

## **Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment**

### **Summary of Comments Received on the Draft Amendment**

October 31-December 29, 2006

NOAA's National Marine Fisheries Service (NMFS), on behalf of the Mid-Atlantic and New England Fishery Management Councils, published a Federal Register notice on October 31, 2006, to announce the availability the draft SBRM Amendment for review and to solicit comments on the document. The Federal Register notice announced two public hearings held on November 14, 2006, in Gloucester, MA, and on December 13, 2006, in New York, NY. Written comments were accepted through December 29, 2006.

A total of 48 individuals attended the public hearings, and a total of 9 individuals offered public testimony on the amendment. In addition to those speaking at the public hearings, NMFS received seven comment letters. Several of these letters restated opinions voiced at the public hearings. One letter was submitted on behalf of six fishing industry organizations, with a second letter endorsing the first. Three of the letters were from conservation organizations, two of which endorsed the more detailed comments of the third. The two remaining letters were submitted by private citizens.

Several comment letters recognized the considerable effort expended to date on the development of the amendment and applauded the progress that has been made. However, with the exception of two letters, one focused entirely on the cost estimates for electronic monitoring and one on the state of fisheries in general and recommending improved enforcement, the comment letters indicated dissatisfaction with a variety of elements of the draft amendment and several expressed doubt that the amendment would satisfy the Court Orders stemming from the Amendment 10 and Amendment 13 lawsuits. The following summarizes all comments provided during testimony at the public hearings and in the written letters; however, in cases where the same individual or organization provided the same comment more than once (e.g., during a public hearing and also in a follow-up letter), the comment is summarized once.

#### **General Comments on the Amendment**

Comment 1. One commenter expressed concern that the SBRM Amendment does not strike an adequate balance between specificity and generality. The commenter suggested that it is overly specific when it stratifies the bycatch reporting regime into "tens of hundreds" of strata, and it is too general in that it prescribes a uniform precision target across all fisheries.

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Comment 2. The same commenter further stated that the SBRM Amendment does not comport with NMFS's nationwide bycatch reporting technical guidance because it establishes blanket standards of precision across all fishing modes, rather than considering the needs and requirements of each fishery.

Comment 3. The same commenter stated that the SBRM Amendment should provide the Councils and NMFS with a process only and some ground rules that can be used to develop and implement fisheries-specific monitoring systems in fishery management plan (FMP) specific contexts. The SBRM Amendment, he wrote, should establish a broad program structure with the details left to development by plan development teams (PDTs) (or some other knowledgeable working group) in the context of the individual FMPs and with full consideration of specific FMP needs.

Comment 4. A commenter expressed dissatisfaction with the process used by the Fishery Management Action Team, with concern that it disengaged interested parties from the development of the amendment except for periodic updates to the Councils.

Comment 5. One commenter was critical of the objectives identified for the amendment, citing that the public hearing document did not define the objectives for the SBRM program. This commenter stated that it was insufficient to prescribe a blanket CV requirement and term this an objective.

Comment 6. A commenter stated that NMFS should ensure the amendment document undergoes external peer review by a party such as the Center for Independent Experts. The peer review panel, he wrote, should be given the opportunity to comment on the technical issues and issues related to management and integration of the SBRM into stock assessments.

Comment 7. Several commenters concluded that the amendment fails to meet the legal requirements of the Magnuson-Stevens Act, the National Environmental Policy Act (NEPA), and relevant Court orders. One commenter called for the SBRM Amendment to be withdrawn and for the Secretary of Commerce to implement emergency regulations to establish adequate levels of observer coverage until a "legally-compliant SBRM" is developed.

Comment 8. A commenter described the draft amendment as fatally flawed because it fails to incorporate the necessary requirements relating to "how" the bycatch data are to be collected; i.e., whether by observers and if so, the nature of the observer coverage. The SBRM should also specify, the commenter continued, how the data are to be analyzed and reported in support of management decisions.

Comment 9. Several commenters stated that NMFS will be fiscally unable to fulfill the requirements for observer coverage specified in the SBRM Amendment. The commenters expressed concern that failure to fulfill the precision or observer level targets may result in litigation affecting the agency's ability to manage fisheries and perhaps bearing on the conduct of the fisheries.

Comment 10. A commenter noted that forms used for the reporting of bycatch should be standardized.

Comment 11. Several commenters were concerned about how the SBRM can be adapted to support the bycatch information needs of each FMP and how the SBRM will be updated to respond to (or in anticipation of) changes in the fishery. These commenters suggested the SBRM should contemplate the changing dynamics of each fishery by gear type and species and be integrated into each FMP.

Comment 12. Commenters said that to ensure the SBRM can provide adequate information to support existing and future management needs, the amendment document should include a discussion of each fishery, its gear types, management scheme, and bycatch species. They suggested there should be a mechanism in place to update the allocation analysis annually or more frequently, in order to address changes in each fishery; i.e., gear innovations, changes in the total allowable catch, and other management changes.

Comment 13. One commenter suggested that the SBRM Amendment provide for future FMP-specific changes to be made by annual specifications, framework adjustment, regulatory action alone, or FMP amendment.

Comment 14. A commenter suggested that each FMP include a set of diagnostics, perhaps simply the coefficient of variation (CV) for bycatch estimate by mode, to gauge whether the FMP-specific SBRM is providing sufficiently precise information for management purposes.

Comment 15. Several commenters stated that despite observer allocation measures identified in the SBRM, actual allocation in any year will ultimately depend on available funding. They noted that while the amendment document acknowledges the potential for funding shortfalls, it does not explain how the funding-delimited allocation will occur and what standards will be used to set minimum levels of observer coverage. One commenter suggested the SBRM Amendment include a set of non-discretionary priorities for allocation of observer resources and that whatever approach was used, it take into account the available resources.

### **Comments on the Amendment and the Court Order**

Comment 16. Several commenters expressed the opinion that the SBRM would not satisfy the remand orders. The Court ruling, they said, requires NMFS to specify the level and allocation of observer coverage in each fishery, and the actual level of observer coverage may not be left to the agency's discretion. Commenters opined that the SBRM establishes only a target performance standard (observer sea days sufficient to achieve a  $CV \leq 30$  percent for bycatch estimates), leaving the actual level of observer coverage as a matter of agency discretion, and therefore, the SBRM Amendment does not satisfy the Court's order.

Comment 17. Another of the comment letters, noting the Court's reference to the bycatch monitoring plan in the Pacific Highly Migratory Species FMP as an example of a legally compliant SBRM, suggested that a similarly compliant SBRM will have to contemplate the dynamics of each fishery and be integrated into each FMP. The writer noted that the SBRM Amendment, as written, will not anticipate and adapt to future fishery conditions and management needs.

Comment 18. A commenter asserted that the draft SBRM Amendment exceeds the requirements laid out by the Court and is far more comprehensive than the example bycatch monitoring plans cited by the Court. The writer agreed that the rulings require the SBRM's implementation to be non-discretionary, but the commenter argued for flexibility in the new program, asserting that the Court did not mandate any particular approach or set of performance requirements.

Comment 19. The same commenter noted that by establishing a target CV for bycatch estimates in hundreds of various mode-species combinations, the SBRM Amendment would require specific application of a generally-derived standard. The writer urged NMFS to recast the omnibus amendment as a broader set of standards and methods, perhaps adopting a CV target for more broadly aggregated bycatch estimates, under which PDTs would establish fishery specific observer coverage requirements and, thus, removing from the agency the discretion for establishing observer coverage levels. The commenter asserted that such flexibility would be consistent with both Court decisions.

Comment 20. Several commenters stated that the Court decision requires the SBRM to clearly establish that an observer program will be developed and made mandatory in each fishery.

### **Comments on the Amendment and NEPA**

Comment 21. Several commenters stated that the Omnibus SBRM Amendment should be subjected to the scoping and development process of an Environmental Impact Statement (EIS). They argued that the environmental impacts of the SBRM Amendment are likely to be significant, since the SBRM ultimately would affect widespread marine life, as data collected under the SBRM would influence fisheries management decisions throughout the region for years to come.

Comment 22. The same commenters stated that the SBRM Amendment document contemplates too few and too narrow a range of alternatives to satisfy NEPA. They suggested that additional alternatives should have been considered with respect to the importance filters, bycatch reporting and monitoring mechanisms, the performance standard, and bycatch program review and reporting.

Comment 23. One commenter indicated that the lack of an EIS limited the opportunities for public participation and stymied involvement by the Councils in the development of the amendment.

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Comment 24. Several commenters insisted that alternative threshold levels for the importance filter mechanism should be identified and analyzed in the NEPA document, as should a range of alternative CV levels, as the performance standard for the SBRM.

Comment 25. One commenter suggested that the purpose, need, and scope of the document are too vague. This commenter also suggested that the entire document, particularly the analytical sections, needs to be easily accessible to the public, stakeholders, and decision makers.

Comment 26. The same commenter argued that the environmental assessment (EA) ignores the indirect and cumulative environmental effects of the SBRM Amendment, and that attention should be paid to the relationship of precision of bycatch estimates to the risks to the environment.

Comment 27. Also, the commenter suggested that through an EIS, NMFS should discuss the effect of the SBRM Amendment on the drafting and issuance of Incidental Take Statements and Biological Opinions under the Endangered Species Act.

### **Comments on the Species Addressed by the Amendment**

Comment 28. Several letters addressed the range of species that would be considered under the SBRM, asserting that without a method to assess and report bycatch of all species, the SBRM is incomplete. Commenters claimed the Magnuson-Stevens Act's definition of bycatch includes more species than those contemplated in the amendment, and includes non-commercial and unregulated fish species (especially those considered at risk, such as wolfish, cusk, and corals), as well as highly migratory species and fish managed by the Atlantic States Marine Fisheries Commission.

Comment 29. The same commenters argued endangered species and marine mammals should also be addressed, and there should be a discussion of the bycatch of corals and sponges as indicators of impacts on marine habitat, particularly those areas designated as essential fish habitat.

Comment 30. One of the letters expressed concern for the “chronic imprecision and inaccuracy” of estimates of bycatch of sea turtles and other protected species.

### **Comments on the Observer Coverage Levels**

Comment 31. One commenter stated their opinion that the amendment does not establish an allocation of observer coverage and does not explain how one would be established. This commenter also expressed concern over whether there was an automatic mechanism to update the allocation analysis every year.

### **Comments on the Level of Precision of Bycatch Estimates**

Comment 32. One commenter asked to what units or level of aggregation would the CV target be applied; that is, would the 30 percent CV be an overall bycatch estimate for all species aggregated, or would it apply by fishing mode, species, or species group?

Comment 33. Another stated that the performance standard must be mandatory, rather than a target, and that the SBRM must clearly establish how the standard is going to be applied for fishery, gear type/sector, and/or species.

Comment 34. Several stated that the target CV does too little to limit the Agency's discretion in determining whether and how to allocate observers. They argued that the SBRM Amendment should require specific levels of observers in each fishery.

Comment 35. Another commenter argued that the application of the same precision standard ( $CV \leq 30$  percent) to all mode-species combinations is impracticable and ignores the issues and objectives of each individual FMP. The commenter also stated that it runs counter to NMFS's own technical guidance calling for more general application of the CV standard across all bycatch species.

Comment 36. The same commenter suggested that days-at-sea estimates to meet the target CV for all mode-species combinations would be likely to exceed current levels of observer coverage, and the writer worried that the SBRM may oblige the agency to observer days-at-sea levels that cannot be met, perhaps resulting in litigation.

Comment 37. One commenter, in calling for the Secretary of Commerce to establish observer requirements through an emergency rule, stated that NMFS should establish observers on at least 20 percent of all days fished, except in cases wherein analysis of the best available science indicates otherwise.

### **Comments on the Importance Filters**

Comment 38. In general, commenters supported the use of importance filters as a means of removing from consideration, for determining target observer sea day allocations, those mode-species combinations that are unlikely to occur or likely to be of minimal consequence, but urged caution in their refinement and use. One commenter characterized the use of importance filters for observer resource allocation as reasoned, practicable, and consistent with the law.

Comment 39. One commenter stated that the filtering mechanisms need to be clarified and expanded to ensure all of the criteria used as filters are fully identified.

Comment 40. Three letters expressed concern that the importance filters rely on poor existing observer data as the foundation for calculation of the allocations. They suggested that a baseline level of observer coverage be established for a period of years to support future appropriate use of statistical filters.

Comment 41. Commenters generally supported the first tier gray-box filter, but several insisted that each decision to gray out a mode-species combination be explained in the

amendment document. Also, the same commenters said that the gray-box filter should not be applied to any mode-species combination, wherein the species is a “protected species,” or a species considered “at risk.” They suggested that only after a robust observer program is in place can it be determined that an interaction between a mode and protected species is unlikely to occur.

Comment 42. Several commenters claimed that the third level filter could be used to mask the real effects of bycatch in high volume fishery modes; i.e., when the discard rate for a species is small relative to a high volume fishery, but still of significant environmental consequence. The commenters asked for the third level filter to be removed from the amendment.

Comment 43. The same commenters expressed concern that the third and fourth level filters rely on threshold values (ratios) which are not specifically identified and analyzed in the amendment document. They stated that the SBRM Amendment must develop and address the specific fixed threshold alternatives through an EIS process before the public can properly assess the usefulness of the SBRM.

Comment 44. A commenter suggested that the Councils consider adding an importance filter for any mode of fishing whose overall contribution to total landings falls below some threshold and, accordingly, for which the contribution to total discards can be considered *de minimus*. The commenter also suggested that the SBRM Amendment provide a means for the reduction of target observer sea days when gear improvements have reduced or eliminated the potential for bycatch.

### **Comments on the Analysis of Accuracy and Precision**

Comment 45. One letter stated that the amendment document sufficiently addresses the issue of accuracy, and its inclusion of the Rago et al. analysis of observer program accuracy rectifies previous Court-identified deficiencies.

Comment 46. Another letter stated that the treatment of accuracy in the document is limited to a dismissal of current science and suggested that the amendment document consider methods to retrospectively assess the accuracy of bycatch in periodic bycatch reports.

Comment 47. A commenter, arguing for FMP-specific bycatch monitoring programs developed under a more general omnibus SBRM structure, suggested the amendment mandate that sampling designs minimize bias to the greatest extent practicable.

Comment 48. The same commenter warned that the SBRM should not result in an undue fiscal burden on the public or the industry, and that precision and accuracy are matters of policy that should be left for the Councils to determine on an FMP basis. The commenter stated that the document should consider not only a scientific perspective on precision and accuracy, but should also include a discussion of the benefits and costs associated with varying levels of precision and accuracy.

Comment 49. A commenter stated that NMFS's bycatch mortality estimates are perceived by industry as inequitable from mode to mode and the document should better explain how discard mortality estimates are determined.

Comment 50. One commenter, providing a technical review on behalf of several fishing industry organizations, suggested that a typical assumption in the calculation of CVs based on observer coverage is that every tow is independent, but the truth is that sequential tows are clearly correlated and should not be treated as statistically independent.

Comment 51. This same commenter indicated that the "observer effect," the degree to which vessel operators behave differently when an observer is aboard, needs to be accounted for in the calculation of the CV.

Comment 52. This commenter also suggested that the CV calculation should account for observer downtime, those periods of fishing operations when the embarked observer is off duty.

Comment 53. This same commenter suggested that the method of calculating the CV is, to some extent, fishery/stratum dependent. For example, different methods should be applied to day boat fisheries versus longer trip oriented fisheries.

#### **Comments on Electronic Monitoring**

Comment 54. A commenter who works in the field of video monitoring agreed with the amendment document's rather high estimates of the costs associated with fishery video monitoring program. He attributed the high costs to the market dominance of a single contractor and he suggested that costs would likely come down should video monitoring requirements become more widespread and more contractors enter the field.

Comment 55. Another commenter agreed with the document's discussion of analytical difficulties that would be involved in video monitoring, and expressed support for the finding that use of such systems be deferred, pending further development.

#### **Comments on the SBRM Reporting Process**

Comment 56. Two commenters stated that the maximum report period should be annual, and the report should present the bycatch data by fishery, gear type, sector, area fished, species, and any other variable, as determined by the Councils.

Comment 57. One commenter argued that various reporting content, format, and frequency alternatives should be described and analyzed in an EIS. Also, the commenter expressed disappointment at the examples provided in the appendices, suggesting that the Councils require "estimates of overall bycatch and bycatch mortality by species/stock within a fishery and/or fishery mode or gear sector in a particular area."



Comment 58. This commenter also expressed concern that the amendment did not require reporting on the SBRM, but provided only for the Councils to request a query of the appropriate databases.

### **Miscellaneous**

Comment 59. A commenter insisted the SBRM must address how data will be collected on sea turtle impacts in the scallop dredge fishery, noting that turtle-chains prevent sea turtles from being captured and hauled on deck in the dredge, and there is no mechanism for observing sea turtle interactions with the gear underwater.

Comment 60. A commenter, arguing for greater FMP orientation of the SBRM, suggested that the amendment authorize and encourage a variety of cooperative research aimed at reducing bycatch and improving bycatch data quality.

Comment 61. A commenter stated that NMFS needs, as practical matter, to ensure the observer program is affordable and effective and enjoys stable funding and workforce.

Comment 62. A commenter suggested that NMFS should make use of industry and government resource surveys to estimate bycatch. The commenter noted that prior to opening an area to scallop fishing, the area is surveyed by observed commercial vessels and that the pre-opening surveys may support sufficient discard estimates and provide for reduced observer coverage in the fishery.

Comment 63. The same commenter expressed concern that the SBRM's reliance on gear and area fished to identify modes may result in an unmanageable number of separate modes for scallop vessels under the SBRM.

Comment 64. A commenter stated that the amendment document does too little to standardize how observers conduct themselves and their data collection aboard fishing vessels.

Comment 65. Another commenter wondered if NMFS had the resources to support the analysis obligations made by the SBRM Amendment.

Comment 66. One commenter suggested that law enforcement be increased "to 10 percent, not less than 1 percent."