

**Testimony of  
Mark Fina, Ph.D., J.D., Senior Policy Analyst  
United States Seafoods**

**Before the  
Committee on Natural Resources  
United States House of Representatives**

**February 4, 2014 in Washington, D.C.**

Good morning Chairman Hastings, Ranking Member DeFazio, and Members of the Committee. I am Mark Fina, a policy analyst for United States Seafoods and President of the Alaska Seafood Cooperative. My company and the cooperative, which includes four other companies, fish in the non-pollock multispecies groundfish fisheries off Alaska. We are substantial participants in the flatfish, rockfish, Atka mackerel, and Pacific cod fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska. We participate in both catch share fisheries, in which portions of the total allowable catches are allocated for exclusive harvest by the cooperative, as well as limited access, derby fisheries, which are governed by limits on entry and in-season monitoring of harvests of total allowable catches. I am not representing my employer, the cooperative, or any other group today. I appreciate having the opportunity to offer comments to the Committee on its Draft Discussion Bill and the Reauthorization of the Magnuson Stevens Fishery Conservation and Management Act. While I have some knowledge of fisheries throughout the country, I am most familiar with the fisheries in the North Pacific and therefore limit my comments to issues in the North Pacific.

Overall, I believe that the Magnuson-Stevens Fishery Conservation and Management Act (the Magnuson-Stevens Act), in its current form, is serving its intended purposes well. The Act and its interpretation and administration by the Regional Fishery Management Councils (the Councils) and the National Marine Fisheries Service (NMFS) provide for the sound conservation and management of our valuable National fishery resources and promotes domestic commercial and recreational fisheries as intended. In the North Pacific, we have sustainable stocks as demonstrated by years of catches consistently between 1.5 and 2 million metric tons and no overfishing. Given these circumstances, only limited and focused, carefully considered modifications to the Act would seem merited at this time. One area addressed by the Committee's draft discussion bill is confidentiality of information. The majority of my comments will be focused on that subject.

**Data confidentiality**

Before joining US Seafoods last year, I worked for 11 years as the Senior Economist at the North Pacific Fishery Management Council (NPFMC or North Pacific Council). In that position, I routinely worked with confidential fisheries data preparing reports to be used by the North Pacific Council to guide their decision making. In considering data confidentiality issues, the two primary questions that should be considered are:

1. do policymakers have adequate information to make informed decisions and
2. do stakeholders and the public have adequate information to support their participation in that decision making process.

Based on my experience under the existing rules as they were interpreted when I worked as an analyst, the answer to both of these questions is ‘yes’.

General information concerning fisheries is readily accessible in standardized reports that are publicly available and posted on NMFS and Council websites. These include weekly and annual catch and bycatch reports, fishery allocations, and closures. In addition, annual Stock Assessment and Fishery Evaluations are available, which include detailed biological, social, and economic analyses of all fisheries and stocks under the North Pacific Council’s management. In the most recent year in the North Pacific, the Bering Sea and Aleutian Islands report alone exceeded 2,500 pages, including an economic section that exceeded 300 pages and an ecosystem section that exceeded 200 pages. In addition, tens of thousands of pages of analysis and large volumes of data are available from the analyses of all previously adopted or considered measures. These documents, together with experience in or related to the fisheries, provide stakeholders with the foundational information needed to decide whether management changes should be advocated. If the North Pacific Council wishes to pursue a management action, staff prepare additional information and analyses examining specific aspects of the fisheries that might be affected by the proposed management changes. These reports and analyses provide ample information for decision making and stakeholder participation in the Council and regulatory process.

### **Aggregating under the rule of three**

Analyses of fishery management measures tend to be data intensive. Stakeholders and policy makers are often interested in examining several alternatives and several different views of data that illuminate various aspects of the effects of those alternatives. For example, a Council considering a change in allocations may consider a variety of historical periods, each of which will result in different allocational distributions. Under the Magnuson Stevens Act and current confidentiality rules, data may only be disclosed in “aggregate or summary” form to “not directly or indirectly disclose the identity and business” of the submitter. Analysts can comply with this requirement by showing the distribution of possible allocations applying a “rule-of-three” under which each data point is an aggregation of the data of at least three submitters. This rule effectively allows analysts to show fishing data to assess a variety of measures. Data can be aggregated spatially to examine management measures such as area closures intended to protect habitat or bycatch. Historical catches can be allocated across groups of vessels to examine allocative measures or across vessels that deliver to a particular community to examine the effects of a fishery on a community. At times, analysts can be challenged to develop aggregations across submitters’ activities to display data. For example, if only a single vessel fishes in a geographic area during a week, aggregations across multiple weeks or a larger area would be needed to mask data at the weekly level. The interest of policy makers and stakeholders in a variety of displays of data can challenge analysts, but under the rules and

practices that I applied as a Council staff member, Council members and stakeholders are able to understand the implications of alternative management actions in all but the rarest of instances.

### **NMFS Proposed Rule on Data Confidentiality**

In May of 2012, NMFS released a proposed rule implementing the Act's current data confidentiality provisions for public comment. For the most part, the proposed rule simply formalizes current data confidentiality practices (see attached Department of Commerce, National Oceanic and Atmospheric Administration, Proposed Rule on Confidentiality of Information 77 FR 30486-30496, May 23, 2012). Most importantly, the proposed rule clearly establishes the requirement that any disclosure of data be in "aggregate or summary" form to "not directly or indirectly disclose the identity and business" of the submitter. This provision is intended to clearly establish the "rule-of-three" aggregation requirement. The proposed rule also clarifies the breadth of protection of confidentiality rules by replacing the word "information" with "statistics", ensuring that all "information" submitted to under a Fishery Management Plan (FMP) is subject to confidentiality protection. A variety of other clarifications are included in the proposed rule, including the development of more specific rules governing access to confidential information by NMFS, State, and Marine Fishery Commission employees and observer employees for fishery management purposes. These provisions all are consistent with the spirit of the current rule and formalize the requirement to continue current practices.

The rule also addresses the Act's exception to confidentiality protections for information required to be submitted for "any determination under a limited access program". Currently (and in the proposed rule) "limited entry program" is interpreted to mean any catch share program (meaning any program which "allocates privileges, such as a portion of the total allowable catch, to a person") and "determination" is interpreted as "grant, denial, revocation of privileges, approval or denial of a transfer of a privilege". Under this rule, any catch share allocations or transfers of those allocations are not subject to confidentiality protections. In my mind, this relatively narrow disclosure of information improves the workings of markets by ensuring that participants are aware of the distribution of shares to facilitate transfers. In addition, the disclosure is consistent with current practices, as NMFS routinely makes share allocations public through webpage postings.

Some comments to the proposed rule have suggested a broader interpretation of the term "determination" should be applied, under which any information used to make any decision under a catch share program should be disclosed. Other comments have suggested that any and all fishing information should be disclosed. These comments argue for the disclosure of all catch and observer data (including all catch amounts and fishing locations) in a disaggregated form with identification of the submitter. Applying this broad definition would be very compromising of proprietary information.

### **What fisheries data are proprietary**

Proprietary information is often thought of as financial information and market prices. Proprietary information often extends into many other aspects of a business, most importantly

operational information. In the fishing industry, fishing locations and catch amounts are among the most sensitive business information. Location and timing of fishing drive costs and often determine a person's position in markets. Fish quality and catch rates often change with timing and location of catch. Because of these factors, timing of fishing, catch rates, and catch amounts can have significant implications for market success and competition.

Contrary to the belief of some people, catch share programs often increase the proprietary value of this type of information. In most limited access fisheries, timing of catch is dictated by regulatory openings and closings. Fishing locations can be limited in a derby fishery by proximity to landing locations. Catch share programs, by providing exclusive access to a specific quantity of catch that may be harvested any time during an extended season, often provide participants with much greater latitude to decide when and where to fish. This greater flexibility increases the competitive effects of choices of fishing time and location. Participants can use proprietary operational information to increase their catch rates, improve product quality, and time deliveries of products to markets. Broadening the definition of "information used to make determinations under a catch share program" in a manner that divulges data and information revealing timing of fishing and location choices would compromise valuable proprietary information.

For the most part, fishery participants are satisfied that the masking effect of aggregating data under the "rule of three" protects their propriety interests in business information; however, some participants remain concerned that in cases where data are aggregated across only a few submitters, competitors will be able to glean information concerning their markets and operations. For example, estimates of catch amounts of competitors can be generated, if only a few other vessels are in a fishery during a period. Despite these concerns, the current rule and its aggregation requirement strike a reasonable balance between the interests of industry in maintaining confidentiality of this proprietary information and the public interest in obtaining information to participate in the effective management of fisheries. Councils receive adequate information for decision making and a minimal level of protection is provided for fishing industry proprietary information.

### **Data confidentiality rules under new catch share management structures**

The development of new management structures, such as cooperatives in the North Pacific, and NMFS recent application of data disclosure limitations to these structures have unnecessarily complicated implementation of data confidentiality protections. Recently, NMFS made an internal decision to consider a cooperative a "submitter" of data for purposes of administering data confidentiality protections. If a cooperative is interpreted to be a submitter of data when applying the "rule-of-three" to data aggregations, some meaningful restrictions on the release of data can arise. For example, no data can be revealed in a fishery with only two cooperatives, if data from three cooperatives must be aggregated for disclosure. Such an interpretation shows a fundamental misunderstanding of the operations of cooperative management structures and data reporting. Under NMFS management, cooperatives are organizations that are formed for the purpose of coordinating harvest of annual allocations. NMFS and the cooperative members can achieve efficiencies by having a single quota allocation made to the cooperative. Under harvest

agreements, which are not filed with NMFS, quota holders can easily move the allocation among vessels to efficiently harvest their collective allocation. To ensure that quotas are not overharvested, each cooperative member must agree to be jointly liable for any overharvest of their collective allocation. NMFS reduces administrative costs by overseeing a single allocation to several vessels.

In considering how to treat data of cooperative members for confidentiality purposes, it is useful to consider how cooperative data are collected. **Catch data submitted to NMFS are transmitted by vessel operators, who are employed by cooperative members (not the cooperative).** The cooperative is not liable for failure to submit these data, the vessel operator is. Under most cooperative agreements, the cooperative will be provided access to landings data by each member, but typically the cooperatives access to a vessel's data is limited to those data needed to oversee harvest of the allocation. A cooperative typically does not have access to each vessel's fishing locations or detailed catches by specific location. Those data are only shared within the cooperative for limited purposes, such as identifying bycatch hotspots.

Cooperatives are not price setting entities and often do not even know the price paid to members for their catches. If cooperative members wish to share price information among members and negotiate prices collectively, they must take care to abide by antitrust laws, ensuring that members qualify for an exemption, most likely under the Fishermen's Collective Marketing Act. If a cooperative (or for that matter, any fishermen in any fishery) chooses to avail itself of an antitrust exemption, NMFS is unlikely to know. Even if and when a cooperative negotiates pricing under the exemption, members may have side agreements with processors and buyers that include price adjustments or other types of compensation, which the cooperative may be unaware of. For these reasons, NMFS collects price data from vessel operators, not cooperatives, and any enforcement action for failure to submit data are pursued with the vessel owner, not the cooperative.

Given that cooperatives do not submit data to NMFS and often do not even have access to most of a member's proprietary data, it is clear that a cooperative should not be considered to be a data submitter for purposes of data confidentiality protections and applying "rule-of-three" aggregations when implementing those protections. Applying the aggregations at the vessel level ensures that Councils, stakeholders, and the public have reasonable access to data for management and conservation purposes. Furthermore, only if "submitter" is interpreted as being a cooperative, is there even an argument that a broad release of data under the "catch share determination exemption" is needed for fishery management purposes. In short, maintaining the rule of three aggregation requirements at the vessel level and a narrow definition of "determination under a catch share program" for purposes of administering the exemption to confidentiality protections provides a reasonable balance between the interests of Councils, stakeholders, and the public in information for fishery conservation and management decision making and fishery participants' interest in protecting proprietary information.

From a practical standpoint, I can say that in working for the North Pacific Council for over 10 years I prepared thousands of pages of analysis that relied extensively on confidential data. In preparing those documents, I routinely applied the "rule-of-three" at the vessel level, and not the

cooperative level. Not once during that time did any industry stakeholder express concern that aggregation at the vessel level compromised proprietary information. Given this state of things and the reality that cooperatives do not submit these data to NMFS, it is unclear why anyone would choose to interpret the term “submitter” to mean the cooperative.

### **The importance of data confidentiality to maintaining data quality and existing data management programs**

The satisfaction of industry with current confidentiality protections provides management benefits by increasing the willingness of industry to improve fishery management information. In the North Pacific, industry representatives have worked extensively with the Council and NMFS in the development of new data collection initiatives, including programs to collect data concerning bycatch management and economic and social information. Although the Magnuson Stevens Act provides the Council with authority to dictate these data collection initiatives independent of any industry cooperation, the effectiveness of the programs are often increased greatly by industry participation in their development. For example, bookkeeping discrepancies across submitters and differences in interpretation of survey questions can often lead to errors and biases in data. Working with industry can ensure that questions and responses are accurate and correctly interpreted by analysts. It is not an overstatement to say that over half of the questions on the crab economic data collection forms were revised from their original form after discussions with industry. The importance of the NMFS/Council/industry working relationship is clearly described in the letter from the North Pacific Council in its October 14, 2013 letter to NMFS Assistant Administrator, which states:

...any further relaxation of these [confidentiality] provisions could undermine the cooperation and goodwill of the fishing industry we have worked hard to cultivate. This cooperation, including numerous biological monitoring and economic data collection programs associated with North Pacific catch share programs, is essential to the effective management of our fisheries. Through these programs we collect sensitive cost and other operational information from industry participants. We need to ensure that such information remains confidential, except where Congress expressly intended otherwise. (see attached letter)

A separate issue with respect to any revisions to data confidentiality protections, which may be specific to the North Pacific, concerns data sharing arrangements between NMFS and the State of Alaska. Currently, the State and NMFS jointly collect in-season management data under a data sharing agreement. To maintain this system NMFS must maintain data confidentiality to the extent required by State law. The proposed rule is consistent with the data protection agreement between the State of Alaska and NMFS and is consistent with the requirements of the State law. Further relaxation of confidentiality protections (such as providing for broader release of data under the catch share determination exemption, however, could jeopardize the existing relationship and require extensive restructuring of data collection in the North Pacific. As noted by the North Pacific Council in its letter to NMFS Assistant Administrator:

potential conflicts with State confidentiality statutes...would inhibit the ability of the State to share State fishery records with NMFS, and thus severely undermine the existing data collection system used for inseason management of federal fisheries. Releasing information that

the State deems to require aggregation would be in violation of both State statute and the existing data sharing agreement between the State and NOAA.

In concluding, I will concede that under the “rule-of-three”, it is possible that Councils and stakeholders may benefit from additional information that cannot be released under the current confidentiality rules. For example, in a fishery with only a few participating vessels or processors, it is possible that community landings cannot be revealed. This need, while important, should not provoke a large scale abandonment of data confidentiality protections. Any modification to address this shortcoming should be focused with a well-defined process for determining 1) if a broader disclosure is necessary for sound management 2) the appropriate scope of that disclosure, and 3) any limitations on the disclosure to protect confidentiality. In considering this data needs, it should be noted that these needs arise in both catch share and non-catch share fisheries and a simple provision exempting catch share data from confidentiality protections will not address the issue. Only carefully considered and developed exemptions that focuses directly on specific data needs and balances those needs against the need to protect proprietary data should be developed..

### **Specific comments on the discussion draft bill**

#### **Section 3 – Flexibility in Addressing Rebuilding Stocks**

Modification of rebuilding timelines - The proposed modification of the timeline for rebuilding would remove the current 10 year rebuilding requirement, replacing that requirement with a more flexible timeline. The proposed modification seems to appropriately accommodate the influences of other factors (such as non-fishing environmental effects) on rebuilding the time.

Relief from rebuilding requirement if stock is not depleted – Provision to relieve requirements for rebuilding if it is determined that a stock is not depleted is important, as it relieves the stress of rebuilding plans when improved stock information shows that a rebuilding plan was unnecessary in the first place.

#### **Section 4 – Modifications to the Annual Catch Limit (ACL) Requirement**

Ecosystem components – The provision for the exemption of stocks from ACL requirement by inclusion as an ecosystem components provides effective protection to nontarget stocks that are unlikely to be affected by fishing.

Scientific and Statistical Committee fishing/overfishing recommendations – The bill would allow a Council to set an ACL for a stock above the recommended fishing level of its SSC. The North Pacific Council’s policy of maintaining its ACLs at or below its SSC’s recommended fishing level predates development of the provision of the current Magnuson-Stevens Act provision. Although a need for removing this requirement may exist in other regions, it is our hope that the North Pacific Council maintains its current policy of setting ACLs at or below the SSC recommended fishing level.

## **Section 5 – Distinguishing between Overfished and Depleted Stocks**

Distinguishing overfished stocks from depleted stocks could be important in the future, if some stocks are depleted for reasons other than fishing. Adopting a revised definition of “depleted” could have some implications for the development of rebuilding plans depending on how that definition is interpreted. For example, a stock might be determined to be “depleted” by dipping “below the natural range of fluctuation associated with the production of maximum sustainable yield”, without reaching an “overfished” state which occurs only if “a level that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis” is reached. The proposed definition of depleted will require that the “natural range of fluctuation associated with the production of maximum sustainable yield” be defined for all stocks. The current definition of overfished provides a more certain metric for assessing stock status. Maintaining the current definition (and applying it to the term “depleted”) or developing a more transparent revised definition may provide more certainty on when a stock will be considered depleted.

## **Section 6 – Transparency and Process**

The procedural and analytical under the National Environmental Policy Act (NEPA) are somewhat redundant and at times difficult to reconcile with the procedural and analytical requirements of the Magnuson Stevens Act. Notwithstanding, NMFS and the Regional Fishery Management Councils have generally managed to reconcile these requirements. An explicit statement that actions prepared in accordance with the Magnuson Stevens Act are considered to comply with NEPA requirements would remove any uncertainty as to whether the reconciliation of the requirements has been fully achieved.

The requirements for video recording and broadcast and production of transcripts seem excessive. Currently, audio broadcasts and recordings and tape logs are available of North Pacific Council meetings and deliberations. These materials provide adequate information to the public without excessive costs. Maintaining the current process provides for adequate transparency and public participation in the North Pacific Council process.

## **Section 7 – Limitation on Future Catch Share Programs**

This applies only outside the North Pacific; therefore, I have no comment.

## **Section 8 – Data Collection and Data Confidentiality**

Electronic monitoring – The use of electronic monitoring will be important to gaining improved information in fisheries across the Nation. The timeline for developing standards and regulations seems aggressive, but the spirit of the measure seems appropriate.

To fully achieve the benefits of electronic monitoring, compliance monitoring should be permitted with electronic monitoring. In addition, several electronic technologies are currently used for compliance monitoring, such as Vessel Monitoring Systems. Continued use of these

existing electronic technologies for monitoring should be maintained by any electronic monitoring provision. Any legislation should clearly provide that electronic monitoring may be used for compliance monitoring. Throughout the consideration of electronic monitoring systems, attention should be given to avoiding redundancies with observer coverage to achieve the most cost effective monitoring.

Video and acoustic survey technologies – The support for further development of video and acoustic survey technologies is an appropriate measure for improving fishery information.

Data confidentiality – Under (c)(1)(B), the insertion limits the protection to being “exempt from disclosure under section 552(b)(3) of title 5, United States Code”. Depending on interpretation, as written this change could substantially broaden disclosures, since it only prevents disclosures under the Freedom of Information Act (FOIA). An alternative wording that provides the current protection could be: “shall be exempt from disclosure, including disclosure under section 552 of title 5, United States Code, except –“. This change would make it clear that FOIA disclosures are not permitted.

Under (c)(1)(B), the insertion at clause “(F)” disclosures “to a Council or State” are allowed with written authorization from the person submitting the data. The current rule allows disclosure of data to any person identified by the data submitter with written authorization. Industry has used the current exception to provide data to a third party for overseeing catches and bycatch, implementing bycatch reduction measures and area closures, and monitoring industry measures to reduce fishing impacts. Maintaining the ability of data submitters to release data to third parties, as permitted under the current exemption, is important to achieving the conservation benefits of these industry measures and poses no threat to confidentiality since disclosures are at the discretion of the submitter. Deletion of “to a Council or State” would clearly provide for the submitter to continue to release data to third parties.

Under (c)(1)(B), the insertion at clause “(G)” allows for the disclosure of information “required to be submitted to the Secretary for any determination under a catch share program.” This modification is consistent with the current interpretation of an exception that provides for disclosure of information “required to be submitted to the Secretary for any determination under a limited access program”. To date, NMFS has interpreted “limited access program” to mean “catch share program”. More problematic are the potential interpretations of the term “determination”. In the Proposed Rule of May 2012, NMFS suggests that a “determination” is limited to a “grant, denial, or revocation of privileges; approval or denial of a transfer of privileges; or other similar regulatory determinations by NMFS applicable to a person.” This interpretation adequately protects proprietary information of submitters. Including the specific definition of “determination” from the proposed rule in legislation could ensure that this protection is continued.

A provision for the release of bycatch information with and without vessel identification applicable only in the North Pacific is removed by the discussion draft. When first adopted, this provision provided important bycatch information that stigmatized poor bycatch performers and likely stimulated improved bycatch performance. Since that time, extensive regulatory bycatch

control measures have been adopted and fleets have developed cooperative arrangements to further reduce bycatch impacts. In some cases, it is possible that disclosures under the exemption could discourage experimentation or fleet coordination that might yield further bycatch reductions. In addition, expansive bycatch information is available without the exemption. Given the advances in bycatch reduction, the potential for disclosures to create a disincentive for bycatch reductions and the breadth of information available regardless of the exemption, the need for continued release of bycatch information under the current exemption should be explored.

Asset Forfeiture Funds – The use of forfeiture funds would be beneficial for developing information on data-poor fisheries. In developing a provision, it should be borne in mind that NMFS often contracts surveys with private vessel owners. As written, the provision allows the use of funds to contract State personnel and resources for data development. A similar provision for the continued contracting of private vessels for surveys should be included.

Thank you for the opportunity to present this testimony. I look forward to working with the Committee on the Magnuson Stevens Act reauthorization process to continue the sound conservation and management of our Nation's fisheries resources.