THE PEW CHARITABLE TRUSTS

2005 Market Street, Suite 2800 215.575.9050 Phone
Philadelphia, PA 19103-7077

901 E Street NW 202.552.2000 Phone
Washington, DC 20004
www.pewtrusts.org

April 25, 2016

Karen Abrams
National Oceanic and Atmospheric Administration Fisheries Service
1315 East West Highway, SSMC3-OSF-SF3
Silver Spring, MD 20910

Re: Standardized Bycatch Reporting Methodology, Proposed Rule, NOAA-NMFS-2016-0002, RIN 0648-BF51

The Pew Charitable Trusts submits the following comments on NOAA Fisheries' proposed rule for implementing Standardized Bycatch Reporting Methodology (SBRM) which was required by the "Sustainable Fisheries Act" amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) in 1996.

Bycatch is a significant problem in many U.S. fisheries. The incidental catch and discard of fish, sea turtles, seabirds, marine mammals, corals, and other wildlife can significantly affect the ecological well-being of our oceans. This waste of natural resources means lost economic opportunity for fishermen and presents persistent challenges for fishery managers because it is a poorly controlled source of mortality. Sustainable fisheries management relies on the incorporation of robust bycatch data and assessment throughout the management process.

An accurate accounting of bycatch in fisheries is crucial to determining the most basic information needed for successful fisheries management – how many fish are killed due to fishing. More specifically, it is critical to fulfilling the requirements of the MSA to account for all sources of mortality in fisheries management, prevent overfishing, rebuild overfished stocks, and minimize the amount of bycatch and the mortality of unavoidable bycatch.[1] Good bycatch data is a further imperative for the management of species under the Marine Mammal Protection Act (MMPA),[2] the Endangered Species Act (ESA),[3] and the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds).[4]

The agency's proposed rule to implement SBRM fails to fulfill the agency's mandated responsibilities and ignores clear case law. If implemented, it will weaken the foundation of

[1] See: 16 U.S.C. § 1851(a)(1). 16 U.S.C. § 1851(a)(9). 16 U.S.C. § 1853(a)(11). 50 C.F.R. §§ 600.310(f)(2)(i), (iv)
[2] The Marine Mammal Protection Act. http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf
[3] The Endangered Species Act. http://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf
[4] NOAA Fisheries. United States National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries. Feb 2001. http://www.nmfs.noaa.gov/ia/species/seabirds/us_npoa.pdf

science-based management in U.S. fisheries, and undermine the management of fisheries and the stewardship of protected resources. Specifically, the rule is fundamentally flawed in the following ways:

- The agency improperly decouples bycatch data collection from the assessment process;
- The agency inappropriately suggests SBRMs do not need to consider the accuracy and precision of bycatch data and estimation methods;
- The rule incorrectly allows funding constraints to compromise the design and approval of SBRM plans; and
- The proposed rule undermines the intent of standardization.

Further, the proposed rule is inconsistent with the agency's recent efforts to advance Ecosystem-Based Fisheries Management,[5] and revise the National Bycatch Reduction Strategy, which was released for public comment simultaneously with this proposed rule.[6] Assessment and minimization of bycatch is an important part of managing fisheries with an understanding for how human activities and the ecosystem interact. Without good data, managers will not be able to fully assess the impacts of fishing or consider the trade-offs of their management actions.

The Pew Charitable Trusts concludes that this proposed rule is deeply flawed, and we strongly recommend the agency withdraw it.

SBRM is a required element of fishery management plans, is intended to ensure the assessment of bycatch for management actions, and must be based on the best scientific information available.

In 1996, Congress recognized that "the issue of bycatch reduction and the reduction of discard mortality [was] one of the most important challenges facing fisheries managers," and amended the MSA with the intent of reducing bycatch and ensuring the long-term productivity of our fishery resources.[7] Sen. Ted Stevens, the principal sponsor of the reauthorization, said the bycatch amendments were intended to "bring a stop to this inexcusable amount of waste."[8] As a result, the MSA now contains specific provisions that task the agency to assess and reduce bycatch in our nation's fisheries.

---

[5] NOAA Fisheries. Ecosystem Based Fisheries Management Policy. Sept 9. 2015 discussion draft. https://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Draft_EBFM_Policy_9.9.2015_for_release.pdf

[6] NOAA Fisheries. Draft National Bycatch Reduction Strategy. Feb 2016. http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/strategy.html

[7] H.R. Rep. No. 104–171, at 27.

[8] 142 Cong. Rec. S10810 (daily ed. Sept. 18, 1996) (statement of Sen. Ted Stevens).

First, the 1996 Sustainable Fisheries Act added National Standard 9 to the MSA.[9] This standard states: "Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch."[10]

Second, it required all fishery management plans (FMPs) include an SBRM and measures to reduce bycatch:

> Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall— . . .
>
> > (11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—
> >
> > > (A) minimize bycatch; and
> > >
> > > (B) minimize the mortality of bycatch which cannot be avoided;[11]

Congress intended for the SBRM requirement to "mandate the assessment of bycatch levels in each fishery."[12] Despite the fact that the SBRM requirement has been law for 20 years, the agency has never issued federal regulations for implementing this crucial provision.[13]

In essence, SBRM is a means to understand a fishery's bycatch so that the agency and managers can:

- Minimize bycatch and bycatch mortality where practicable;
- Account for all sources of mortality, including bycatch, when setting annual catch limits;[14]
- Prevent overfishing;
- Rebuild overfished stocks;

---

[9] Sustainable Fisheries Act of 1996. http://www.nmfs.noaa.gov/sfa/laws_policies/msa/documents/sustainable_fishereries_act.pdf

[10] 16 U.S.C. § 1851(a)(9).

[11] 16 U.S.C. § 1853(a)(11).

[12] Senate Report from the Committee on Commerce, Science, and Transportation on S. 39, the "Sustainable Fisheries Act" S. REP. NO. 104-276, at 5.

[13] 81 Fed. Reg. 9413 (Feb. 25, 2016) ("NMFS has never issued regulations that set forth the agency's interpretation of the SBRM provision.").

[14] The National Standard 1 (NS1) Guidelines define an ACL as "the level of annual catch of a stock...that serves as the basis for invoking AMß ..." and "includes fish that are retained for any purpose, as well as mortality of fish that are discarded." 50 C.F.R. §§ 600.310(f)(2)(i), (iv). On precisely the question of how ACLs should account for discards, the response to comments in the NS1 Guidelines stated that "all sources of fishing mortality, including dead discards and post-release mortality from recreational fisheries must be accounted for..." and "catch includes fish that are retained for any purposes, mortality of fish that have been discarded, allocations for scientific research, and mortality from any other fishing activity." NOAA, NS1 Guidelines, Response to Comments, 74 Fed. Reg. 3178, 3190 (Jan. 16, 2009).

- Fulfill requirements to steward protected resources, including endangered and threatened species;
- Make better management decisions based on accurate stock assessments; and
- Effectively implement ecosystem-based fishery management.

However, for many years after the 1996 provisions were added, NOAA Fisheries failed to ensure the establishment of adequate SBRMs and that meaningful action was taken to monitor and reduce bycatch. As a result, there is significant case law supporting that NOAA Fisheries has a non-discretionary duty to ensure all FMPs contain substantive SBRMs. In *Pac. Marine Conservation Council, Inc. v. Evans,* the court found "[S]ection [1853(a)(11)] of MSA requires that bycatch assessment methods be established in the fishery management plan itself."[15] In *Oceana, Inc. v. Evans*, the court struck down an FMP amendment for failing to meet SBRM requirements because it did "not set forth the substance of a reporting methodology for the . . . fishery except in a vague and conclusory fashion."[16] The court further stated "[a] methodology need not necessarily be detailed, but it must at the very least provide decisionmakers and the public with a program of what actually will be *done* to improve bycatch reporting, and why these measures will be sufficient based on the best available science."[17]

The issue of "best available science" is crucial to understanding the requirements an SBRM should meet. National Standard 2 clearly states that "conservation and management measures shall be based on the best scientific information available."[18] The MSA also states that "the collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States."[19] Councils rely on the scientific recommendations of their Congressionally-mandated Scientific and Statistical Committees to understand the magnitude of bycatch in each fishery, to consider appropriate management measures to mitigate that bycatch, and to set annual catch limits for managed fishery species.[20] In order to meet these needs and the intent of Congress, SBRMs should not only provide the best data available, but should be designed based on the best scientific statistical and sampling methods available to collect and analyze that data.

An SBRM should be designed to meet the needs of scientists and managers, and to fulfill the agency's conservation responsibilities.

NOAA's 2004 technical memorandum on SBRM, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*, describes a reasonable and workable structure for ensuring useful bycatch assessments while striving towards better data and

[15] *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002).
[16] *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 232 (D.D.C. 2005).
[17] *Id*. at 234 (emphasis in original).
[18] 16 U.S.C. § 1851(a)(2).
[19] 16 U.S.C. § 1801(a)(8).
[20] 16 U.S.C. § 1852(g); 16 U.S.C. § 1852(h)(6).

methodologies.[21] We are concerned that the memorandum is vanishing from the agency's website, as it is no longer accessible from the bycatch landing page and the URL to the report cited in the agency's most recent update to the National Bycatch Report is no longer active.[22] It is unclear what role this technical memorandum will play in the future, or whether SBRMs designed to incorporate this expert advice will be encouraged or approved by the agency.

However, this guidance is still useful to review. It finds that bycatch estimates have three primary uses: 1) for incorporation into stock assessments to evaluate the health of the species; 2) for direct management purposes, such as enforcing bycatch quotas; and 3) to guide management actions to minimize or mitigate bycatch.[23] In order to provide useful data for these management purposes, an SBRM is "the combination of data collection and analyses… used to estimate bycatch in a fishery." The SBRM includes the use of at-sea observers and observational technologies, a statistically valid sampling design, a goal to achieve levels of precision of 20-30% coefficient of variance, models for combining data to assess bycatch, and adherence to data collection and estimation standards.[24]

The Evaluating Bycatch report also asserts that:

> "Based on its stewardship responsibilities defined elsewhere in the MSA and in other laws, including the MMPA and ESA, NMFS believes that: (1) the SBRM for each FMP fishery should address the bycatch of marine mammals and seabirds, as well as fish and sea turtles, and (2) an effective and efficient SBRM should be established for each federally managed fishery and for each other fishery that either takes ESA-listed species that are under NMFS jurisdiction or is an MMPA Category I or II fishery."[25]

We support these aspects of the *Evaluating Bycatch* memorandum. SBRMs should provide the best scientific information available through the application of methodologies recommend by technical experts to ensure the statistical relevance and usefulness of that data. The agency should use a broad definition of bycatch for SBRM and mitigation efforts that reflects the full suite of its conservation and management responsibilities, rather than be limited by the narrow definition of the MSA. This is consistent with agency policy; for

---

[21] NOAA Fisheries. Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs, NOAA Technical Memorandum NMFS-F/SPO-66, October 2004. Available at http://spo.nmfs.noaa.gov/tm/tm66.pdf

[22] NOAA Fisheries. 2016. U.S. National Bycatch Report First Edition Update 2 [L. R. Benaka, D. Bullock, J. Davis, E. E. Seney, and H. Winarsoo, Editors]. U.S. Dep. Commer., 90 p. Online at http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/nationalreport.html. On page 84, it cites to the *Evaluating Bycatch* report at http://www.nmfs.noaa.gov/by_catch/SPO_final_rev_12204.pdf

[23] NOAA Fisheries. Evaluating Bycatch at 55.

[24] *Id.* at 102.

[25] *Id*. at 101.

instance, the National Bycatch Report defines bycatch as "discarded catch of any living marine resource plus unobserved mortality due to a direct encounter with fishing gear."[26]

The agency should also broaden the scope of the SBRM rule to include fish released alive under recreational fishing as part of the bycatch to be monitored. In many fisheries across the country, recreational fishing is a large component of the total catch and recreational bycatch, in some fisheries, can be a significant source of mortality. For instance, recreational catch for numerous fisheries in the Southeast is greater than commercial catch and the number of discarded recreational fish is substantial. Often, the number of discarded fish is higher than landed fish — which in certain fisheries, e.g., deep water reef fish, can be a significant source of mortality when fish are released. In some cases, the mortality from released fish is greater than the amount of fish caught and kept. As an example, Gulf red grouper recreational dead discards account for approximately 15-20% of the total fishing mortality (commercial and recreational) in recent years whereas the landed catch accounted for about 10%.[27] Additionally, it's currently not possible to make regional comparisons of recreational fisheries bycatch due to differences in reporting (i.e., as individuals rather than pounds of fish) that prevent the calculation of fishery bycatch ratios.[28] The agency is working on developing conversion rates and estimating discard mortality to begin to address these problems, but, given the significance of bycatch mortality in recreational fisheries, it is important that SBRMs attempt to include and address these sources of bycatch.[29]

Accurate bycatch accounting that includes all bycatch species will enable managers to look at the big-picture of fisheries and resource management. Scientifically-robust assessments have numerous benefits for management, including:

- the reduction of uncertainty in stock assessments, which can allow managers to identify problems with management measures or opportunities for additional catch;
- increased confidence and buy-in from stakeholders;
- the option to set and enforce hard-caps on bycatch species; and
- the ability to combine assessment data across sectors, fisheries or regions.

For example, bycatch is a significant issue in recreational and commercial fisheries in the Southeast, and good SBRM design could address these problems faced by fisheries. In the South Atlantic, the latest 2016 stock assessment report for red snapper estimates discard mortality for the commercial sector to range from 28-48% and discard mortality for the recreational sector to range from 20-36%. Bycatch has been a significant source of mortality since the implementation of the moratorium in the red snapper fishery and

[26] NOAA Fisheries. U.S. National Bycatch Report First Edition Update 2 at 7.
[27] SEDAR 42. Southeast Data, Assessment, and Review Report for Gulf of Mexico Red Grouper. October 2015. SEDAR, North Charleston, South Carolina. Available at http://sedarweb.org/sedar-42
[28] NOAA Fisheries. U.S. National Bycatch Report First Edition Update 2 at 9.
[29] *Id*. at 17.

subsequent use of mini-seasons. In fact, the Review Panel noted that since the moratorium, recreational discards are one of the most important, yet most uncertain, sources of information for the assessment and are a major driver in the review panel's finding that the stock is currently undergoing overfishing.[30] Additionally, the most recent stock assessment for red grouper in the Gulf of Mexico had high uncertainty around commercial discard estimates, which account for a substantial amount of the total mortality in the assessment.[31] Discards are reported both from fishermen through logbooks as well as from observers covering less than 5% of the trips. As expected, the estimates generated by the two data sources are vastly different compromising the scientific analysis and outcome of the assessment.[32] Sufficient SBRMs in the fishermen logbooks and especially the observer coverage would provide much more certain data leading to a more robust assessment used for management.

However, SBRMs designed according to the proposed rule would fail to provide managers and scientists with the information they need to effectively manage fisheries.

The proposed SBRM rule is irredeemably flawed

As stated previously, an accurate accounting and assessment of bycatch in fisheries is crucial to fulfilling the requirements of the MSA to manage with science-based ACLs, prevent overfishing, rebuild overfished stocks, and minimize the amount of bycatch and the mortality of unavoidable bycatch. It is also vital for the management of ocean resources, particularly vulnerable protected resources. Responsible management that ensures resilient fisheries and ecosystems depends on robust SBRM assessments. To better achieve sustainable fisheries and ecosystems, standardized monitoring and full scientific assessment of bycatch is necessary, and in many cases now, adequate SBRMs is indeed lacking.

Despite the clear intentions of the law, NMFS's proposed rule would fail to require the collection of accurate and statistically-significant data and thereby weakens scientists' and managers' ability to understand and address bycatch. The agency also appears to be attempting to circumvent the findings of several courts on these issues. If bycatch reporting is incomplete, incorrect, or insufficient, scientists cannot make accurate assessments and managers cannot make well-informed decisions. This can lead to more overfishing and more depletion of vulnerable species.

---

[30] SEDAR. 2016. SEDAR 41 – South Atlantic Red Snapper Assessment Report. SEDAR, North Charleston SC. 660 pp. available online at: http://sedarweb.org/sedar-41.
[31] SEDAR 42. Southeast Data, Assessment, and Review Report for Gulf of Mexico Red Grouper. October 2015. SEDAR, North Charleston, South Carolina. Available at http://sedarweb.org/sedar-42
[32] The SEDAR 42 Review Panel spent much of their 4-day review workshop discussing commercial discards and how best to incorporate the highly uncertain data into the assessment.

1. SBRM should include both data collection and the assessment of that data

In the proposed rule, the agency claims that the "collection and reporting of bycatch data" is entirely separate from "the assessment of such data."[33] However, this arbitrary separation of functions undermines the purpose of the SBRM provision and is counter to the intent of Congress.

The agency supports this assertion by muddying the plain language of the MSA. Section 303(a)(11) of MSA states that FMPs are required to "establish a standardized reporting methodology to *assess* the amount and type of bycatch occurring in the fishery..." The proposed rule for SBRM instead states: "the purpose of a standardized reporting methodology is to *inform the assessment* of the amount and type of bycatch occurring in the fishery" (emphasis added in both). The agency is reinterpreting the SBRM to be only a part of the assessment process, which is contrary to the MSA. As mentioned previously, the legislative record shows that Congress intended for the SBRM requirement to "mandate the assessment of bycatch levels in each fishery,"[34] not simply require that some minimum level of data collection take place.

This distinction between data collection and assessment is also contrary to previous guidance from the agency. In the 2004 technical memorandum *Evaluating Bycatch,* the agency states "the combination of data collection and analyses that is used to estimate bycatch in a fishery constitutes the SBRM for that fishery."[35]

Further, assuming the agency's proposed rule for SBRM was in place, Councils and scientists would now have no guidance for how to actually assess bycatch. There is no guidance provided, and none promised, on how to model the amount, type, and scope of bycatch with the (likely) piecemeal and uneven data provided by the agency's proposed threadbare SBRMs.

If the design of an SBRM is disconnected from the needs of the bycatch assessment process, scientists and managers will not have the data they need to get an accurate accounting of bycatch, reduce uncertainty in the assessment of species, and fairly consider the effects of management decisions. Data collection without consideration of assessment needs will likely result in the collection of data of limited usefulness, and wasted resources and effort by the government and fishermen.

---

[33] 81 Fed. Reg. at 9415.
[34] Senate Report from the Committee on Commerce, Science, and Transportation on S. 39, the "Sustainable Fisheries Act" S. REP. NO. 104-276, at 5.
[35] NOAA Fisheries. Evaluating Bycatch at 102.

2. SBRMs must consider statistical accuracy and precision

The proposed rule insists that SBRMs need not deliver "a particular standard of statistical accuracy or precision."[36]This proposal tiers off of the assertion that assessment is a distinct process from data collection, and as such, many of the arguments covered in the above section apply here as well.

But additionally, there is also a significant court record addressing this issue. In *Conservation Law Foundation v. Evans*, the court found that it was the "clear will of Congress" that NOAA Fisheries "must more accurately measure and reduce bycatch."[37] Two courts have focused on the need for SBRMs to include mechanisms that produce statistically reliable estimates of bycatch. In *Oceana, Inc. v. Evans,* the court found the SBRM for the New England scallop fishery was deficient because it didn't "analyz[e] what type of program—whether a mandated level of coverage or some other mechanism—would succeed in producing the statistically reliable estimates of bycatch needed to better manage the fishery" as required by the SBRM provision of the Act.[38] The court focused on the need for "statistical reliability" and "accuracy" in SBRMs, and found that in the situation at hand, "the agency ignored the accuracy issue throughout the process."[39] In *Pacific Marine Conservation Council, Inc. v. Evans*, the court found an amendment to a fishery management plan legally insufficient for having an optional, rather than mandatory, at-sea observer program, because "the administrative record makes it clear that an adequate...observer program is essential to account for bycatch."[40]

Excluding the consideration of statistical accuracy and precision from SBRMs also runs counter to the agency's technical guidance on SBRMs, which recommends precision levels of 20-30% coefficient of variation (CV) in estimating bycatch for protected species and bycatch or total catch for fisheries.[41] The *Evaluating Bycatch* memorandum further recommends SBRMs consider appropriate sampling design to provide a scientific and statistically valid basis for bycatch estimation, the use of appropriate models, and the application of methods to identify and decrease sources of bias.[42] Determining and achieving these statistical methods for specific fisheries in coordination with NOAA Fisheries' regional science centers and the Councils' SSCs is paramount to establishing sound and standardized SBRMs.

---

[36] 81 Fed. Reg. at 9415.
[37] *Conservation Law Foundation v. Evans*, 209 F.Supp.2d 1, 13 (1st Cir. 2001) (citing 16 U.S.C. § 1853(a)(11)).
[38] *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 233-34, *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).
[39] *Id*. at 235-36.
[40] *Pacific Marine Conservation Council, Inc. v. Evans* , 200 F. Supp. 2d at 1200.
[41] NOAA Fisheries. Evaluating Bycatch at 103.
[42] *Id.* at 102.

The MSA enshrines scientific data as a cornerstone for sustainable management, yet the agency is proposing to approve data collection and assessment programs that do not achieve a reasonable scientific standard. In the guidance for implementing National Standard 2, the agency states that scientific information that shall be considered the best scientific information available "should be accurate, with a known degree of precision, without addressable bias, and presented in an accurate, clear, complete and balanced manner."[43] If implemented under the agency's proposed rule, the data resulting from some or many SBRMs would fail to meet this standard, meaning taxpayers and fishermen are paying for data that doesn't serve the intended purpose, and managers are left without useful information with which to weigh management options.

3. The rule incorrectly allows funding constraints to compromise the design and approval of SBRM plans

The proposed rule "requires that each SBRM be designed to be implemented within available funding" and threatens to disapprove or partially disapprove of any Council-proposed SBRMs that do not meet this requirement.[44] We strongly disagree with the agency's position, as it is contrary to the plain language of the MSA. Nowhere in Section 303(a)(11) does the MSA say that an FMP must include SBRM if it is "feasible" or even "practicable". Whereas the MSA states that FMPs shall contain measures to minimize bycatch "to the extent practicable," that modifying phrase does *not* apply to the MSA command that fishery management plans "shall establish" SBRM to assess bycatch.[45] The statute requires FMPs to establish SBRM without any qualifying condition, in all circumstances.

This is also the conclusion of the D.C. circuit in *Oceana v. Locke*, where it concluded that NOAA Fisheries may not excuse itself from implementing SBRM by citing general "operational constraints", including funding shortfalls.[46] Contrary to the agency's assertion in the proposed rule, this finding was not a narrow, fact-based determination.[47] The court held that the language of the MSA clearly directs the agency to establish SBRMs without consideration of practicability (*i.e.*, costs or funding):

> Although the Service congratulates itself for having adopted an approach "particularly wise in this fiscal climate," the self-proclaimed wisdom of the approach cannot save it because the Congress, in its more commanding wisdom, has not authorized it.

[43] 50 C.F.R. § 600.315(a)(6)(iii)
[44] 81 Fed. Reg. 9415.
[45] 16 U.S.C. § 1853(a)(11).
[46] *Oceana v. Locke*, 670 F.3d 1238 , 1241-42 (D.C. Cir. 2011).
[47] 81 Fed. Reg. 9414.

> Here, we take note of the second clause of subsection (a)(11), which directs the agency to adopt "conservation and management measures that [minimize bycatch and bycatch mortality] to the extent practicable." The qualifier "to the extent practicable" does not appear in or modify the first clause of the same sentence, where the Service is directed to "establish" a standardized methodology. When a statute commands an agency without qualification to carry out a particular program in a particular way, the agency's duty is clear; if it believes the statute untoward in some respect, then "it should take its concerns to Congress," for "[i]n the meantime it must obey [the statute] as written."[48]

Rather than heeding the D.C. Circuit's directive to obey the law as written, NOAA Fisheries is trying to rewrite it through the proposed regulations.

NOAA Fisheries attempts to avoid the D.C. Circuit's ruling by arguing that the decision did not address National Standard 7. National Standard 7 states that "[c]onservation and management measures shall, *where practicable*, minimize costs and avoid unnecessary duplication"[49] (emphasis added). Unlike the requirement to establish SBRM, the requirement to minimize costs only applies to instances where it is "practicable" to do so. The agency cannot subordinate a non-discretionary requirement (like SBRM) to a secondary goal such as NS7.

Furthermore, National Standard 7 does not allow fishery managers to use reducing costs as an excuse to implement a weakened management measure that will not achieve the MSA's primary conservation requirements. In *Connecticut v. Daley*, the court found "the language of National Standard Seven provides that costs should be minimized and duplication avoided where practicable, not absolutely". [50] National Standard 7 simply directs fishery managers to minimize the costs associated with implementing required measures, where it is practicable to so. In examining a claim involving National Standard 7, the D.C. District Court explained: "Explicit in both the statutory text and the implementing regulations is Congress's intent that conservation efforts remain the Secretary's priority, and that a focus on the economic consequences of regulations not subordinate this principal goal of the MSA. Hence, '[i]t is only when two different plans achieve similar conservation measures that the [NMFS] takes into consideration adverse economic consequences.'"[51]

---

[48] *Oceana v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011)(citations omitted).
[49] 16 U.S.C. § 1851(a)(7).
[50] *Connecticut v. Daley*, 53 F. Supp. 2d 147, 172-73 (D. Conn. 1999), *aff'd sub nom. Connecticut v. U.S. Dep't of Commerce*, 204 F.3d 413 (2nd Cir. 2000).
[51] *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 91-92 (D.D.C. 2007), quoting Natural Res. Defense Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000).

Additionally, the agency has a role in determining the amount of funding available for bycatch observation and assessment. The D.C. circuit court found this further underscored the inappropriateness of using funding constraints as a trigger for modification or denial of SBRMs and observer coverage: "Because the agency determines both the amount of funding required for bycatch observation and the funding it will allocate for that purpose, it can determine the stringency of this supposedly 'external' constraint and thus free itself at will from the methodology it purportedly 'established.' This will not do." The court explained, "no reasonable interpretation of the statutory instruction to 'establish a standardized methodology' would allow the agency to reserve to itself effectively complete discretion to trigger an exemption."[52]

Finally, we note that this approach weakens the position of the agency in advocating for funding for bycatch and stock assessments, observers, electronic monitoring and reporting, and protected species management. While the agency may not have sufficient assets to fully fund a scientifically robust SBRM for each fishery at this time, it cannot easily justify to Congress the need for more funds if it has prevented Councils from assessing those needs by designing good SBRMs and identifying capacity shortfalls. SBRMs can and should describe the methodology by which bycatch data will be incrementally improved with new efficiencies, techniques, and funding.

4. The SBRM proposed rule undermines the purpose of standardization

The proposed rule suggests that the requirement that the methodology be "standardized" means only that individual fisheries need a standard way of reporting data, and that no standardization needs to occur at a regional or national level.[53] This interpretation makes it nearly impossible to assess the bycatch of species between fisheries, or even within multispecies fisheries, even if the same species are being caught as bycatch. For example, one fishery could report in pounds of a species discarded, one could report in number of fish discarded, and another could categorize a species within a group of species and then report in number or pounds. Each one could have a different level of uncertainty with incomparable data systems yielding disparate data sets that cannot be reconciled.

We are not advocating for a strictly designed, one-size-fits all standardized approach. However, as written, the agency fails to propose any standards at all. What is more, the agency encourages changing these methodologies frequently for any reason.[54] Without standardization the data cannot be compared or combined across fisheries or regions, making assessment of bycatch, and therefore

[52] *Oceana v. Locke*, 670 F.3d at 1242.
[53] 81 Fed. Reg. 9415.
[54] 81 Fed. Reg. 9416.

minimization of bycatch and bycatch mortality, very difficult, if not impossible. It also hamstrings the ability to analyze which region(s) and fisheries are most in need of additional funding to bycatch monitoring, or to track long-term trends to monitor the efficacy of bycatch minimization efforts.

The proposed rule is contrary to or would undermine many other agency programs and initiatives.

SBRM, if implemented as described in the proposed rule, would prevent the agency from achieving many of its mandated conservation and management responsibilities. But it would also undermine many recent agency and Council efforts to improve fisheries data, modernize data collection programs, and integrate ecosystem considerations into fisheries management. The following is an incomplete list of agency initiatives that will be negatively affected by the proposed SBRM rule.

- *Ecosystem-Based Fishery Management Policy*:[55] The agency intends to finalize this draft policy later this year to enhance fisheries management decision-making. EBFM will consider "interactions among fisheries, protected species, aquaculture, habitats, and other ecosystem components, including the human communities that depend upon these ecosystem services."[56] But without accurate SBRM assessments of bycatch, the agency will not have all the data it needs to fully implement this policy.

- *National Bycatch Reduction Strategy:*[57] The agency recently released this draft policy for public comment simultaneously with the proposed rule on SBRM. Simply put, the proposed SBRM rule will ensure the agency fails to meet its objectives in the draft national plan. For example:
    - The agency intends to strengthen monitoring and data collection programs, with a focus on long-term data collection and monitoring.[58] But the SBRM rule weakens data collection and will allow for uneven, inaccurate, and piecemeal data collection and monitoring.
    - The agency plans to "clarify bycatch research needs and support research programs to meet these needs,"[59] yet, in the SBRM rule, the agency is making it clear that it will not support the development of scientifically-robust assessment methodologies.

[55] NOAA Fisheries. Ecosystem Based Fisheries Management Policy. Sept 9. 2015 discussion draft. https://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Draft_EBFM_Policy_9.9.2015_for_release.pdf
[56] *Id.* on p2.
[57] NOAA Fisheries. Draft National Bycatch Reduction Strategy. 2016. http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/strategy.html
[58] *Id.* at 4.
[59] *Id.* at 5.

- An objective to "improve discard and take estimates for use in commercial and recreational fishery management" [60] would be fundamentally undermined by the proposed SBRM guidance, with nearly every intended strategy (e.g., reflect best scientific information available, improve bycatch estimates, improve methods for estimating total catch, strengthen approaches to assessing the impacts of bycatch on ecosystems across multiple fisheries) crippled by the proposed rule.
- Without good data and assessment, as is likely under the proposed SBRM rule, the agency will not be able to "improve management measures designed to reduce bycatch, while strengthening understanding of … the effectiveness of bycatch measures"[61]
- Finally, instead of allowing the agency to improve communication with stakeholders and build partnerships, the poor quality of data under the proposed SBRM rule, combined with the wasted resources and time to collect data insufficient to improve the assessment and management of fishery and ocean resources, will only further frustrate fishermen and other stakeholders.

- *Action Plan for Fish Release Mortality Science:*[62] The proposed SBRM rule also undermines the agency's efforts to develop an action plan for assessing release mortality and incorporating that information into assessments. The purpose of this Action Plan is to "Guide NMFS science efforts related to reducing fish release mortality, improving estimates of release mortality, and better incorporating improved release mortality estimates into stock assessments and management processes." And, two of the four goals of this Action Plan are to "[2] facilitate the development of improved fish mortality rate estimates" and "[4] ensure that improved fish mortality rate estimates are incorporated effectively into stock assessments and existing management processes." There is a direct connection with SBRMs and ensuring the science and monitoring of bycatch and discards is sufficient for use in assessments and management. However, whereas the SBRM rule could enhance this Action Plan, in effect it is doing quite the opposite and providing a great disconnect between the regulatory and science divisions of the agency.

- *Regional Electronic Monitoring and Reporting Implementation Plans:*[63] As above, there is an apparent disconnect between the proposed SBRM rule and the agency's regional electronic monitoring and reporting (EM/ER) implementation plans. These plans are intended to "integrate new fisheries reporting and monitoring

[60] *Id.* at 6.
[61] *Id.* at 7.
[62] NOAA Fisheries. Action plan for Fish Release Mortality Science. Feb 2016. https://www.st.nmfs.noaa.gov/ecosystems/bycatch/discard-and-release-mortality
[63] NOAA Fisheries. Electronic Monitoring and Reporting. https://www.st.nmfs.noaa.gov/advanced-technology/electronic-monitoring/index

technologies in the most effective and cost-efficient way" possible. For example, through the use of fishermen electronic logbooks, standardized approaches within or across regions could be developed for reporting discarded catch for more accurate assessments of bycatch and discards. Additionally, standardized protocols and procedures for at-sea monitoring in select fisheries through electronic technologies would not be required under the proposed SBRM rule leaving the process for developing these protocols haphazard and in isolation.

- *MRIP Implementation Plan*:[64] As discussed previously, monitoring bycatch and discards in recreational fisheries is imperative for assessing total mortality, particularly in the Southeast where recreational discards oftentimes makes up a significant portion of the total catch and mortality. Each year, NOAA Fisheries develops an Implementation Plan for the Marine Recreational Information Program (MRIP). There is a distinct role MRIP plays in monitoring and estimating bycatch in the recreational fishery. Currently, when SBRMs incorporate recreational discards, they often reference MRIP as the SBRM. By taking a limited scope of the definition of bycatch, the agency is missing an opportunity to include recreational data as a fundamental component of SBRMs and the proposed rule should guide how MRIP (and other recreational data programs) collects bycatch data. The MRIP Implementation Plans could then more seamlessly test and incorporate improved and standard methodology for monitoring bycatch in the recreational fisheries. Through this Implementation Plan and the SBRM rule, MRIP could also then play a more prominent and lead role in developing and overseeing data collection programs that fall under the agency and council purview (e.g., Gulf states' individual red snapper data collection programs).

- *West Coast Drift Gillnet Fishery:*[65] The agency is implementing hard caps and performance objectives in the West Coast drift gillnet fishery targeting swordfish. Without accurate data that is useful for analyzing the extent of bycatch and bycatch mortality in the drift gillnet fishery, the agency and the Pacific Fishery Management Council will not be able to properly enforce hard caps on protected species or ensure that the fishery is complying with performance objectives on finfish and other species of concern.

- *New England fisheries:* In New England, an SBRM approach that limits observer coverage based on available funding has resulted in low coverage rates and the inadequate assessment of the type and amount of bycatch occurring in regional

[64] NOAA Fisheries. Marine Recreational Information Program. 2015-2016 Implementation Plan Update. https://www.st.nmfs.noaa.gov/Assets/recreational/pdf/FINAL-updated-implementation-plan-3.22.16.pdf

[65] Pacific Fishery Management Council. California Large Mesh Drift Gillnet Fishery Management Final Preferred Alternatives. 2015. http://www.pcouncil.org/2015/09/38641/california-large-mesh-drift-gillnet-fishery-management-final-preferred-alternatives/

fisheries. In the groundfish fishery, low observer coverage levels has allowed for increased discarding of legally sized catch on unobserved trips, and is causing overfishing and chronic retrospective patterns in stock assessments.[66] In the industrial mid-water trawl herring and mackerel fisheries, extremely low observer coverage levels allows vessels to dump significant amounts of river herring, shad, Atlantic herring, groundfish, and other species without accountability;[67]this could even force early closure of the herring and mackerel fisheries if extrapolated catch estimates result in catch caps being exceeded.[68] Because the proposed rule will allow non-statutory factors such as funding and economic costs to the industry to be factored into SBRM design,[69] NOAA Fisheries will be able to continue to justify the same old underfunded and inadequate bycatch monitoring programs that have facilitated collapse of New England's iconic groundfish fishery, and that are allowing industrial trawlers to deplete some of the East Coast's most important forage bases.

Conclusion

The MSA is clear that Congress intended for FMPs to contain an SBRM "to assess the amount and type of bycatch occurring in the fishery." Yet the agency is proposing to avoid its responsibility to assess bycatch by suggesting SBRMs are merely for the collection of some data, which need not be statistically relevant to the assessment process or comparable across fisheries, so long as variable funding levels permit.

The assessment of bycatch via an SBRM is vital to the sustainable management and stewardship of fisheries and ocean resources. The agency should strive to ensure these programs produce the best scientific information available so that scientists and managers

---

[66] Northeast Fisheries Science Center Reference Document 15-24, Operational Assessment of 20 Northeast Groundfish Stocks, Updated Through 2014 at 12, Table 6: Summary of Operational Assessment estimates of biomasses and fishing mortality rates in 2014, available at: http://www.nefsc.noaa.gov/publications/crd/crd1524/crd1524.pdf; see also Final Fishing Year Catch Results for Fishing Years 2010-2014, available at: http://www.greateratlantic.fisheries.noaa.gov/aps/monitoring/nemultispecies.html; see also Proposed Rule Framework 55, 81 Fed. Reg. 15,003, 15,005 (Mar. 21, 2016) (discussing worsening retrospective pattern in GB cod assessment); Final Exemption on interim GOM cod measure, 80 Fed. Reg. 12,349, 12,350 (Mar. 9, 2015) (removing 200 pound trip limit due to concerns of increased discarding); Summary of Analyses Conducted to Determine At-Sea Monitoring Requirements for Multispecies Sectors FY 2015 at 22, available at http://docplayer.net/14549102-Summary-of-analyses-conducted-to-determine-at-sea-monitoring-requirements-for-multispecies-sectors-fy2015.html (noting consistent differences between observed and unobserved trips across eight metrics).

[67] SBRM Annual Sea Day Schedule available at: http://www.nefsc.noaa.gov/fsb/SBRM/2015/NEFOP_seaday_schedule_April_2015_March%202016_version2.pdf.

[68] See Temporary Closure of Atlantic herring fishery for exceeding Georges Bank Haddock Catch Cap, 80 Fed. Reg. 63929 (Oct. 22, 2015).

[69] See 50 C.F.R. 600.345(b)(1) (costs may be considered only "where two alternatives achieve similar conservation goals"); see also NRDC, 209 F.3d 717, 753-54 (D.C. Cir. 2000) (costs may not trump conservation requirements).

can work together to make good decisions. This rule is contrary to the MSA, contrary to the findings of numerous court cases, and contrary to the principles of good resource stewardship. **The Pew Charitable Trusts strongly recommends the agency withdraw this proposed rule.**

Sincerely,

Lee R. Crockett
Director, U.S. Oceans
The Pew Charitable Trusts