the Magnuson-Stevens Act or any other statute administered by NOAA and/or any regulation issued under the Magnuson-Stevens Act, is subject to the civil **and criminal penalty provisions and civil forfeiture provisions** of the Magnuson-Stevens Act, to this section, to 15 CFR part 904 (Civil Procedures), and to other applicable law

By adding “(x) Disclose confidential information without authorization” to 50 CFR § 600.725 (General Prohibitions) NMFS is making a clarification that criminal prosecution and asset forfeiture are warranted for even the accidental release of fishing data and information. NMFS is saying that a staffer who unwittingly shares the past location of a single fishing vessel should be considered in the same category as someone who assaults a law officer. While the same broad civil and penalties coverage of 16 USC §1857(1)(A) arguably applies to observer and EM service providers, 600.410(d) of the proposed rule only cites the *civil* penalties section (16 USC 1858), implying that NMFS staff, contractors, and other partners in the fisheries data ecosystem warrant harsher penalties for disclosures.

Since NGA started our work in 2016, we have heard many stories from NMFS staff, partners, and fisheries researchers who have described the delays confidentiality concerns introduce into their work and the culture of fear around sharing data, even within the same office. This includes delays in preparing stock assessments<sup>1</sup>, an essential tool for fisheries management. While we see that NMFS may be intending to set up more standardized internal processes that *could* ease the burden on staff and make it easier to share sensitive information within a research project or Council team, those processes will not improve the quality of science products if the overarching message is ‘you could go to jail if you forget to scrub a vessel number.’

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<sup>1</sup> See GAO-23-105172, 2022. FEDERAL FISHERIES MANAGEMENT: Overfishing Determinations Vary Across Regions, and Data Challenges Complicate Management Efforts

**Recommendation:**

If the agency feels that a regulatory section on penalties is necessary (rather than relying on statute) we recommend looking to general language on Federal Information Protection, such as 44 USC 3572(f), and amending the rule to require both knowledge and intent:

(x) **Knowingly and willfully** disclose confidential information without authorization **to a person or entity not entitled to receive it**

**NMFS should focus on enabling data sharing for conservation and management, not tightly restricting data access**

When the Magnuson-Stevens Act was created in 1976, the primary U.S. concern was eliminating foreign fishing in U.S. waters to secure the growth of the domestic industry. At that time, an expansive interpretation of:

*...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...*

may have made sense to protect a fisherman’s competitive advantage. Fisheries were open access, rapidly expanding, and knowing where another boat had a good haul could give you a chance to beat them to it. That is not the state of U.S. fisheries today, with limited quotas and permits, where graying fleets are looking for buyers for their retirement and climate change makes each season less predictable. Fishing businesses need to be able to share verified information with investors, exporters, and other partners in order to operate. Consolidation, reductions in fisheries infrastructure, and smaller fleets can make it almost impossible to share local or regional landings without indirectly identifying a single vessel or company.

Today, commercially available AIS and satellite imagery makes it possible to determine fishing vessel locations, often in real time. Marine mammal interactions and offshore energy operations are increasing the demand for near-real-time reporting on fishing activity. It’s time to stop pretending that fishing catch and location is classified information. Where there are legitimate concerns about business competition, NMFS could set 60 or 90 day embargoes on catch and location data, rather than trying to obfuscate locations and landings, which are not the source of competitive advantages and are often common knowledge within the industry. NMFS should be setting the tone that fisheries data gains value in being shared and work to increase and accelerate the agency’s public reporting to be more relevant to businesses, investors, and fishermen as well as other ocean users.

The more expansively NMFS defines “identity or business of any person” the more data NMFS must treat as ‘confidential’ and manage under restricted access. It is not clear from this rule that embargoes would qualify as acceptable protection for ‘confidential’ information. Personally

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identifying information (PII) about individuals is covered by FOIA, the Privacy Act, and other federal and state information statutes. NMFS and its data partners can and do take advantage of both legal guidance and well-documented data protocols for PII. Similarly, trade secrets and other business practices that offer a true competitive advantage are addressed by well-established national and international intellectual property rights frameworks. NMFS has the choice of how to define “business” data and the proposed rule chooses a definition so broad that it includes data that is both “readily ascertainable” from other sources and vital for NMFS to share to support NOAA’s conservation and management obligations.

**Recommendation:**

In §600.10, drop the proposed definition of “operational information” and amend the definition of *Business of any person* to read:

Business of any person means: ~~(1)~~ financial information such as ownership information, cash flow documents, income statements, or information that contributes to the preparation of balance sheets, *as well as information specific to a person submitted for any determination under a limited access program, as defined under §600.420(c)2.* ~~;~~ ~~or~~

~~(2) Operational information such as fishing locations, time of fishing, specific gear configuration, 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 U.S. fish processors.~~

**NOAA needs accessible fisheries data to meet its ocean goals**

NOAA needs timely and accessible fisheries data to meet its overall ocean protection and management goals, as well as achieving social goals for fisheries and coastal management. This includes the Blue Economy<sup>2</sup> work advanced by NOAA to build “a knowledge-based economy, looking to the sea not just for extraction of material goods, but for data and information to address societal challenges and inspire their solutions”. This ambitious and necessary initiative simply cannot be done without greater, timely data access from all sources. Similarly, the NOAA Data Strategic Plan<sup>3</sup> requires ready access to all data sources, including fisheries data, to provide NOAA the data foundation needed to address emerging and future issues.

<sup>2</sup> <https://www.noaa.gov/blue-economy>

<sup>3</sup> NOAA Data Strategy, March 2022, <https://www.noaa.gov/sites/default/files/2022-11/NOAA-Data-Strategic-Action-Plan.pdf>

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The Nation’s renewable energy goals are aimed at providing no or low carbon alternatives to the current energy mix. A significant component of this effort is offshore wind energy development by BOEM. To be successful, BOEM’s Renewable Energy Program<sup>4</sup> needs timely, accurate data to cite wind energy projects in areas with minimized impacts on fisheries and the marine environment. Without important fisheries data being available, the current tension between fisheries and wind energy development will continue, and likely increase.

As the Net Gains Alliance has commented previously, monitoring progress on NMFS’s 2022-2024 Diversity, Equity and Inclusion Strategic Plan<sup>5</sup> and Equity and Environmental Justice<sup>6</sup> goals also require access to timely, accurate data so that NMFS and NOAA policies promote ecosystem integrity and access to ocean resources in fair and equitable fashion. Without these data, DEIJ efforts will be based on subjective measures and political pressure rather than a sound information base.

**NMFS should adopt more regular public reporting and more open processes for updating data and information policies**

**Release more verified, reliable, and detailed reports on fishing activity data more often**

As we discuss in this article<sup>7</sup>, NMFS’ major reports on fishing activities — Fisheries of the United States and Fisheries Economics of the United States — are one to two years out of date when they are published. Investors and businesses need more frequent reporting, like the weekly and monthly market reports provided by USDA, and they don’t have time to dig through the databases of regional Fishery Information Networks (FINs) to get it. Even if they did, the FINs don’t track the outcomes of all NMFS programs, like the Fishery Finance program. NMFS is the authoritative source of information on fishing activity in the United States and should be reporting on that activity more frequently than every two years. The proposed public process for administrative procedures to implement this rule provides an opportunity to survey the fisheries community to determine what types of reports would be most valuable.<sup>8</sup>

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<sup>4</sup> <https://www.boem.gov/renewable-energy/renewable-energy-program-overview>

<sup>5</sup> <https://www.fisheries.noaa.gov/s3/2021-10/Fisheries-D-I-strategic-plan-2022-25-508-hirez-.pdf>

<sup>6</sup> <https://media.fisheries.noaa.gov/2023-05/NOAA-Fisheries-EEJ-Strategy-Final.pdf>

<sup>7</sup> <https://www.netgainsalliance.org/news/ocean-data-silos-are-a-business-issue>

<sup>8</sup> Note that increased public reporting on social and economic data is also Recommendation 4-1 in a recent report from the National Academies of Sciences, Engineering, and Medicine. [Assessing Equity in the Distribution of Fisheries Management Benefits: Data and Information Availability](#). (2024) Washington, DC: The National Academies Press. <https://doi.org/10.17226/27313>.

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The proposed rule includes a provision for data submitters to provide written authorization that could allow other parties access to submitted confidential information (600.420(f)). The preamble highlights this section, stating:

After finalization of this rulemaking, NMFS intends to streamline its processes for a person that is subject to an information submission requirement to authorize release of information pursuant to the written authorization exception. These improvements would create more uniformity and efficiencies across regions and provide details to persons who are subject to MSFCMA information reporting requirements on how they can use the written authorization exception.

This could make it easier for fishing businesses to share verified information with business partners, such as fellow members in a fishing co-op, an exporter needing to certify catch location to meet EU import requirements, or a lender for a business loan. The inability to share fishing data across partners is a common complaint we have heard through our years of interviews and discussions with the fisheries community. We strongly encourage NMFS to explore an interpretation of “written authorization” that is essentially a multi-party data use agreement, enabling more simplified, “one-step” reporting for fishermen where records are submitted once and delivered to all partners who need them, including state and federal agencies.

**Formally commit to a public process for drafting and adopting the supporting administrative guidance**

The preamble for the proposed rule discusses making many changes to internal procedures and processes to modernize and fully implement the confidentiality rule. Given the relatively minor changes proposed to the regulatory language, the development of implementing procedures is extremely important. NMFS should commit to an open, transparent process for developing internal controls and procedures to allow all stakeholders the opportunity to understand proposed changes and to comment accordingly. Without a transparent, accessible process, changes to data and information confidentiality could be made that either further restrict access to these data or do not take advantage of good, forward looking ideas from fishermen, scientists, and other stakeholders. This would be a lost opportunity, bad public policy, and could hinder efforts, including those of NOAA, to address issues such as climate adaptation and wind energy development that will require greater access to fisheries data.

Additionally, it is important to recognize that fisheries are a public resource that belongs to all U.S. citizens and, as such, the data coming from use of the public resource should be readily available. The time has passed when all fisheries data should be treated as a state secret, unavailable to the public.

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**This is a missed opportunity to make real progress in improving access to fishery data at a critical time**

The Net Gains Alliance is disappointed that the proposed rulemaking did not address the need for improved fisheries data management and access in a significant way. This proposed rulemaking could have built on the work of the 2019 Fishery Information Management Modernization Workshop<sup>9</sup> and lessons from Fisheries Information System projects with policies reflecting NMFS' investments in data modernization. The rule could have clarified how fisheries data and information will connect not only to NMFS's work on current and developing fisheries issues, like climate impacts, but also to NOAA and Department of Commerce initiatives such as promoting a sustainable Blue Economy, the NOAA data strategy, and efforts to broadly promote diversity, equity, and inclusion at all levels of NMFS operations and planning.

We are not asking NOAA Fisheries to withdraw the proposed rule. Rather, we urge that NMFS use the comments the agency receives to amend and finalize the proposed rule and immediately begin a public process to implement the rule. As part of that process, we hope NMFS and the fisheries and ocean community will also revisit the confidential information provisions of MSFCMA and propose legislative changes to make critical data available to meet the real, significant challenges facing commercial and recreational fisheries, scientists, managers, and all ocean stakeholders as we work towards ocean sustainability.

The Net Gains Alliance team is available to discuss these issues further at your convenience.

Sincerely,

**The Net Gains Alliance Team**

George Chmael II  
George Lapointe  
Kate Wing

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<sup>9</sup> NOAA Technical Memorandum NMFS-F/SPO-204