



2005 Market Street, Suite 1700  
Philadelphia, PA 19103-7077

215.575.9050 Phone  
215.575.4939 Fax

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901 E Street NW, 10th Floor  
Washington, DC 20004  
[www.pewtrusts.org](http://www.pewtrusts.org)

202.552.2000 Phone  
202.552.2299 Fax

June 3, 2016

NOAA Fisheries  
1315 East-West Highway  
Silver Spring, MD 20910  
[nmfs.bycatch@noaa.gov](mailto:nmfs.bycatch@noaa.gov)

**Re: Comments for NOAA Fisheries' draft National Bycatch Reduction Strategy**

The Pew Charitable Trusts appreciates the opportunity to comment on the draft National Bycatch Reduction Strategy (the Strategy).<sup>1</sup> We strongly support robust efforts to improve the monitoring, assessment, and minimization of bycatch in U.S. fisheries. While bycatch remains a problem in many fisheries, progress has been made since the bycatch provisions in the Magnuson-Stevens Fishery Conservation and Management Act (MSA) were strengthened in 1996. However, we are seriously concerned that this new Strategy, in combination with the recently proposed rule to implement the MSA's Standardized Bycatch Reporting Methodology (SBRM)<sup>2</sup> requirement, indicates that the agency is moving away from a commitment to improve bycatch monitoring and minimization to a new regime where significant amounts and types of bycatch will be uncounted and unmanaged. We strongly feel that this is the wrong direction for the country and agency, because it is contrary to legislative intent and jeopardizes the health and sustainability of our ocean ecosystems.

The Strategy is a non-binding visioning document which outlines a set of goals and initiatives. Some of these, if implemented, could yield important advancements in understanding the extent of bycatch, reducing the waste of fishery resources, and minimizing risks to vulnerable species.

However, the positive components of the Strategy are overshadowed by the combined impact of specific, significant changes that would substantially weaken efforts to minimize bycatch in U.S. fisheries.

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<sup>1</sup> NOAA Fisheries. Draft National Bycatch Reduction Strategy. February 2016.

[http://www.nmfs.noaa.gov/sfa/fisheries\\_eco/bycatch/docs/national-bycatch-strategy-2-23-16-web.pdf](http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/docs/national-bycatch-strategy-2-23-16-web.pdf)

<sup>2</sup> NOAA, NMFS, Standardized Bycatch Reporting Methodology, Proposed Rule and Request for Comments, 81 Fed. Reg. 9413 (Feb. 25, 2016); 16 U.S.C. § 1853(a)(11).

Briefly, our chief concerns are:

- The recently proposed guidance on SBRM would significantly undercut the Strategy by depriving scientists and managers of the basic information needed for successful fisheries management. Further, the Strategy fails to incorporate SBRM appropriately.
- The Strategy promotes increased utilization of non-target catch as a means to minimize bycatch, which is contrary to the MSA.
- The Strategy inappropriately redefines bycatch to exclude unobserved mortality.

We also have additional recommendations regarding observers, protections for vulnerable species, and ecosystem-based fisheries management.

We find it discouraging and challenging to comment on the merits of the Strategy, as the proposed SBRM rule, the change in bycatch definition, and the improper focus on utilization would undermine virtually every aspect of the agency's proposed vision by weakening bycatch data assessment and reduction. Should the agency withdraw the SBRM proposed rule and address these major concerns in the Strategy itself, the Strategy generally outlines a useful, appropriate, and ambitious set of objectives and strategies which, if implemented, could greatly improve the assessment and reduction of bycatch in U.S. fisheries. We support the identified program areas and the objectives enumerated in the Strategy. In particular, there is a significant need to strengthen monitoring and data collection programs, and ensure that fishery managers and scientists have better, more regular access to that information so they can sustainably manage fisheries. In addition, we support efforts to incentivize the use of new, targeted gear types, improve estimates of discards and post-release mortality, and actively assess the effectiveness of bycatch management measures.

However, our significant concerns about the strategy and the agency's proposed SBRM rule must be addressed before we can support the document as a whole.

**The proposed SBRM guidance fundamentally undermines the Strategy and should be withdrawn, and the Strategy should incorporate robust SBRMs.**

Simultaneously to releasing the Strategy, the agency published a proposed rule for implementing the SBRM requirements of the MSA. This rulemaking, if implemented, would hamstring efforts to manage and minimize bycatch in the U.S.

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.<sup>3</sup> Good bycatch data is a further imperative for the management of species under the Marine Mammal Protection Act (MMPA),<sup>4</sup> the Endangered Species Act (ESA),<sup>5</sup> and the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds).<sup>6</sup> This information is also necessary to establish effective measures for bycatch reduction in international agreements. Finally, quality data is important for understanding socio-economic effects of fishery management decisions.

While the Strategy clearly recognizes and identifies these needs, the proposed SBRM rule fails to fulfill the agency's mandated responsibilities and ignores clear case law. If implemented, it will weaken the foundation of science-based management in U.S. fisheries, undermining 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.

Pew and several other conservation groups submitted detailed letters during the comment period on the SBRM guidance and requested the agency withdraw this deeply flawed rule. As you finalize this Strategy, we urge you to fully consider these comments, which we have appended to this document. In addition, 65,000 individuals and 28 NGOs expressed deep concern with the rule and urged the agency to abandon it.

In particular, the SBRM rule would undermine the Strategy in the following ways:

- In the Strategy, the agency intends to strengthen monitoring and data collection programs, with a focus on long-term data collection and monitoring.<sup>7</sup> But the proposed SBRM rule will allow for uneven, inaccurate, and piecemeal data collection and monitoring. Under the proposed rule, SBRMs do not need to provide statistically

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<sup>3</sup> 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)

<sup>4</sup> The Marine Mammal Protection Act. <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>

<sup>5</sup> The Endangered Species Act. <http://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>

<sup>6</sup> 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](http://www.nmfs.noaa.gov/ia/species/seabirds/us_npoa.pdf)

<sup>7</sup> Draft National Bycatch Reduction Strategy at 4.

accurate or precise data to the assessment process. Further, SBRMs will not be standardized across fisheries or regions, further complicating efforts to assess the total amount of bycatch of species.

- The agency plans to “clarify bycatch research needs and support research programs to meet these needs”<sup>8</sup> in its Strategy, yet, in the proposed SBRM rule, the agency is not prioritizing the development of scientifically-robust assessment methodologies.
- The objective of the Strategy to “improve discard and take estimates for use in commercial and recreational fishery management”<sup>9</sup> 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 the likely outcome 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.”<sup>10</sup>
- Instead of allowing the agency to improve communication with stakeholders and build partnerships, the poor quality of data that will be collected and assessed under the proposed SBRM rule, combined with the wasted resources and time to collect this insufficient data, will only further frustrate fishermen and other stakeholders.

Further, the Strategy should include strategies to ensure that all fishery management plans have an SBRM, as required by law. Despite a nearly twenty year mandate to minimize bycatch and bycatch mortality to the extent practicable in federally managed fisheries, guidelines for implementing National Standard 9,<sup>11</sup> and technical guidance for SBRM,<sup>12</sup> the bycatch requirements in the MSA and other applicable law are still inadequately and unevenly implemented throughout the regions.

While progress has been made in a number of fisheries in accounting for and reducing bycatch, the standards and practices for bycatch and mortality minimization vary widely by region and fishery, and many fishery management regions still lack standardized bycatch data collection, monitoring and reporting systems. Although nearly all U.S. fisheries include at least some measures aimed at addressing bycatch, less than half of the nation’s commercial fisheries

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> 50 C.F.R. 600.350.

<sup>12</sup> NOAA Fisheries. Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs. 2004. [http://www.nmfs.noaa.gov/by\\_catch/SPO\\_final\\_rev\\_12204.pdf](http://www.nmfs.noaa.gov/by_catch/SPO_final_rev_12204.pdf)

evaluated by NOAA Fisheries in 2011 had high-quality bycatch data and estimation methods capable of evaluating the performance and effectiveness of such management measures over time.<sup>13</sup> In many U.S. fisheries, catch monitoring and accounting is simply not adequate to give a representative sample of the fishing activities of the fleet, resulting in high levels of uncertainty in bycatch estimates and total fishing mortality. The lack of reliable bycatch data in many U.S. fisheries undermines the ability of managers to effectively assess the amount and type of bycatch occurring in a fishery, as the law requires.<sup>14</sup> This also prevents accurate catch accounting from all sources of mortality, jeopardizing the ability of the agency to prevent overfishing, rebuild overfished stocks, implement annual catch limits and accountability measures, and achieve optimum yield from each fishery on a continuing basis.

SBRMs should be designed to provide statistically relevant data, apply assessment methods that account for bias and use the best scientific methods available, and produce data which is useful and comparable over fisheries, regions, and timeframes. While some combination of the components of the Strategy could achieve this outcome, the SBRM is a fundamental requirement and it should be more clearly addressed in the Strategy. In fact, the Strategy does not even mention SBRMs. This oversight, combined with the proposed guidance on SBRMs discussed earlier, is troubling, considering the clear mandate in the MSA.

**The priority of the Strategy should be the minimization of fisheries bycatch and bycatch mortality, or the protection of vulnerable species - not promoting increased utilization.**

The MSA is clear in National Standard 9 that bycatch is to be minimized to the extent practicable, and, in cases where it cannot be avoided, the mortality of that bycatch should be minimized. The agency's first bycatch strategy clearly stated this priority:

“The national goal of the National Marine Fisheries Service’s bycatch plan activities is to implement conservation and management measures for living marine resources that will minimize, to the extent practicable, bycatch and the mortality of bycatch that cannot be avoided. Inherent in this goal is the need to avoid bycatch, rather than create new ways to utilize bycatch.”<sup>15</sup>

The agency does not have a clearly mandated goal to increase the utilization of discards, or create markets for bycatch. While utilizing these resources may provide some economic benefit to fishermen and increase the efficiency of fishing effort, it could also incentivize targeting of

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<sup>13</sup> NOAA Fisheries. (2011). National Bycatch Report, First Edition. [http://www.nmfs.noaa.gov/by\\_catch/bycatch\\_nationalreport.htm](http://www.nmfs.noaa.gov/by_catch/bycatch_nationalreport.htm).

<sup>14</sup> 16 U.S.C. 1853(a)(11).

<sup>15</sup> NOAA Fisheries. “Managing the Nation’s Bycatch: Priorities, Programs, and Actions for the National Marine Fisheries Service.” June 1998. At vi.

these typically-unmanaged species. In its response to comments on the original bycatch strategy, the agency clearly delineated its priority, re-iterating that “Inherent in [National Standard 9] is the need to avoid bycatch over creating new ways to utilize bycatch.”<sup>16</sup> The agency should maintain that level of clarity in the new Strategy.

Further, increased utilization of discards should not be considered a strategy to minimize bycatch. Utilization of non-target catch may reduce bycatch on paper, but it does not address the biological and ecological effects of non-target catch in the water. In enacting bycatch minimization requirements, Congress recognized that the catch of non-target species, particularly when it is not effectively monitored or regulated, contributes to overfishing, complicates fishery management, and degrades marine ecosystems. Creating a market for non-target species that would otherwise be considered “bycatch” would likely contribute to negative effects on the species itself and the ecosystem by encouraging or creating directed fisheries without adequate scientific analysis. At a time when several Regional Fisheries Management Councils are adopting common-sense prohibitions on the development of new (currently unmanaged) fisheries, this proposal could undercut the precautionary presumption underlying those commendable efforts. Furthermore, the Strategy does not provide any clear criteria or process for ensuring that all species that are retained for market are first managed under the appropriate Fishery Management Plan as stocks in the fishery, and are subject to regular stock assessments, catch monitoring, and management measures, including annual catch limits, allowable biological catches, and overfishing limits. NOAA Fisheries and the Councils cannot comply with the MSA’s prime directive to prevent overfishing of species being marketed unless those species are subject to full management and an analysis of whether developing a market for those species would be sustainable.

**The bycatch definition in the Strategy is inconsistent with other agency documents and fails to protect some species.**

We support the use of the expansive definition of bycatch, which includes marine animals and protected species managed under several legal authorities. However, we note the agency’s definition of “discarded fish or interactions between fishing operations and protected species”<sup>17</sup> does not include unobserved mortality of fish from contact with fishing gear. This is inconsistent with the definition the agency uses in its National Bycatch Reports, which is “discarded catch of any living marine resources plus unobserved mortality due to a direct encounter with fishing gear.”<sup>18</sup> We recommend the final Strategy correct this omission.

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<sup>16</sup> *Id.* at 187.

<sup>17</sup> Draft National Bycatch Reduction Strategy at 1.

<sup>18</sup> NOAA Fisheries. U.S. National Bycatch Report, First Edition, Update 2. <http://www.st.nmfs.noaa.gov/observer-home/first-edition-update-2> At 7.

Excluding unobserved mortality from bycatch monitoring and assessment would greatly undercount bycatch in fisheries, and is contradictory to MSA's intent that the mortality of unavoidable bycatch should be reduced.

**The Strategy correctly promotes electronic monitoring and reporting, but fails to clearly support appropriate expansion of observer coverage.**

Electronic monitoring and reporting technologies hold great promise for fisheries data collection and reporting, and could provide near-real time information upon which to build adaptive management strategies to address bycatch issues. However, observer coverage has a significant and important role to play, both independent from electronic technologies and in the implementation and calibration of these new tools. While the Strategy has an objective to "strengthen monitoring and data collection programs," it fails to include the expansion of these programs to provide statistically-reliable data to fisheries managers and scientists as a sub-strategy. Observers remain the best available method for monitoring catch and bycatch in fisheries, and the Strategy should more clearly acknowledge this and support the appropriate expansion of observer programs to improve fisheries data. We encourage the agency to take advantage of partnerships, cost-sharing or cost-recovery opportunities to expand and support these important programs. Many fisheries still do not have statistically-significant levels of observer coverage, and the agency should state its intent to fill those gaps in the Strategy.

**Vulnerable fish populations and protected species may need additional bycatch monitoring and protections to ensure their rebuilding and recovery.**

The agency addresses this concern to some extent in the text under its third objective – "improve discard and take estimates for use in commercial and recreational fishery management."<sup>19</sup> However, the strategies under this objective do not directly address the need to promote enhanced consideration of the role bycatch may be playing for fish species and protected resources that are failing to rebuild or recover. In some rebuilding fisheries, like the South Atlantic red snapper, where directed fishing has been closed for five years, the primary source of mortality is bycatch. In other fisheries, bycatch may be contributing to the stock's failure to rebuild. Having accurate assessments of bycatch, combined with effective management strategies to minimize that bycatch, are important for ensuring these species will reach healthy population levels.

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<sup>19</sup> Draft National Bycatch Reduction Strategy at 6.

**Bycatch is an important consideration for Ecosystem-Based Fisheries Management and the effects of bycatch on an ecosystem should be minimized.**

The Strategy will seek to “strengthen approaches to assessing the impacts of bycatch on the ecosystem across multiple fisheries.”<sup>20</sup> However, the agency also has the responsibility to minimize bycatch and minimize the mortality of unavoidable bycatch. As NOAA Fisheries moves towards EBFM through ecosystem initiatives at the councils and the Ecosystem-Based Fisheries Management Policy,<sup>21</sup> it is important to address not only the need to assess the impacts of bycatch on the ecosystem, but take steps to minimize those impacts in an ecosystem context. It is vital to understand the interactions of fisheries with all components of the ecosystem to ensure that food web structure and function are not compromised due to fishing activities. This is of particular importance as stressors like pollution and climate change increasingly affect the ocean.

**The cumulative effects of these serious concerns could set bycatch minimization back significantly.**

In conclusion, the Pew Charitable Trusts supports efforts to minimize bycatch and bycatch mortality in U.S. fisheries, and we appreciate that the National Bycatch Reduction Strategy is concentrating greater attention to addressing this issue. However, we have serious concerns about components of the Strategy and the cumulative effects of this Strategy and the SBRM rulemaking. Bycatch numbers could dramatically fall on paper if the agency stops counting them under well-designed SBRMs, creates markets to sell previously non-targeted fish, and fails to account for fish that die unobserved – meanwhile, the actual problem of bycatch and its negative effects on ecosystem health could increase dramatically. These concerns must be addressed, or we will not be able to advance efforts to minimize bycatch and the progress made in the past 20 years will be undermined.

We appreciate being able to provide comments on the draft Strategy. We hope to have additional opportunities to provide feedback as the implementation plans are developed, and look forward to working with the agency to advance effective bycatch monitoring, assessment, and minimization efforts in the future.

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<sup>20</sup> Draft National Bycatch Reduction Strategy at 6.

<sup>21</sup> National Marine Fisheries Service Policy Directive. 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](https://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Draft_EBFM_Policy_9.9.2015_for_release.pdf)



Sincerely,

A handwritten signature in cursive script that reads "Ted Morton". The signature is written in black ink and is positioned below the word "Sincerely,".

Ted Morton  
Director  
U.S. Oceans - Federal  
The Pew Charitable Trusts

**Attached:** Comments from the Pew Charitable Trusts on the proposed rule to implement the Standardized Bycatch Reporting Methodology

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.<sup>22</sup> Good bycatch data is a further imperative for the management of species under the Marine Mammal Protection Act (MMPA),<sup>23</sup> the Endangered Species Act (ESA),<sup>24</sup> and the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds).<sup>25</sup>

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 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;

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<sup>22</sup> 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)

<sup>23</sup> The Marine Mammal Protection Act. <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>

<sup>24</sup> The Endangered Species Act. <http://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>

<sup>25</sup> 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](http://www.nmfs.noaa.gov/ia/species/seabirds/us_npoa.pdf)

- 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,<sup>26</sup> and revise the National Bycatch Reduction Strategy, which was released for public comment simultaneously with this proposed rule.<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup> As a result, the MSA now contains specific provisions that task the agency to assess and reduce bycatch in our nation’s fisheries.

First, the 1996 Sustainable Fisheries Act added National Standard 9 to the MSA.<sup>30</sup> 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.”<sup>31</sup>

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<sup>26</sup> 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](https://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Draft_EBFM_Policy_9.9.2015_for_release.pdf)

<sup>27</sup> NOAA Fisheries. Draft National Bycatch Reduction Strategy. Feb 2016. [http://www.nmfs.noaa.gov/sfa/fisheries\\_eco/bycatch/strategy.html](http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/strategy.html)

<sup>28</sup> H.R. Rep. No. 104–171, at 27.

<sup>29</sup> 142 Cong. Rec. S10810 (daily ed. Sept. 18, 1996) (statement of Sen. Ted Stevens).

<sup>30</sup> Sustainable Fisheries Act of 1996.

[http://www.nmfs.noaa.gov/sfa/laws\\_policies/msa/documents/sustainable\\_fishereries\\_act.pdf](http://www.nmfs.noaa.gov/sfa/laws_policies/msa/documents/sustainable_fishereries_act.pdf)

<sup>31</sup> 16 U.S.C. § 1851(a)(9).

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;<sup>32</sup>

Congress intended for the SBRM requirement to “mandate the assessment of bycatch levels in each fishery.”<sup>33</sup> 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.<sup>34</sup>

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;<sup>35</sup>
- Prevent overfishing;
- Rebuild overfished stocks;
- 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

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<sup>32</sup> 16 U.S.C. § 1853(a)(11).

<sup>33</sup> Senate Report from the Committee on Commerce, Science, and Transportation on S. 39, the “Sustainable Fisheries Act” S. REP. NO. 104-276, at 5.

<sup>34</sup> 81 Fed. Reg. 9413 (Feb. 25, 2016) (“NMFS has never issued regulations that set forth the agency’s interpretation of the SBRM provision.”).

<sup>35</sup> 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 AMB ...” 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).

fishery management plan itself.”<sup>36</sup> 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.”<sup>37</sup> 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.”<sup>38</sup>

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.”<sup>39</sup> 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.”<sup>40</sup> 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.<sup>41</sup> 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 methodologies.<sup>42</sup> 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.<sup>43</sup> 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.

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<sup>36</sup> *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002).

<sup>37</sup> *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 232 (D.D.C. 2005).

<sup>38</sup> *Id.* at 234 (emphasis in original).

<sup>39</sup> 16 U.S.C. § 1851(a)(2).

<sup>40</sup> 16 U.S.C. § 1801(a)(8).

<sup>41</sup> 16 U.S.C. § 1852(g); 16 U.S.C. § 1852(h)(6).

<sup>42</sup> 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>

<sup>43</sup> 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](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](http://www.nmfs.noaa.gov/by_catch/SPO_final_rev_12204.pdf)

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.<sup>44</sup> 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.<sup>45</sup>

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.”<sup>46</sup>

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 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.”<sup>47</sup>

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%.<sup>48</sup>

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<sup>44</sup> NOAA Fisheries. Evaluating Bycatch at 55.

<sup>45</sup> *Id.* at 102.

<sup>46</sup> *Id.* at 101.

<sup>47</sup> NOAA Fisheries. U.S. National Bycatch Report First Edition Update 2 at 7.

<sup>48</sup> 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>

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.<sup>49</sup> 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.<sup>50</sup>

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 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.

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<sup>49</sup> NOAA Fisheries. U.S. National Bycatch Report First Edition Update 2 at 9.

<sup>50</sup> *Id.* at 17.

<sup>51</sup> SEDAR. 2016. SEDAR 41 – South Atlantic Red Snapper Assessment Report. SEDAR, North Charleston SC. 660 pp. available online at: <http://sedarweb.org/sedar-41>.

<sup>52</sup> 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>

<sup>53</sup> 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.

## 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.

### 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."<sup>54</sup> 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,"<sup>55</sup> 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

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<sup>54</sup> 81 Fed. Reg. at 9415.

<sup>55</sup> Senate Report from the Committee on Commerce, Science, and Transportation on S. 39, the "Sustainable Fisheries Act" S. REP. NO. 104-276, at 5.



combination of data collection and analyses that is used to estimate bycatch in a fishery constitutes the SBRM for that fishery.”<sup>56</sup>

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.

## **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.”<sup>57</sup> 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.”<sup>58</sup> 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.<sup>59</sup> 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.”<sup>60</sup> 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,

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<sup>56</sup> NOAA Fisheries. Evaluating Bycatch at 102.

<sup>57</sup> 81 Fed. Reg. at 9415.

<sup>58</sup> *Conservation Law Foundation v. Evans*, 209 F.Supp.2d 1, 13 (1<sup>st</sup> Cir. 2001) (citing 16 U.S.C. § 1853(a)(11)).

<sup>59</sup> *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 233-34, order clarified, 389 F. Supp. 2d 4 (D.D.C. 2005).

<sup>60</sup> *Id.* at 235-36.

at-sea observer program, because “the administrative record makes it clear that an adequate...observer program is essential to account for bycatch.”<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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.

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.”<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> The statute requires FMPs to establish SBRM without any qualifying condition, in all circumstances.

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<sup>61</sup> *Pacific Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d at 1200.

<sup>62</sup> NOAA Fisheries. *Evaluating Bycatch* at 103.

<sup>63</sup> *Id.* at 102.

<sup>64</sup> 50 C.F.R. § 600.315(a)(6)(iii)

<sup>65</sup> 81 Fed. Reg. 9415.

<sup>66</sup> 16 U.S.C. § 1853(a)(11).

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.<sup>67</sup> Contrary to the agency’s assertion in the proposed rule, this finding was not a narrow, fact-based determination.<sup>68</sup> 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. 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.”<sup>69</sup>

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”<sup>70</sup> (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”.<sup>71</sup> National Standard 7 simply directs fishery managers to minimize the costs associated with implementing required measures, where it is practicable to so. In

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<sup>67</sup> *Oceana v. Locke*, 670 F.3d 1238, 1241-42 (D.C. Cir. 2011).

<sup>68</sup> 81 Fed. Reg. 9414.

<sup>69</sup> *Oceana v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011)(citations omitted).

<sup>70</sup> 16 U.S.C. § 1851(a)(7).

<sup>71</sup> *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).

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.’”<sup>72</sup>

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.”<sup>73</sup>

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.<sup>74</sup> 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.

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<sup>72</sup> *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).

<sup>73</sup> *Oceana v. Locke*, 670 F.3d at 1242.

<sup>74</sup> 81 Fed. Reg. 9415.

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.<sup>75</sup> Without standardization the data cannot be compared or combined across fisheries or regions, making assessment of bycatch, and therefore minimization of bycatch and bycatch mortality, very difficult, if not impossible. It also hampers 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*:<sup>76</sup> 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.”<sup>77</sup> 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*:<sup>78</sup> 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.<sup>79</sup> 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,”<sup>80</sup> yet, in the SBRM rule, the agency is making it clear that it will not support the development of scientifically-robust assessment methodologies.

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<sup>75</sup> 81 Fed. Reg. 9416.

<sup>76</sup> 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](https://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Draft_EBFM_Policy_9.9.2015_for_release.pdf)

<sup>77</sup> *Id.* on p2.

<sup>78</sup> NOAA Fisheries. Draft National Bycatch Reduction Strategy. 2016. [http://www.nmfs.noaa.gov/sfa/fisheries\\_eco/bycatch/strategy.html](http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/strategy.html)

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 5.

- An objective to “improve discard and take estimates for use in commercial and recreational fishery management”<sup>81</sup> 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”<sup>82</sup>
  - 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:*<sup>83</sup> 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:*<sup>84</sup> 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 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

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<sup>81</sup> *Id.* at 6.

<sup>82</sup> *Id.* at 7.

<sup>83</sup> NOAA Fisheries. Action plan for Fish Release Mortality Science. Feb 2016.

<https://www.st.nmfs.noaa.gov/ecosystems/bycatch/discard-and-release-mortality>

<sup>84</sup> NOAA Fisheries. Electronic Monitoring and Reporting. <https://www.st.nmfs.noaa.gov/advanced-technology/electronic-monitoring/index>

be required under the proposed SBRM rule leaving the process for developing these protocols haphazard and in isolation.

- *MRIP Implementation Plan:*<sup>85</sup> 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:*<sup>86</sup> 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 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.<sup>87</sup> In the industrial mid-water trawl herring and mackerel fisheries, extremely low

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<sup>85</sup> 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>

<sup>86</sup> 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/>

<sup>87</sup> 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


observer coverage levels allows vessels to dump significant amounts of river herring, shad, Atlantic herring, groundfish, and other species without accountability;<sup>88</sup> this could even force early closure of the herring and mackerel fisheries if extrapolated catch estimates result in catch caps being exceeded.<sup>89</sup> Because the proposed rule will allow non-statutory factors such as funding and economic costs to the industry to be factored into SBRM design,<sup>90</sup> 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 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

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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).

<sup>88</sup> SBRM Annual Sea Day Schedule available at:

[http://www.nefsc.noaa.gov/fsb/SBRM/2015/NEFOP\\_seaday\\_schedule\\_April\\_2015\\_March%202016\\_version2.pdf](http://www.nefsc.noaa.gov/fsb/SBRM/2015/NEFOP_seaday_schedule_April_2015_March%202016_version2.pdf).

<sup>89</sup> See Temporary Closure of Atlantic herring fishery for exceeding Georges Bank Haddock Catch Cap, 80 Fed. Reg. 63929 (Oct. 22, 2015).

<sup>90</sup> 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).