DOCUMENT # 1

[*This will be added to the document, most likely as a new appendix. The summaries of the two public hearings, along with all the written comments, will also be included in this appendix.*]

Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment

Summary of Comments Received on the Draft Amendment

Comment Period: 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 of 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 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.

Response:

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.

Response:

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.

Response:

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

Response:

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.

Response:

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.

Response:

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.

Response:

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.

Response:

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.

Response:

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

Response:

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.

Response:

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.

Response:

Comment 13. The same commenters also 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.

Response:

Comment 14. 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.

Response:

Comment 15. 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.

Response:

Comment 16. 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.

Response:

Comments on the Amendment and the Court Order

Comment 17. 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.

Response:

Comment 18. Another of the commenters, 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.

Response:

Comment 19. 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.

Response:

Comment 20. 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.

Response:

Comment 21. 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.

Response:

Comments on the Amendment and NEPA

Comment 22. 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.

Response:

Comment 23. 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.

Response:

Comment 24. 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.

Response:

Comment 25. 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.

Response:

Comment 26. 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.

Response:

Comment 27. 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.

Response:

Comment 28. 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.

Response:

Comments on the Species Addressed by the Amendment

Comment 29. Several commenters 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.

Response:

Comment 30. 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.

Response:

Comment 31. One of the letters expressed concern for the "chronic imprecision and inaccuracy" of estimates of bycatch of sea turtles and other protected species.

Response:

Comments on the Observer Coverage Levels

Comment 32. 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.

Response:

Comments on the Level of Precision of Bycatch Estimates

Comment 33. 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?

Response:

Comment 34. Another commenter 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.

Response:

Comment 35. Several commenters 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.

Response:

Comment 36. 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.

Response:

Comment 37. 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.

Response:

Comment 38. 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.

Response:

Comments on the Importance Filters

Comment 39. 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.

Response:

Comment 40. 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.

Response:

Comment 41. Three commenters 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.

Response:

Comment 42. 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.

Response:

Comment 43. 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.

Response:

Comment 44. 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.

Response:

Comment 45. 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.

Response:

Comments on the Analysis of Accuracy and Precision

Comment 46. One commenter 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.

Response:

Comment 47. Another commenter 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.

Response:

Comment 48. 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.

Response:

Comment 49. 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.

Response:

Comment 50. 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.

Response:

Comment 51. 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 treated as statistically independent.

Response:

Comment 52. 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.

Response:

Comment 53. 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.

Response:

Comment 54. 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.

Response:

Comments on Electronic Monitoring

Comment 55. 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.

Response:

Comment 56. 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.

Response:

Comments on the SBRM Reporting Process

Comment 57. 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.

Response:

Comment 58. 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."

Response:

Comment 59. 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.

Response:

Miscellaneous

Comment 60. 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.

Response:

Comment 61. 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.

Response:

Comment 62. A commenter stated that NMFS needs, as practical matter, to ensure the observer program is affordable and effective and enjoys stable funding and workforce.

Response:

Comment 63. 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.

Response:

Comment 64. 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.

Response:

Comment 65. A commenter stated that the amendment document does too little to standardize how observers conduct themselves and their data collection aboard fishing vessels.

Response:

Comment 66. Another commenter wondered if NMFS had the resources to support the analysis obligations made by the SBRM Amendment.

Response:

Comment 67. One commenter suggested that law enforcement be increased "to 10 percent, not less than 1 percent."

Response:

Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment

Public Hearing Summary

Gloucester, MA
November 14, 2006

Chair:	Dana Rice
Council Staff:	Chris Kellogg
NMFS Staff:	Michael Pentony
Council Members:	Phil Ruhle
Attendance:	32 (8 signed in)

Introduction:

Mr. Rice welcomed those in attendance and introduced the purpose and structure of the SBRM Amendment public hearing. Mr. Pentony provided a short presentation on the purpose of the hearing, a summary of the SBRM Amendment and the Councils' preferred alternatives, and a review of the process to comment on the draft amendment, which are accepted at the hearing, or at the second of two public hearings on December 13, 2006, in New York, NY. Mr. Pentony announced that written comments would be accepted through December 29, 2006, via mail, fax, or email.

Five individuals provided comments on the draft amendment. The following represents a summary of the testimony of each commenter and is not intended to be a complete transcript.

Comments:

1. Gib Brogan, Oceana: Mr. Brogan relayed Oceana's concerns regarding the draft SBRM Amendment. Mr. Brogan asserted that the SBRM Amendment, as proposed, does not satisfy the Court's remand order regarding Amendment 13 to the Northeast Multispecies Fishery Management Plan (FMP). During his testimony, Mr. Brogan identified the following concerns with the document:

- The proposed SBRM continues to leave the level of observer coverage at the discretion of the Regional Administrator (RA). The SBRM Amendment should require a minimum level of observer coverage for each fishery and, therefore, does not meet the court order.
- The Purpose and Need in the first section of the document is not sufficiently clear. It should better state what is in the document and what it sets out to do; that is, how it will move the SBRM issue forward.
- An omnibus FMP amendment effects changes to all the region's FMPs. The document does not, but should, discuss how the amendment will affect each individual FMP.

- The possibility of future management implications is not spelled out in the document.
- The document should also clarify the annual process to update the observer allocations.
- An SBRM needs to establish an allocation of observer days and this document does not do that.
- The range of alternatives considered in the document is inadequate to comply with the National Environmental Policy Act (NEPA), and more viable alternatives should be considered. The performance standard of a CV equal to or less than 30% is accepted in the document as a gold standard without consideration of other CV levels.
- The document should specify what is to be included in the SBRM Report. The alternatives for requiring reports on the SBRM should be expanded.
- The idea of *accuracy* is not explored in the amendment document.
- The SBRM amendment is very complex and technical and relies on NMFS science. The amendment should be peer reviewed to ensure the science and reasoning are robust.
- The concept of *importance filters* is too vague in the document. Sample threshold levels (used in several of the filters) and the effects of their range (0.5% - 3.0%) on the outcomes of data quality are not discussed. It appears that the threshold level can be manipulated. Threshold values should be fixed and established in the SBRM amendment document. The importance filters should not be a mechanism merely for justifying status quo observer levels.
- Oceana has issues with specific fisheries. For sea scallop trawls, NMFS and the Councils should consider the use of underwater video monitoring to capture interactions of the fishing gear with marine life. There is no discussion of underwater video monitoring in the amendment document.
- Appendix E is an example of what a required SBRM Report might look like. The information provided in Appendix E is insufficient and does not satisfy the requests of the NEFMC regarding SBRM reporting. The example does not include any time/area data or analyses of bycatch patterns. Mr. Brogan expressed concern that if such information is not specified as required, it will not be collected.
- The SBRM amendment has come a long way since the review of the Rago et al (2005) paper in September 2005, but more needs to be done to move the region's bycatch monitoring into modern management. Oceana will submit written comments.

2. David Frulla, Fisheries Survival Fund: Commenting on behalf of the Fisheries Survival Fund, Mr. Frulla expressed concern that some of the approaches proposed in the SBRM amendment are too open to litigation. Mr. Frulla stated that the Fisheries Survival Fund will be submitting written comments and, perhaps, technical papers on specific issues. During his testimony, Mr. Frulla identified the following issues:

- Levels of precision and accuracy are matters of policy that should be left to the Councils. Whatever monitoring methods are decided upon, they should not unduly burden the public or bankrupt the industry.
- The document should explain the costs and benefits of achieving varying levels precision and accuracy.
- Mr. Frulla expressed support for the concept of importance filters and notes that under the example threshold levels the required number of observer days still more than doubles the highest levels ever achieved.

- Mr. Frulla concurs with the document's finding that video monitoring of discards is still a ways off. The method is not robust, as the boat deck is not a production line that is easily videotaped. Also, vis a vis underwater video monitoring, sea turtles that are deflected by a scallop dredge's turtle chains are not *bycatch*. A white paper by the Fisheries Survival Fund will address this issue.
- Mr. Frulla expressed support for the "gray cell" importance filter that removes from consideration (for observer day allocation) improbable bycatch gear/species combinations. Bycatch problems that have been addressed, such as sea turtles scallop dredges, might also be considered as gray cells in the importance filters.
- Add consideration of reducing needed observer coverage levels for fisheries that have implemented successful bycatch reduction devices.
- The detailed discussion of accuracy in the SBRM Amendment document and Rago et al (2005) should satisfy the Court's remand order. NMFS has done a good job addressing accuracy and bias in a principled way.
- The SBRM Amendment would set a performance standard of a CV less than or equal to 30% for each mode/species combination. Case law has provided more room for flexibility in this matter. The level of detail – down to mode/species combinations – is one reason the tally of observer days is so high. Mr. Frulla expressed concern that this approach may lead to a court order that requires observer coverage to meet a CV target of 30% for each mode/species combination.
- There's more flexibility in the court orders than Oceana suggests. Methodology has not been specified by the courts. The Pacific groundfish SBRM has been held up by the court as an acceptable example, but even it does not go into the level of detail of the Northeast SBRM Amendment.

3. Cindy Smith, Maine Department of Marine Resources (DMR): Speaking on behalf of the Maine DMR, Ms. Smith identified an issue related to the estimated discard mortalities. NMFS's mortality estimates by mode, derived from observed discards, are perceived by constituents in Maine as inequitable from mode to mode. The SBRM Oversight Committee should explain the discard estimates in the document. She explained that Maine DMR will be submitting written comments.

4. Jeff Kaelin, Ocean Spray Partnership/Ocean Frost Seafood: During his testimony, Mr. Kaelin identified the following issues:

- Mr. Kaelin supports the Council's decision not to adopt an electronic monitoring alternative. Electronic monitoring methods are not yet practical.
- Mr. Kaelin expressed concern regarding the Council's decision not to set minimum percentages of observer coverage.
- Mr. Kaelin also expressed concern regarding how a CV standard may leave NMFS open to litigation and that setting such a standard would handcuff the SBRM to artificial and unrealistic expectations. NMFS should not be in the position of getting sued due to lack of resources to meet CV and observer coverage targets. Can other parties at the table pitch in funds to support additional observer coverage?

- The use of importance filters in the determination of observer day determinations makes good sense. Mr. Kaelin expressed concern about the extrapolation of observed discards to derive total discard estimates. He will be submitting written comments.

5. Ron Smolowitz, Fisheries Survival Fund: During his testimony, Mr. Smolowitz identified the following issues:

- One component of monitoring that could be expanded is the use of industry and NMFS surveys to estimate bycatch. Prior to opening an area to fishing, the area gets surveyed by commercial vessels. The pre-opening surveys and the bycatch rates from VMS reporting could be expanded. Mr. Smolowitz believes that pre-opening surveys in which bycatch rates are determined may support discard estimates, even with a lower level of observer coverage in the fishery.
- The SBRM Amendment document should include a retrospective analysis of the Georges Bank sea scallop opening to determine whether the target CV was met using the pre- and post-opening surveys.
- Sea turtle interactions with scallop dredges are not bycatch. Turtle chains prevent the turtles from being caught. The interactions are "takes" (under the Endangered Species Act) and should be addressed elsewhere. This distinction should be clarified in the document.
- In areas without a TAC-driven closure, the Council and NMFS should consider requiring an exploratory level of observer coverage and develop methodology for such pilot coverage.
- The reliance in the SBRM Amendment on fishing gear/area modes is a concern for the scallop industry. Each new access area in the fishery is likely to result in a separate mode under the SBRM. This concern may be alleviated if pre-opening surveys are used to reduce the observer burden on the industry.

Conclusion:

No one else requested to speak, and the hearing was adjourned at 6:30 p.m.

Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment

Public Hearing Summary

New York, NY
December 13, 2006

Chair:	Laurie Nolan
Council Staff:	Jim Armstrong
NMFS Staff:	Michael Pentony
Council Members:	Pat Augustine, Paul Scarlett, Ed Goldman, Fran Puskas, Gene Kray, and Jeff Deem
Attendance:	16 (10 signed in)

Introduction:

Ms. Nolan welcomed those in attendance and introduced the purpose and structure of the SBRM Amendment public hearing. Mr. Pentony provided a short presentation on the purpose of the hearing, a summary of the SBRM Amendment and the Councils' preferred alternatives, and a review of the process to comment on the draft amendment. Mr. Pentony announced that written comments would be accepted through December 29, 2006, via mail, fax, or email.

After a short question-and-answer period to clarify several specific points about the amendment, four members of the public provided comments on the draft amendment. The following represents a summary of the testimony of each commenter and is not intended to be a complete transcript.

Comments:

1. Shaun Gehan, Fisheries Survival Fund: Speaking on behalf of the Fisheries Survival Fund, Mr. Gehan reiterated many of the comments made at the first hearing. In particular, Mr. Gehan identified the following issues:

    - The draft SBRM Amendment does a good job of addressing the issue of accuracy that was identified by the Court as an area of concern.
    - Overall, the importance filters are a good thing. In particular, they help focus limited resources where they would be the most meaningful.
    - Some concern that the plan far exceeds the National guidance for bycatch monitoring, which suggests achieving a CV of 20-30 percent across fisheries, not at the species-by-species level as the SBRM Amendment proposes.
    - Concerned over the potential for litigation if the amendment creates high expectations which are then not met. In order to remedy this, Mr. Gehan suggested expanding the

importance filters and focusing them to further refine the resulting observer coverage levels.

- Concerned that the document does not go far enough in *requiring* an observer program; the Court said this was not optional. At a minimum, the document should stipulate that the use of observers is mandatory.

2. Greg DiDomenico, Garden State Seafood Association: Mr. DiDomenico expressed mixed emotions regarding this type of action, but stressed he hopes NOAA Fisheries Service can get good information on bycatch occurring in the fisheries. He expressed concern that if the Agency cannot meet the requirements for fisheries observer coverage, then the amendment could serve as a tool for litigation. His primary concerns are that, if litigation occurs, either a fishery would be shut down due to incomplete observer coverage or the industry would be forced to pay for the observers.

3. Sima Freierman, Montauk Inlet Seafood: Ms. Freierman expressed concern that the SBRM Amendment does not address problems with the fisheries observer program, such as faulty data, anomalous tows, and putting observers on smaller vessels. She reported being particularly concerned about standardizing observer practices. Ms. Freierman would like the amendment to shift away from focusing on how the data are collected and to look at what goes on on the fishing vessels.

4. Peter Moore, American Pelagics Association: Mr. Moore indicated he would be submitting written comments, but expressed particular concern over the potential for unintended consequences of the amendment if the Agency cannot achieve the observer coverage levels stipulated in the amendment. He is concerned that fisheries may be shut down if there is insufficient funding to meet the expectations.

Conclusion:

There was some discussion among the attending Council members and staff, but no other members of the public requested to speak, and the hearing was adjourned at 8:15 p.m.

Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment

Written Comments

October 31 – December 29, 2006

Subject: PUBLIC COMMENT ON FEDERAL REGISTER OF 11/16/06 VOL 71 PG 66748
Date: Thu, 16 Nov 2006 07:33:23 -0800 (PST)
From: jean public <jeanpublic@yahoo.com>
To: SBRMcomment@noaa.gov, COMMENTS@WHITEHOUSE.GOV, VICEPRESIDENT@WHITEHOUSE.GOV

FED REG DOC E6 19398 ID 102006a
HEARING IN NYC - 50 CFR 648
MEETING ON DECEMBER 13 AT 7 PM

OF COURSE THERE SHOULD BE STANDARDIZED FORMS WHICH ARE USED ALL OVER THE U.S. BY THESE COUNCILS.

HOWEVER, THE FORMS USED ISNT THE ISSUE, THE LIES TOLD BY COMMERCIAL FISH PROFITEERS WHO OVERCATCH IS THE ISSUE. LAW ENFORCEMENT NEEDS TO BE STEPPED UP TO TEN PERCENT, NOT LESS THAN ONE PERCENT.

WE NEED TO JAIL THESE OVER QUOTA COMMERCIAL FISH PROFITEERS, FINE THEM WITH FINES STARTING AT ONE MILLION DOLLARS AND GOING UP AND SEIZE THEIR VESSELS.

IT IS CLEAR THERE IS FAR TOO MUCH OVERFISHING GOING ON AND SPECIES AFTER SPECIES AFTER SPECIES ARE VANISHING FROM THIS EARTH. OUR CHILDREN'S HERITAGE IS BEING LOST BY NOAA AND ITS FAILURE TO PROTECT ALL AMERICANS FROM RAPACIOUS SMALL PROFITEERING CLIQUES.
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December 22, 2006

Patricia Kurkul
Northeast Regional Administrator
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

Via email to: SBRMcomment@noaa.gov

Re: Comments of Oceana Concerning the Omnibus Standardized Bycatch Reporting Methodology Fishery Management Plan Amendment for the New England and Mid-Atlantic Regions

Dear Ms. Kurkul:

We would like to take this opportunity to comment on the development and approval of the Standardized Bycatch Reporting Methodology (SBRM). Catch data is the fundamental basis of any fishery management system. Without an adequate bycatch reporting system, the sustainable management of New England and Mid-Atlantic fisheries will be impossible. Developing a robust program to collect, analyze, and report bycatch data – that is available and useful for fisheries managers, stakeholders, and the public -- is a critical step in improving the sustainability of these fisheries and the efficacy of the many rebuilding programs that are under way in these regions.

Oceana would like to commend the staff of the Fisheries Service for their work in developing a draft SBRM document that provides meaningful guidance for the Council and the Agency. The draft SBRM makes important conclusions about the need for increased use of at-sea observers to collect information about bycatch, including the findings of the National Working Group on Bycatch. This information and analysis will undoubtedly improve the way the regions' fisheries are managed.

However, the SBRM draft is the product of a remand order, and it must satisfy the requirements of the law and of the Court's order. As it stands now, the draft document fails to meet those requirements. This SBRM amendment will be a precedent-setting management action that will influence how fisheries are monitored and managed across the country. Oceana understands that it may require additional time and effort to fully address the requirements of the Court's order and controlling statutes, but emphasizes again that the document must be legal and complete. We are happy to work with the agency as the process moves forward, but intend on using every option to ensure that this document fulfills its requirements.

In order to meet the legal requirements of the Magnuson-Stevens Act, National Environmental Policy Act ("NEPA") and the Court order, the SBRM must incorporate significant changes, including:

- **The SBRM must mandate how data is collected by mandating the level and allocation of observer coverage**
- **The SBRM must mandate how data is reported**
- **The agency must take a hard look at the environmental impacts of the SBRM in an Environmental Impact Statement ("EIS").**

Below is more detail on these required changes.

DETAILED COMMENTS

I. THE SBRM MUST MANDATE HOW DATA IS COLLECTED BY MANDATING THE LEVEL AND ALLOCATION OF OBSERVER COVERAGE

As you know, Oceana brought lawsuits against the Fisheries Service concerning both Groundfish Amendment 13 and Atlantic Sea Scallop Amendment 10, because neither amendment contained an adequate SBRM. In these cases, the Court ruled that the amendments violated the SBRM requirement of the Magnuson-Stevens Act.

Most importantly, the Court held that Amendment 13 failed to "establish" an SBRM, because, while it set forth an intention to achieve 5% observer coverage, it left the actual level of observer coverage completely in the discretion of the agency. *Oceana v. Evans,* No. 04-0811, 2005 WL 555146 at *42 (D.D.C. Mar. 9, 2005) (hereinafter "*Oceana I* "). The Court found Scallop Amendment 10 to be unlawful, because it too failed to "establish" an SBRM, instead leaving the actual allocation of observers up to the Regional Administrator. *Oceana v. Evans*, 384 F. Supp.2d 203, 232 (D.D.C. 2005) (hereinafter "*Oceana II")*.

The draft SBRM appears to have exactly the same flaw as Groundfish Amendment 13 and Scallop Amendment 10; it appears to establish performance targets while leaving the actual level and allocation of observer coverage entirely up to the agency.

What is more, the SBRM draft does not establish an allocation of observer coverage and does not explain how one would be established. The analysis in the document appears to be based upon a certain level of days-at-sea, but it is not clear whether there is an automatic mechanism to update the allocation analysis every year, which would be needed as fishing effort changes as the result of changes in total allowable catch levels ("TACs") and other measures controlling fishing effort. The draft also makes clear, at p. 184, that the actual allocation of observers would be further reduced based on funding, but the SBRM neither

gives a minimum number of observers nor any way to determine how observer allocation would be reduced.

The hard work of the SBRM team should not be in vain. The Council and the agency must take the final step required by the law and establish the SBRM with binding requirements for observer allocation in affected fisheries.

II. THE SBRM MUST MANDATE HOW DATA ARE REPORTED

As an omnibus amendment to individual fishery management plans, the SBRM amendment must develop a standardized bycatch reporting methodology that addresses the management and data needs of each fishery. The reporting methodology should be an integral part of each plan and effectively contribute to improving fishery management. The current document does not consider current or future management needs or discuss how the information provided by the SBRM could improve or change the management of a given fishery. The final document should include a discussion of the management scheme for each affected fishery and the possible bycatch data needs of the current and future management of these fisheries. The amendment should take affirmative steps to address these needs.

For example, the SBRM as drafted merely states that the Council can request information and it will be provided through a 'query' of the bycatch database and related analyses. This non-binding and vague promise does not establish a reporting methodology – it leaves reporting solely at the discretion of the agency. Instead, the SBRM should specify data to be collected, reporting formats, and reporting frequencies to address the needs of specific fisheries.

III. THE SBRM MUST CONSIDER BYCATCH OF SPECIES THAT ARE NOT TARGETED UNDER FISHERY MANAGEMENT PLANS

The Magnuson-Stevens Act definition of bycatch and fish encompasses a much broader range of bycatch species than the SBRM document considers in its analyses. Species that are not targeted under fisheries managed by the New England or Mid-Atlantic Councils, such as those managed by the Atlantic States Marine Fisheries Commission (i.e. striped bass, shad, etc) or the National Marine Fisheries Service directly (Highly Migratory Species), must be considered in the Standardized Bycatch Reporting Methodology. Without a method to assess and report bycatch of *all* species, the SBRM is incomplete. Additionally, the SBRM must consider the management needs of the Councils in its analysis and include a discussion of bycatch of corals and sponges as possible indicators of impacts on marine habitat, especially essential fish habitat ("EFH").

IV. THE SBRM DRAFT DOES NOT SATISFY NEPA

A. An Environmental Assessment ("EA") Is Insufficient for This Action

The information and analysis in the SBRM document will have a significant impact on thirteen fisheries from the Canadian border to North Carolina. The information, analysis, and technical guidance contained in a complete SBRM will affect how these fisheries are managed, their stock assessments, and ultimately the management approaches used to reach management goals. Therefore, the Omnibus SBRM amendment is a major federal action significantly affecting the quality of the human environment. Accordingly, the agency must take a hard look at the environmental impacts of the preferred alternative as well as other alternatives, in a full Environmental Impact Statement.

With a wide range of stakeholders that could be affected by the findings of this process, the agency must engage in a complete scoping process to educate and engage the public about the issue and seek concerns and ideas to be investigated and developed as part of the document. Instead of an open public process, the agency chose to develop this document using the internal Fishery Management Action Team ("FMAT") process which removed interested parties from the development process with the exception of periodic updates to the Councils.

B. The SBRM Document Must Discuss the Purpose, Need, and Scope of the Amendment

In it current form, the SBRM document is vague and fails to clearly state the goals or issues to be addressed. The SBRM EIS must be presented in a format that is accessible to the public, affected stakeholders, and decision makers. The SBRM development process suffered because of a lack of public participation and the failure to engage the New England and Mid-Atlantic Councils apart from cursory presentations at council meetings. Putting the analysis in a more accessible format will yield a more complete and functional document.

C. The EIS Must Consider a Range of Feasible Alternatives

Instead of examining real alternatives for each decision point, the EA only presents the options of status quo, preferred alternative and impossible straw man. This is blatantly in violation of NEPA and quite similar to the EAs that were thrown out in the original EFH case. *See AOC v. Daley*, 183 F. Supp.2d 1, 19 (D.D.C. 2000) (EAs overturned where most considered only status quo and preferred alternative).

For the important choices the EIS must consider *real* alternatives. For example:

1. Performance standard

The document fails to define to which units of measurement the performance standard will be applied. For example, would the bycatch estimate that would have a 30% CV be an

overall bycatch estimate for all species aggregated; an estimate for all species aggregated, but broken out by time and area; an estimate by "fishing mode;" an estimate for each individual species; or an estimates for various species groups?

For the SBRM to be effective, it needs to include a performance standard. This standard needs to be a requirement, not a target. Oceana believes that the SBRM can and should mandate compliance with relevant performance standards to ensure high quality bycatch data is used in fisheries management.

2. Reporting

The EIS should consider different reporting formats and frequencies and the option of a mandatory periodic report on bycatch in respective fisheries. The draft EA considers different frequencies of the SBRM review process, but does not discuss what should be in the report, or whether different reports should be required under the SBRM.

3. Accuracy

Precision and accuracy are equally important metrics by which the quality of data can be assessed. The treatment of accuracy in the SBRM is limited to a dismissal of current science (Babcock, et al). Although accuracy may be considerably more difficult to proactively plan for in sampling design, the EIS should consider alternative methods to retrospectively assess the accuracy of bycatch data in periodic bycatch reports.

D. The EIS Must Consider Cumulative Environmental Impacts

The EA erroneously ignores the indirect and cumulative effects of the SBRM on the environment. As a broad reaching amendment to 13 management plans, the SBRM will indirectly affect the level of fishing and the level of mortality of targeted, bycatch, and protected species in the many fisheries and will directly affect the quality of the data used to complete stock assessments and set mortality limits. Particularly salient is that the less frequent the reporting and the less precise the methodology, the greater the risk to the environment. The EIS must fully discuss these issues and the importance of a robust SBRM or risk marginalizing the document and its important work.

E. The EIS Must Address Protected Resources

Bycatch of protected species is a recently documented problem in some of the fisheries affected by this SBRM document. More attention must be given to the problem of protected resources and the chronic imprecision and inaccuracy of, e.g., sea turtle bycatch, estimates in these fisheries. Furthermore, the SBRM must address how data will be collected on sea turtle impacts in the scallop dredge fishery, which currently has no adequate monitoring mechanism since turtle chains render it impossible for at-sea observers to monitor interactions. Additionally, the EIS must fully discuss the impacts of the SBRM on the drafting and issuance of Incidental Take Statements and Biological Opinions for these fisheries.

F. The EIS Must Address Importance Filters

The various alternatives for filters must be laid out in an EIS that explains the implications of the filters and proposes levels at which the filters could be set. *See section VI below for additional information.*

V. Peer Review

The Omnibus SBRM Amendment is a significant action that will affect a wide range of fisheries. The National Marine Fisheries Service should ensure that the document receives a full external peer review by a body such as the Center for Independent Experts (CIE). Although the SBRM received a short review by a limited number of members of the joint Council Scientific and Statistical Committee, the review was limited to very technical issues, and was done while the SBRM was still very incomplete. Experts from the CIE should be given the opportunity to comment on the technical issues but also issues related to management and the integration of the SBRM into stock assessments.

VI. IMPORTANCE FILTER

A. Development of Filters

The preferred alternative would reduce the initial observer allocation by means of applying a series of "importance filters" to remove fishery mode/species combinations from the list of observer needs based on different criteria including the current database of fishery mode/species interactions. This approach is fundamentally flawed because it uses the scant observer data from past years as the foundation for the calculation of interaction percentages. Instead, the SBRM should mandate a baseline level of observer coverage and use the information from this coverage as the foundation for the future application of statistical filters.

Oceana also has serious concerns about the development and use of filters 3 and 4. These filters create a loophole through which the agency can support any level of observer coverage by manipulating the threshold values for these filters. If the SBRM does not specify the thresholds, the public has no way of knowing how useful the SBRM will be. Because the threshold values will constitute a significant part of the SBRM if the importance filter is adopted, the amendment must go out for further public comment on specific alternatives for the threshold values, including a proposed preferred alternative.

The draft document states that: "The third-level filter would eliminate species when the discards of that species in a mode are less than a certain minimum percentage of the total discards for that mode." Thus, the filter can be used to mask the real effects of a bycatch problem. For example, an unselective gear that catches a high volume of fish, like trawl gear, might catch a significant percentage of a particular species, but the percentage of that species in the total catch of the gear might not be high. Thus the third-level filter might fail to properly address bycatch of species like cod or haddock in gear like herring trawls.

Oceana recommends that filter 3 be removed from the SBRM and that the options for the percentage level for filter 4 be developed through an EIS.

B. Protected Species

Oceana agrees that applying the first level 'graying out' filter is appropriate for those species which are geographically limited or physically unable to be taken with a given fishery mode but recommends that criteria or discussion be provided for all combinations removed through 'graying out'. This importance filter, however, is inappropriate for removing any fishery mode/protected species combination. Interactions with protected species are rarer than interactions with fish species. Interaction combinations should not be excluded based on frequency of the interactions until a robust observer program is in place which indicates that an interaction is unlikely.

VII. COMMENTS ON DRAFT REPORT OF BYCATCH

Throughout the SBRM development process, FMAT members assured those involved at Committee and Council discussions that data would be available from the SBRM which would provide estimates of bycatch broken down by ***time, area, gear, and species/stock***.

Instead of real examples of the usable data that the SBRM could produce, the Council and the public were provided with disappointing reproductions of past uses of bycatch data in fisheries management.

The New England Council is moving forward with a new management action to meet the mortality and rebuilding goals of the Multispecies Fishery. The Council should require that the following information should be included in any report from a 'query':

Estimates of overall bycatch and bycatch mortality by species/stock within a fishery and/or fishery mode or gear sector in a particular area (e.g. Bycatch of George's Bank Cod in the small vessel gillnet fishery)

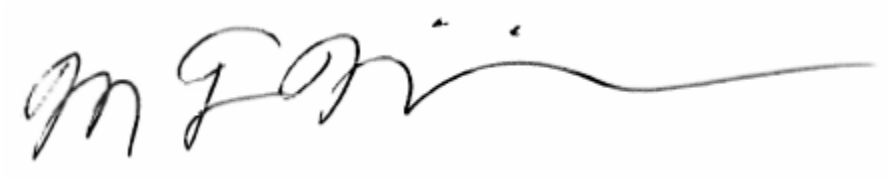
Without evidence of the capability to assess bycatch in this kind of detail, the Council should require the FMAT to resume development of the document until such time as this level of detail is available.

CONCLUSION

Oceana appreciates the work that has gone into the development of the SBRM document and its analyses. The work will advance the management of the region's fisheries and will bring the region closer to real fisheries accountability. Oceana is concerned that the process has gone most of the way toward completing its obligations but fails to take the final step to finish the job. We hope that the issues raised above can be amended before the SBRM is approved and implemented.

Thank you for your consideration.

Sincerely,



Michael F. Hirshfield, Ph.D.
Senior Vice President and Chief Scientist

cc: Members
New England Fishery Management Council

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Subject: Comments on Section 7.2.1.3.2. Alternative 1.2 - Implement Electronic Monitoring
Date: Wed, 27 Dec 2006 08:02:29 -0900
From: Mark K. Buckley <mkbuckley@alaska.com>
To: SBRMcomment@noaa.gov

My comments are related to the concluding paragraph of the above-referenced section of the SBRM:

> "Comparatively, the costs associated with the electronic monitoring alternative appear much greater than the status quo alternative that is proposed as the preferred alternative at this time. Future consideration of electronic monitoring programs would need to weigh the benefits of such a program against the substantial costs to both the fishing industry and the Federal government, although as technologies improve, costs may decrease."

The facts in support of this statement are found in the previous paragraphs of that section. They reflect the cost structure associated with one contractor, who has has thus far been involved with the vast majority of video monitoring deployments in the commercial fisheries of North America. This contractor provides excellent service, and my comments are in no way meant to disparage the quality or thoroughness of its products. Nonetheless the contractor enjoys a virtual monopoly in the video monitoring field on this continent. This market dominance and scarcity of competition, I believe, have led to higher prices for video monitoring services.

A case in point is a video monitoring RFP issued in 2006 by the Alaska Fisheries Science Center. In this example there was a competitive field, with my Alaska-based company bidding against the market leader. My company's bid was $101,000 and the market leader's bid was $151,000.

This 33% cost difference, I believe, was due to my company's lower overhead and its local-hire business model. I am confident that if there were more competition to provide electronic observer services in places such as the New England Region, the prices would come down considerably.

Mark Buckley
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December 29, 2006

Patricia A. Kurkul
Regional Administrator
Northeast Regional Office
National Marine Fisheries Service
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Re: Comments on Draft SBRM Amendment

Dear Ms. Kurkul:

On behalf of the Natural Resources Defense Council (NRDC), I submit the following comments regarding the National Marine Fisheries Service (NMFS)' Northeast Region Standardized Bycatch Reporting Methodology, an Omnibus Amendment to the Fishery Management Plans of the Mid-Atlantic and New England Regional Fishery Management Councils ("Draft Bycatch Amendment" or "Draft Amendment").

NRDC's primary concern with the Draft Bycatch Amendment -- and it is a fundamental one -- is that the Draft Amendment fails to incorporate the necessary requirements relating to *how* the bycatch data is collected. Section 303 of the Magnuson-Stevens Act requires that each Fishery Management Plan ("FMP") and FMP amendment (hereinafter collectively "FMP") "shall … establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery …." *See* 16 U.S.C. § 1853(a)(11). It seems self-evident that, to "establish" such a standardized bycatch reporting methodology ("SBRM"), a FMP must "establish" both the manner in which the bycatch data is collected, *e.g.*, whether by observers and if so the nature of the observer coverage, as well as "establish" how this data is then processed so as to provide an adequate basis for management decisions. Adequate data collection is obviously a necessary predicate to adequate analysis.

In three different decisions, one in 2001 and two in 2005, the federal district court for the District of Columbia recognized that the requirement to establish a SBRM includes a requirement to establish the bycatch data collection system itself. *See Oceana v. Evans*, No. 04-0811, 2005 WL 555146 (D.D.C. Mar. 9, 2005) (hereinafter "*Oceana I")*; *Oceana v. Evans*, 384 F. Supp. 2d 203 (D.D.C. 2005); *CLF v. Evans*, 209 F. Supp. 2d 1 (D.D.C. 2001). The federal court specifically concluded that a SBRM that only indicates an "intent" to implement,

rather than a mandate to implement, an adequate observer program fails to satisfy Section 303. *See, e.g. Oceana I,* 2005 WL at *34.

The Draft Bycatch Amendment does not satisfy the requirements of Section 303. In the portions of the Draft Amendment addressing data-gathering, NMFS simply states that its "preferred" approach is to continue to utilize the "status quo" data sources, most significantly the at-sea observer program. *The Draft Amendment is fatally flawed because it does not propose to set any requirements relating to these data gathering programs, or to otherwise "establish" them.* Most critically, the Draft Amendment does not set any requirements for level or allocation of observer coverage, or, for that matter, for any observers at all. The Amendment does propose the use of a 30% "Coefficient of Variation" ("C.V.") "standard" applied to "all applicable fishing modes for each species group." As an initial matter, we note that, because of the relatively general level at which NMFS proposes to apply the 30% C.V. "standard," it may not provide adequate precision. More significantly, like the 5% observer coverage level at issue in *Oceana I,* the 30% C.V. "standard" appears to still be simply a target, not a requirement. While such a performance measure may well provide an enhanced understanding of the precision of various bycatch estimates, as well as facilitate the most cost-effective use of observers, the 30% C.V. performance target proposal still falls short of what the law requires. As was already determined by the district court in *Oceana I:* it "merely suggests a hoped-for result, as opposed to 'establish[ing]' a particular standardized methodology, [and thus] does not measure up to the statute's requirements." *See id.*

In its comments dated December 22, 2006, Oceana addressed a number of other concerns with the Draft Amendment. NRDC shares these concerns and adopts Oceana's comments herein in their entirety. We want to draw the agency's attention in particular to the following concerns:

- The Draft Bycatch Amendment proposes the use of "importance filters" for the purpose of reducing observer coverage to only what it considers to be significant fishery mode/species interactions. As set out in the Draft Amendment, however, the "importance filters" threaten to ensnare the agency in a self-perpetuating data-poor bycatch reporting methodology and to mask the shortcomings of this methodology from the public. First, it is critical – given that up-to-date data of adequate specificity, *i.e.*, to the time/area/species/fishing mode level, is frequently lacking – that NMFS explain the limits of the existing data for each specific gear/species combination proposed to be "filtered out." Second, NMFS must identify, and allow the public to comment on, the "specific minimum percentage" thresholds that it intends to apply in the case of importance filters 3 and 4.

- The Draft Bycatch Amendment needs significantly more detail concerning how the bycatch information needs of each specific FMP will be addressed on an ongoing basis. For example, it is not at all clear that the proposed bycatch reporting methodology will be able to generate analyses, reports, and other forms of information that adequately address specific bycatch problems in specific fisheries, i.e.,

provide adequate information to make a management response possible. It is also important that managers be able to propose changes in the SBRM and supplemental monitoring in order to focus on a particular bycatch problem and enable development of a management response.

- For reasons set forth by Oceana, the Draft Bycatch Amendment requires an EIS. In this regard, we want to note that the Draft Amendment is, as NMFS almost certainly recognizes, a very important regulatory proposal. It addresses a significant fisheries management problem and proposes to do so by amending thirteen different FMPs, which cover dozens of managed stocks and affect a much larger number of marine species. The Draft Amendment is also of course a response to a judicial remand in two separate federal court actions.

In closing, NRDC does recognize that the Draft Bycatch Amendment is the product of considerable work and represents a step forward in certain respects, such as by recognizing the importance of observers and the need to increase observer coverage. However, as already noted, the Draft Amendment still falls substantially short of what the statute requires. We strongly urge NMFS to address the concerns we have highlighted above, as well as those identified by Oceana. Thank you for consideration of our comments.

Respectfully yours,

Brad Sewell
Senior Attorney
Natural Resources Defense Council

KELLEY DRYE
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December 29, 2006

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VIA ELECTRONIC MAIL

Ms. Patricia A. Kurkul
Regional Administrator
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RE: FISHERIES SURVIVAL FUND COMMENTS ON SBRM AMENDMENT

Dear Ms. Kurkul:

We represent the Fisheries Survival Fund, an association whose participants include the bulk of the Atlantic scallop full-time limited access permit holders. We submit this letter on behalf of the FSF, as well as North Carolina Fisheries Association, the Garden State Seafood Association, Montauk Inlet Seafood, Inc., the American Pelagic Association, and Associated Fisheries of Maine, and we expect other groups may associate themselves with these comments. Collectively, these organizations represent thousands, of participants in nearly every, if not every, fishery managed by the New England and Mid-Atlantic Fishery Management Councils. We appreciate this opportunity to provide comments, including technical comments prepared by a respected fisheries scientist, Mr. Paul Starr, who has years of experience in designing and implementing bycatch estimation programs,[1] on the proposed omnibus Standardized Bycatch Reporting Methodology ("SBRM") Amendment, under consideration by both these councils.

INTRODUCTION

Development of an omnibus SBRM amendment represents an ambitious project, albeit one that has not garnered attention and scrutiny commensurate with its significance. The Public Hearing Document is technical, but if it is implemented in the preferred form, it will have major practical ramifications for New England and Mid-Atlantic fisheries. It appears, moreover, that neither the fishing communities nor the New England and Mid-Atlantic Fishery Management Council members yet understand these ramifications. In contrast, and judging by the attendance at the two public hearings on the SBRM Amendment, environmental organizations, including those whose lawsuits in the groundfish and scallop cases resulted in the court decisions to which the SBRM Amendment responds, are paying close attention to this process. If the past is prologue, these groups will not hesitate either to renew such challenges if they perceive any weakness in the amendment or bring suit to enforce any mandate seen as resulting from the action the Councils take on this amendment.

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[1] These comments are included, along with Mr. Starr's *curriculum vitae*, as Attachments 1 and 2 to this letter.

Indeed, whatever standardized bycatch reporting methodology the Councils decide to implement, they should recognize that they are creating standards for a program that might be able to be enforced in court. In discussing a case involving invalidation of the Pacific Groundfish FMP for lacking an adequate SBRM, the federal court that invalidated the Scallop Amendment 10 SBRM, explained:

> The failing in PMCC was that NMFS had determined that a live observer program was necessary for accurate reporting, but it had nonetheless neglected to establish any type of observer program.

Oceana v. Evans, 384 F. Supp. 2d 203, 234 n.38 (D.D.C. 2005) ("*Oceana II*"), *citing Pacific Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1200 (N.D. Cal 2002).

In summary, the SBRM Amendment is currently not on a feasible or productive track. While considerable rigorous work has gone into this draft omnibus amendment, it does not strike an adequate balance between specificity and generality. It is overly specific when it stratifies the bycatch reporting regime into tens of hundreds of strata and then prescribes a uniform coefficient of variation ("CV") for each. Such fine gradations of the units of analysis are not necessary to meet the requirements for an SBRM requested by the court in the scallop and groundfish cases. (The undersigned participated on the government's side in the challenges to the SBRM in these cases and have a detailed understanding of these decisions.) Even more fundamentally, as explained herein, such an approach is not consistent with nationwide NMFS technical guidance.

Such a uniform CV approach across these many strata is likewise too general. Bycatch reporting objectives will and should vary with the particular management needs and problems specific to each fishery. NMFS explained in its nationwide technical guidance for establishing such monitoring systems that, "The development of a sampling strategy for the estimation of bycatch based on an at-sea observer program entails first clearly defining the objectives of the sampling program and selecting a sampling strategy designed to meet these objectives. . . . An explicit statement of the objectives is a critical step in devising effective sampling procedures."[2]

In contrast to this considered nationwide guidance, the omnibus amendment puts the metaphorical cart before the horse (as the court found in the prior cases) by establishing blanket standards of precision across a myriad of fisheries "modes" sub-divided by bycatch species, rather than considering the needs and requirements of individual fisheries. In this regard, the amendment appears to share the failures that the court found to exist in the scallop and groundfish amendments.

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[2] National Marine Fisheries Service, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*, NOAA Technical Memorandum NMFS-S/SPO-66, at 48 (Oct. 2004) (hereafter "*Evaluating Bycatch*"); *see also* Comments of Mr. Paul Starr, at 1-2 (attached) ("Starr Comments").

This omnibus amendment would be more constructive if it provided the Councils and NMFS with a process and some ground rules they could employ to develop and implement fisheries-specific monitoring systems in plan-specific contexts. Such an approach could provide information that is actually useful to management. The amendment could also establish general rules for NMFS to use in administering observer programs. As we explain, we would expect, and the omnibus amendment could prescribe, that observer programs represent a core component of fishery-specific programs.

Finally, and perhaps equally importantly, such an approach could take into account available resources. As explained above, the Public Hearing Draft would prescribe that managers seek to achieve a 30% CV for tens of hundreds of different strata. While it is not clear whether the Public Hearing Document plans to treat this 30% CV goal as mandatory for each stratum, it is quite possible (and perhaps even likely) that a court would find this requirement to be enforceable, particularly if attainment of 30% CV represents the centerpiece requirement of the amendment. As the Councils can well understand, the resources do not and will not exist to achieve such a mammoth undertaking. However, failure to achieve these CVs could result in chronic and disabling litigation, each time a target CV is not met.

Fortunately, it is not necessary to begin the process from square one. With the adjustments suggested herein, which are based on the *Evaluating Bycatch* report, applicable law, consultation with experts in sampling design, and the decisions in the groundfish and scallop cases, the Omnibus SBRM Amendment can fully meet legal requirements and assist the Councils in their statutory responsibilities to evaluate and minimize bycatch. The following proposal provides a more practical – and practicable – way forward to create a workable program that not only actually can be implemented, but is also more consistent with legal requirements and the Councils' management needs. After setting forth our proposal, we will conclude by discussing the general legal framework applicable to this action and the specific issues raised in the SBRM Public Hearing Document.

RECOMMENDED DIRECTION FOR THE SBRM AMENDMENT

The key task identified by NMFS in its *Evaluating Bycatch* report is to define the objectives of any SBRM program. (Typically, an SBRM program would not be designed for an entire NMFS Region's worth of fisheries at once, but the principle remains the same.) As we explain below, the draft Public Hearing Document has not been able to define the objectives for the SBRM program, either as a whole or for each specific fishery. It is simply not sufficient to prescribe a blanket CV requirement and term this an objective.

Properly conceived bycatch and reporting methodology objectives will vary by fishery, depending on such factors as whether protected species issues are involved, the gear types employed, and the baseline amount of information on the types and amount of bycatch. As noted in *Evaluating Bycatch*, different fisheries have differing needs in terms of sampling design and other elements of an SBRM. The report explains:

> [A]n at-sea observer program designed with the objective of estimating fishery discards may be quite different from one designed to assess incidental takes of protected species, particularly if the latter represents rare events. When there are multiple objectives for an observer program, the program design often will need to address competing objectives and the optimal design cannot be determined unless weights have been assigned to the various objectives. Basically, when there are multiple objectives, it becomes much more difficult to clearly define the objective (including the weights to be used), to identify the appropriate sample design, and to identify the desired level of precision for each estimate.

Evaluating Bycatch, at 48-49; *see also* Starr Comments, at 1 ("There is no substitute for dealing with each fishery unit (or grouping) individually and tailoring the monitoring to fit the situation.").

Accordingly, the omnibus should instead focus on the development of a broad program – and methodology for developing fishery specific bycatch reporting regimes – with the details left to development in the context of individual fishery management plans. Such an approach represents a constructive enterprise. There is a value in and of itself for the Northeast Region to have a consistent set of standards for developing fishery-specific bycatch reporting programs.

Furthermore, the applicable case law does not require NMFS to develop fishery-specific programs to have a legally adequate and useful omnibus amendment. *Oceana II* explained that:

> A methodology need not necessarily be detailed, but it must at the very least provide decision makers 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.

384 F. Supp. 2d at 234. Realistically, given the nature of this omnibus amendment process, the elements of this amendment must be somewhat general.

Whether general or specific, the key element for an appropriate SBRM is that it sets requirements for NMFS to follow in deploying observer coverage and undertaking other fishery monitoring programs. *Oceana II* explained:

> The Court concluded that the Secretary's mere "intention" to maintain a five-percent observer coverage level, while delegating the actual level of observer coverage and methodology to the Regional Administrator, did not constitute establishment of a "bycatch reporting methodology."

Oceana II, 384 F. Supp. 2d at 232 (*citing Oceana I*, 2005 U.S. Dist. Lexis 3959, 2005 WL 555416, at *40). Our proposal's strength is that it would allow the Councils to develop these requirements, based on the recommendations of those with fishery-specific expertise.

Accordingly, this SBRM omnibus amendment would meet all legal requirements so long as it: (1) establishes a process and broad programmatic outline that will guide the development of FMP-specific programs; and (2) directs the agency to focus resources according to certain criteria based on urgency for coverage determined from an examination of existing bycatch information, including reliable anecdotal information.

Regarding process, the omnibus amendment should authorize the Councils to develop and implement more detailed methodologies, specific to each fishery, through framework adjustments, regulatory amendments, or full plan amendments, as they see fit. To allow for initiation of such a subsequent FMP-specific process, the omnibus amendment should amend each fishery management plan to allow for the adoption of a bycatch estimation program by abbreviated rulemaking processes, such as through a framework action.[3] Individual plan development teams, perhaps supplemented by working groups (as explained by Mr. Starr at page 3), would have the specific knowledge of the fishery in question to develop practical and practicable approaches. Moreover, the process should allow managers to adjust these fishery specific requirements, perhaps through annual or biannual specification setting processes, as conservation and management requirements for the fishery change over time. This approach would allow each Council to tailor bycatch monitoring and reporting to the specific needs of each fishery as they evolve.

Regarding more substantive requirements, the amendment will most likely have to mandate a live observer program in each fishery, in conjunction with other data collection systems. *Evaluating Bycatch* and other studies have found observers to be important to achieve precise and accurate estimates. Courts have also recognized the importance of live observers.[4]

Additional substantive requirements can be more general in nature. To that end, we would suggest that the SBRM:

- Mandate that each fishery management plan establish observer coverage levels in that fishery based on considerations specific to that fishery. Such levels can be particular to an individual species or a species grouping, as well as to each specific gear type, and can be changed through framework adjustment or specification

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[3] As an omnibus amendment, the SBRM Amendment can provide overarching analyses that can be incorporated into streamlined rulemaking documents under each FMP. This is perfectly consistent with legal requirements under the National Environmental Policy Act.

[4] *See, e.g., Oceana II*, 384 F. Supp. 2d at 233-34 ("'Because the observer program is optional under Amendment 13, NMFS in theory could decide not to implement an observer program for the ground fishery, and nothing in Amendment 13 would prohibit the agency from making that decision.'") (quoting *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002)).

setting processes, as conservation and management needs changes in the fishery and across fisheries[5];

- Provide that each FMP should establish a set of diagnostics, perhaps using a target CV or CVs for each fishery or fishery mode, to gauge whether the program is providing sufficiently precise information for management purposes. This is consistent with NMFS' guidance,[6] and far more realistic than attempting to achieve such a level for several hundred fishery modes sub-divided by bycatch species;
- Create a general set of priorities for deployment of limited observer resources that is non-discretionary for NMFS. For example, that resources be dedicated first to fisheries or sectors within a fishery that have taken protected species or that have material bycatches of overfished species;
- Mandate that sampling designs developed for each fishery minimize bias (thus promoting accuracy in assessments) to the greatest extent practicable;
- Authorize and encourage cooperative research to undertake such activities as, for example, development of gear that minimizes bycatch, identification of times/areas/gear with unusually high or levels of bycatch, testing of sampling designs, and getting basic information for fisheries for which the extent of bycatch information is not well understood. *See Evaluating Bycatch*, at 35 (also suggesting cooperative research projects focus on discard mortality and identifying means of minimizing the so-called "observer effect");
- Explain, expand upon, and authorize the use of "importance filters" by Councils as they develop fishery-specific observer plans, in order to insure that resources are focused on the highest priority areas.

These suggestions are not exclusive, but provide some flavor of the type of guidance the Omnibus SBRM Amendment should provide, and most of these elements are already contained in the document. A combination of mandatory elements, such as the observer program, priorities, and general guidance will together provide the necessary structure and guidance for the operation of fishery-specific monitoring programs that do not leave all the discretion with NMFS. As explained above, this is a key element of the court decision in the groundfish and scallop cases. *See Oceana II,* 384 F. Supp. 2d at 234 n.41 ("[T]he Court is not suggesting that the FMP should mandate the precise areas where observers must be concentrated for years to come; it only requires that the FMP establish some method for determining observer concentration instead of leaving all decisions to the Regional Administrator's discretion.").

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5 In developing these fishery-specific programs, existing observer commitments (such as for higher levels of coverage in the Atlantic sea scallop area access and groundfish "B" day programs) will need to be considered as well.

6 *See Evaluating Bycatch*, at 57-58.

As noted, our proposal does not represent a major change from the direction that the current SBRM Amendment has taken. The Public Hearing Document contains many useful elements, such as its discussion of the various reporting methodologies, tools (such as logbooks, VMS, electronic monitoring systems, etc.). However, in its ambition, it far exceeds both legal requirements and what is feasible given current constraints, not to mention the national guidance from NMFS. As such, there is a very real danger that, if passed essentially as is, it could be found by courts to set a new standard that is neither feasible nor necessary.[7]

GENERAL LEGAL ISSUES

Before turning to the specifics of the Public Hearing Document, there are general legal issues to consider. The Executive Summary of the Public Hearing Document explains:

> Generally, an SBRM can be viewed as the combination of sampling design, data collection procedures, and analyses used to estimate bycatch in multiple fisheries. The SBRM provides a structured approach for evaluating the effectiveness of the allocation of fisheries observer effort across multiple fisheries to monitor a large number of species. Several specific analyses are conducted to calculate a measure of the variance associated with the data that have been collected by fisheries observers and to determine the most appropriate fisheries observer coverage levels and the optimal allocation of observer effort across the fisheries in order to minimize the variance to the degree practicable. Given the target level of data precision desired by fisheries scientists and managers, fisheries observer coverage levels can be calculated that would be expected to provide data of the desired precision [and accuracy].

Public Hearing Document, at iv.

The appropriate levels of precision and accuracy to be achieved from the SBRM contain a policy component under the Magnuson-Stevens Fishery Conservation and Management Act. The Public Hearing Document explains that the Magnuson-Stevens Act "addresses both the requirement to establish an SBRM for each FMP and the requirement to include conservation measures to minimize bycatch and bycatch mortality to the extent practicable . . . ." Public Hearing Document, at 6 (citing 16 U.S.C. § 1853(a)(11) (requiring these bycatch related measures in each FMP)). Notably, the Public Hearing Document proceeds to explain that it will deal with only the former element, and not address bycatch reduction as a conservation matter. *Id.* However, it does note that the goal is "to minimize the variance to the extent practicable." *Id.* at iv.

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[7] Parenthetically, the supervening changes in the Magnuson-Stevens Act, signed into law on December 27, 2006, and their applicability to amendments such as this now under consideration, mean that a slightly new course can be charted without any delay beyond that which will necessarily occur as guidance is developed and the SBRM Amendment reviewed for consistency with the newly-amended law.

Accordingly, the Magnuson-Stevens Act's practicability standard applies to this exercise. In this instance, practicability entails two considerations: (1) the monitoring standards/observer requirements should not unduly burden the public fisc or bankrupt the fishing industry to implement; and (2) there needs to be a discussion of the benefits and costs of various levels of precision and accuracy, not just a purely scientific conclusion that a certain level is required. The court in the *Oceana* cases essentially made this point, and we are litigating it in another context.

A corollary to the first point, also, is that the SBRM should not be established as a set of aspirational goals that are not expected to be attained on a regular basis, given the expected resource constraints from a budgetary and observer manpower perspective. If the system is either aspirational, or so ambitious that it can only be expected to be aspirational, it will just become fodder for litigation from year to year when the standards are not met, with the threat of a court injunction on the fishery as a remedy for non-compliance.

As to the point regarding practicability, it must be noted that the requirement to establish an SBRM is an adjunct to the duty of the Council to minimize bycatch more generally. Indeed, the SBRM must be designed "to assess the amount and type of bycatch occurring in the fishery," and that bycatch must then be minimized to the extent practicable. 16 U.S.C. § 1853(11). In instances where a particular bycatch species is rarely encountered, and thus has been minimized, it is fully consonant with the legal requirement not to expend significant scarce resources in an attempt to develop extremely precise estimates. That is the essence of the practicability limitation, which applies with as much force to the SBRM as to the bycatch minimization objective itself.

In this regard, the FSF applauds the decision to include "importance filters" as a means of insuring that limited resources are directed to where they will be most effective. The Public Hearing Document, *see e.g.*, *id.* at 167-71, does an admirable job of providing a reasoned explanation and justification for their use, and does so in legally relevant terms. For instance, it notes that achieving the essentially arbitrary target level of precision for estimates of red crab bycatch would cost more than three times the value of the entire red crab fishery. *Id.* at 170. Employment of these filters as a means of identifying the truly important bycatch species and fishing modes in which to focus limited observer resources represents a reasoned, practicable policy judgment that meets the requirements of the law.

Finally, it is worth noting that the SBRM well addresses one of the key issues in the court decisions in the Amendments 10 and 13 cases, specifically, the issue of accuracy. The failure in those amendments to address the findings in the Babcock, *et al.*, study with respect to levels of observer coverage necessary to achieve precise and accurate estimates was one of the key omissions identified by the court. This shortcoming, however, has been rectified with the Rago, *et al.*, study referenced in, and included with the amendment.

ELEMENTS OF SBRM AMENDMENT

Turning to the elements of the Public Hearing Document, it prescribes four choice points for the councils: (1) bycatch reporting and monitoring mechanisms; (2) analytical techniques and allocation of observers; (3) SBRM standard; and (4) SBRM review process. This memorandum will set forth the Councils' preferred alternative and some initial thoughts below.

The problem, however, is that the uncertainties of agency budgets and observer availability make it very difficult for NMFS to ensure implementation of a mandatory, highly ambitious level of observer coverage. Perhaps the most fundamental flaw in the Public Hearing Document is that it provides for an incredibly, in fact unduly, ambitious set of standards for observed trips, without any discussion or understanding of whether and how that level of observer coverage can be provided or paid for, or whether the agency can even make use of all the data it would collect under such a program (which has been a problem even in very targeted observer programs). *See* Starr Comments, at 2.

Oceana II makes clear that an SBRM standard may not be based, or back-calculated from, how much observer coverage can be funded. "While the logistics of paying for observers is a fair consideration in establishing a particular bycatch reporting methodology," the agency cannot put "the cart before the horse, predicting sampling frequency, observer distribution, and precision rates based on potentially available funding rather than establishing a methodology." *Oceana II*, 384 F. Supp.2d at 236.

Monitoring Mechanisms: Regarding element one, monitoring mechanisms: The Public Hearing Document essentially contains two options. The first involves using the sources of information that are currently available: fishery independent surveys, fishing vessel trip reports, dealer purchase reports, at-sea observers, commercial port sampling, recreational fishery sampling (MRFSS), and industry-based surveys. The document then addresses the strengths and limitations of each source of data from the perspective of identifying bycatch:

> Observer-gathered discard information is generally considered the most accurate and objective in recording bycatch and discard information. Observer programs often collect detailed biological information on both catch and discards for all aspects of commercial catch . . . .
>
> Observer data are preferred over other data sources including FVTR data for a few reasons. Unlike fishermen, who may be performing or managing many fishing related tasks at once . . . observers are focused solely on data collection while deployed at sea. . . .
>
> [However,] [m]anaging an observer program requires dealing with numerous practical and fiscal constraints. Observers must be carefully trained, work under sometimes hazardous conditions, and deal with a variety of circumstances that can arise while at sea on a fishing vessel. Logistical issues, such as having an adequate number of observers available to cover a wide geographic area,

> numerous ports, and a variety of fisheries; and getting the observers aboard vessels within relatively short windows of time before they intend to sail further add to the complexity and costs of observer programs.

Public Hearing Document, at 89. The document identifies only video sampling as an alternative to the current array of monitoring options, and explains that video does not currently provide the same types of detail as on-board observers. *Id.* at 98-101. The document correctly recognizes the analytical difficulties involved in transitioning to video monitoring and thus sensibly defers use of these systems, pending further development. *Id.* at 113.

Of course, this is not the end of the story. If the status quo is chosen, NMFS needs, as a practical matter, to get to an affordable and effective observer system, with a stable workforce and budgets. This is lacking right now for most Northeast Region fishing fleets.

Analytical Techniques and Allocation of Observers: In general, we support the preferred alternative, which would apply an "importance filter" to "aid in establishing target observer sea day allocations." *Id.* at 117. Recommended by the Scientific and Statistical Committee, the importance filter "is specifically designed to 'weed out' particular combinations of fishing gear and bycatch species where the infrequency and variable amounts of discards would result in very high observer sea day coverage levels, in spite of the fact that the actual magnitude and frequency of discards is very low and likely of no consequence to the discarded species." *Id.* "The importance filter focuses on the encounter rate (the proportion of trips in which the species was encountered and discarded), the relative proportion of discards of that particular species when compared to the discards of other species within the fishing mode, the magnitude of the observed discards, and the proportion of the discards of the species within the fishing mode to the total landings of the species among all fisheries." *Id.*

The importance filtering mechanisms need to be clarified and perhaps expanded to ensure that they have sufficiently identified the criteria to be used as filters. For instance, while an importance filter includes an encounter rate component, the Amendment should state that observer sea days can be reduced when gear improvements have reduced, if not eliminated, the potential for bycatch, viz. turtle chains ought to preclude intensive scallop fishery turtle monitoring. The Councils should also consider a filter for any mode of fishing whose overall contribution to total landings falls below some threshold or is so rarely used that it can be assumed that the contribution to total discards are likely *de minimus*. This would help to reduce the administrative complexity of the plan, as well as to preserve limited observer assets for areas of real concern.

SBRM Standard: The question presented in the Public Hearing Document is whether the SBRM Amendment would "specify a target CV as a performance measure or standard against which to judge the adequacy of the bycatch monitoring program described in the amendment." *Id.* at 121. The options are the *ad hoc* approach that exists now, or application of a uniform 30% CV, subject to importance filtering. <u>As explained above, we submit these decisions should be made in a more structured way than they currently are, but in FMP-specific contexts</u>.

The Public Hearing Document explains that the preferred alternative (uniform 30% CV) would comprise the following:

> In addition to a set of bycatch reporting and monitoring mechanisms used to collect information on discards in a fishery, and a set of analytical techniques and procedures used to estimate discards, allocate at-sea fishery observer effort, and perform stock assessments, the preferred alternative would also establish a performance measure to ensure that the bycatch-related data collected under the SBRM and utilized in stock assessments and management is adequate for those tasks. In order to ensure that the SBRM is performing to the expected level, this preferred alternative would establish a process to periodically review the adequacy of the SBRM, with consideration of how and when changes to the SBRM should be made.

Id. at 121.

We submit that it will be important for the Amendment to establish some standards, to ensure fidelity to the *Oceana* decisions, but that: (1) there will need to be some flexibility in these standards; and (2) the Amendment should not be light years more ambitious than NMFS guidance in seeking to apply these standards. Our recommendations that seek to address these concerns are set forth above.

In terms of flexibility, such performance measures should represent diagnostic tools, and must not be read or be able to be characterized as immutable standards, such that failure to achieve them in any given year becomes an event for litigation. In this regard, as discussed below in regards to the second point, the ambitions of the SBRM as proposed in the Public Hearing Document may far exceed the ability of the agency to meet on a sustained basis, making it very important that the Councils utilize the importance filters, make clear that the CVs are aspirational, and state that program overall is sufficient to precisely characterize and assess bycatch across fisheries (as opposed to any particular mode).

Such flexibility is consistent with the decisions in the *Oceana* cases. The primary deficiency of Amendments 10 and 13 was the Council's failure to develop an reporting methodology coupled with what the judge saw as a grant of unfettered discretion to the Regional Administrator to determine when, where, and how much observer coverage to deploy. "[A]n FMP that merely suggests a hoped-for result, as opposed to 'establishing' a particular standardized methodology, does not measure up to the statute's requirements." *Oceana v. Evans* ("*Oceana I*"), 2005 U.S. Dist. LEXIS 3959, at *136 (D.D.C., March 9, 2005) (citation omitted). "Instead of analyzing 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, the FMP essentially assigns this task to the Regional Administrator." *Oceana II*, 384 F. Supp. 2d at 233-34 (emphasis added).

In the current instance, the methodology specified more than meets, and even exceeds, the requirements laid out by the court.[8] In fact, the proposed amendment is far more comprehensive than what has been laid out in FMPs for other fisheries, such as the Pacific Groundfish and the Pacific Highly Migratory Species fisheries, the latter of which was cited by the environmental plaintiffs as a model and the former which was promulgated in response to a similarly successful SBRM challenge.

What the *Oceana* cases did not do, however, was to mandate any particular approach or set of performance requirements in order to meet the SBRM requirement. For instance, the judge explicitly noted that "*Oceana I* did *not* require that an FMP mandate a specific level of observer coverage. Rather, the Court held that an FMP may not delegate the development of a standardized bycatch reporting methodology to the Regional Administrator." *Oceana II* at 384 F. Supp. 2d at 234 n.38. The court also noted that it "is not suggesting that the FMP should mandate the precise areas where observers must be concentrated for years to come; it only requires that the FMP establish some method for determining observer concentration instead of leaving all decisions to the Regional Administrator's discretion." *Id.* n.41. What the court did require, and this amendment actually overachieves relative to NMFS's guidelines, as noted below, is that mechanisms be developed that "would succeed in producing the statistically reliable estimates of bycatch needed to better manage the fishery." *Id.* In these terms, the task is to best utilize the government's resources to gain a precise estimate of the amount and composition of bycatch in the managed fisheries rather than designing a theoretically ideal system.

Even in instances where the importance filtering still requires some coverage, there may be a need for reduced levels of coverage designed to identify whether there is any bycatch issue when the data is too sparse to determine what level of observer coverage would be needed to achieve a pre-determined level of precision/accuracy. This may also need some statistical support as a basis for application either of an importance filter or some tolerance for a reduced level of precision/accuracy. These considerations are best addressed in context, as both *Evaluating Bycatch* and Mr. Starr explain. *See Evaluating Bycatch*, at 58-59; Starr Comments, at 1-2.

What would appear to be required, however, is a mandate that the agency create an observer program to implement the SBRM. *See, e.g., Oceana II*, at 135 ("'Because the observer program is optional under Amendment 13, NMFS in theory could decide not to implement an observer program for the ground fishery, and nothing in Amendment 13 would prohibit the agency from making that decision.'") (quoting *Pac. Marine Conservation Council, Inc.*, 200 F. Supp. 2d at 1200). This is not the same as setting minimum levels of observer coverage, which,

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[8] *See id.* ("A methodology need not necessarily be detailed, but it must at the very least provide decision makers 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.") (citation omitted)).

it should be stressed, is not required under the law.[9] Rather, it is a matter of including language similar to that in Pacific Groundfish Plan: "The Regional Administrator will implement an observer program through a Council-approved Federal regulatory framework." PFMC, Pacific Coast Groundfish FMP, at 71 (Sept. 2006). Such is necessary to avoid the same deficiency the court found in the *Oceana* cases.

The second, and significant, issue is that the Public Hearing Document goes far beyond NMFS guidance by recommending to apply this level of statistical precision to fishery modes, as opposed to the fishery for a species as a whole. It would also apply such a level of precision to each bycatch species rather than to bycatch in a fishery as a whole:

> In total, the proposed SBRM would separately track and report the precision associated with the discard estimates of 36 individual fishery resources or species groups and 23 individual protected species or species groups across 39 separate fishing gear modes. In sum, this means that rather than trying to achieve a precision of 20-30 percent for a single estimate of total discards in each of the 16 major fisheries (16 separate estimates), under the proposed SBRM, the Councils and NOAA Fisheries Service will strive to achieve a precision of no more than 30 percent in up to 2,301 unique fishing gear mode and species combinations [less certain importance-filtered combinations].

Id. at 123. The *Oceana* decisions do not require this level of detail, as the quotes from the decisions above indicate.

Significantly, the Public Hearing Document's disaggregated approach countervails nationwide NMFS guidance. The SBRM Amendment explains:

> Although the proposed 30-percent CV target is based on the recommendation [for CVs of 20-30% for SBRM programs] in NMFS (2004), the proposed application

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[9] While the court found fault with the fact that Amendments 10 and 13 did not set a mandatory level of observer coverage, those decisions were made in the context of two plans that contained "recommended" levels of observer coverage that could be changed or not implemented at all at the agency's sole discretion. *See, e.g., Oceana I* at 133 ("[T]he Secretary stated that he merely 'intends' to maintain a 5% coverage level. While he did state that a 5% level 'will resume in FY 05 and beyond,' in the context of the Secretary's overall response to criticisms of Amendment 13's bycatch reporting, it is clear that this figure is not mandatory and may be subject to change if the Secretary deems it proper.") (citations omitted). In other words, minimum levels of observer coverage were the primary means for collecting bycatch information under those two plans, and as such, the Court found that they must be mandatory and shown to be sufficient to collect precise and accurate data. By contrast, Councils could select a different mechanism, to wit, a methodology focused on gear types, sectors, and fisheries.

> of this standard differs in several important ways. First, the precision goal is recommended to apply to a "fishery," but in the proposed SBRM, the target CV would apply at the level of the fishing mode. [The Amendment then explains that this would require the six separate modes of the monkfish fishery to be examined separately.]
>
> ***
>
> Another way in which the proposed application of the SBRM differs from the NMFS (2004) guidance is that while the guidance document indicates that the precision goal of 20-30 percent should apply to total discards "aggregated over *all* species [emphasis added], this proposed alternative proposes disaggregating all species to the level of individual species or groups of related species. Continuing the example of the monkfish fishery, among the gear types that catch monkfish, there are more than 29 other species caught in those gears (along with many other non-FMP species). The guidance in NMFS (2004), therefore, recommends that the precision of the estimate of total discards of all 30+ species across all applicable fishing gears would be sufficient if the single estimate had a CV between 20 and 30 percent. The SBRM proposed under the preferred alternative would separately track the precision of the discard estimates for each individual species, except for a few limited cases where a species complex is more appropriate, managed under a Northeast Region FMP.

Id. at 122.

This is not an academic exercise. In practical effect, adopting the preferred alternative might require, based on estimates provided at the SSC, about 58,000 observer sea-days across the Northeast Region, compared to the 8,000 or so deployed, for example, in 2004. As explained above, the *Oceana* decisions suggest that if the Amendment appears to set certain standards for observer coverage, Councils will likely be held to those standards. It is, furthermore, unlikely that even with such coverage levels this standard could be attained for many of the various modes.

In this regard, Mr. Starr explains:

> It is very unlikely that a single CV "performance standard" can be applied successfully to such a broad and diverse range of fisheries. While the application of such a standard may improve the existing situation, given that relatively little monitoring presently exists, I believe that it will also result in a large number of data collection programmes which will be poorly designed, badly applied and subsequently not properly analysed. Thus I believe that the overall goal of better monitoring and management of these fisheries will not be achieved, particularly in the short term.

Starr Comments, at 1. It is also Mr. Starr's conclusion, which coincides with the advice in the NMFS nationwide technical document, that "[t]here is no substitute for dealing with each fishery

unit (or grouping) individually and tailoring the monitoring to fit the situation." *Starr Comments, at 1.*

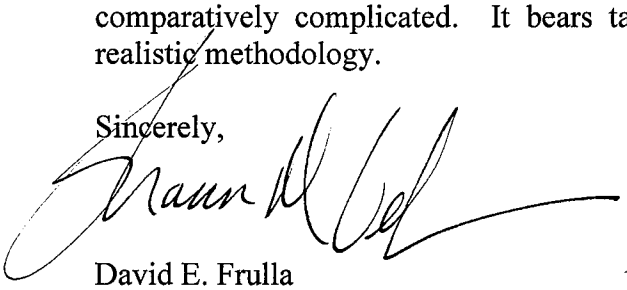
The divergence from NMFS guidance that would seek to prescribe a uniform level of precision of estimates for each bycatch species appears to present the biggest obstacle in practical implementation.[10] Tellingly, Mr. Starr further explains that, in his experience, calculation of CVs for each cell is a detailed, individualized process. Starr Comments, at 2-4. It is hard to conceive how NMFS could administer this program, with the resource constraints it faces and its essential inflexibility as an institution. There is a reasonable concern that litigation could ensue again if NMFS were not able to achieve the stated degree of precision (plus accuracy) in each of these 2,000 or so individual situations, even if this approach is not consistent with NMFS guidance.

Figuring out how to address this issue will be very important for the fishing fleets in the Northeast Region. It may be that observer and management decisions could be based on an aggregated estimate, consistent with the NMFS nationwide guidance, and that the species by species information could be assembled as a diagnostic and evaluative tool. In either event, importance filtering will have an important role.

CONCLUSION

The suggestions offered represent a workable and legally sufficient approach, that better meshes with available resources. It will also provide the Councils with the fishery-specific bycatch information they need in order to meet the conservation and management of the Magnuson-Stevens Act, especially as amended. This is an important issue, albeit one which is comparatively complicated. It bears taking the time necessary to produce a workable and realistic methodology.

Sincerely,



David E. Frulla
Shaun M. Gehan

Counsel for Fisheries Survival Fund

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[10] There may be good reason, to seek to ensure consistent levels of coverage among fishing sectors, but there needs to be flexibility in terms of the levels of precision that are sought. *See Evaluating Bycatch*, at 59 ("Flexibility is needed when setting CV targets for specific fisheries and bycatch species.").

ATTACHMENT 1

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29 December 2006

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Gloucester, MA 01930

RE: Submission on SBRM Amendment

Dear Ms. Kurkul:

Introduction and qualifications

I have been asked by the Fisheries Survival Fund (FSF) to prepare an independent submission as an outside expert familiar with many of the issues being debated over the adoption of the Standardised Bycatch Reporting Methodology (SBRM) Amendment. I have had considerable experience over the thirty years that I have been a fisheries scientist in designing, implementing and analysing data generated from various programmes intended to measure quantities of interest in a fishery. These programmes range from observer programmes such as those being discussed in relation to the SBRM to logbook programmes which are designed to be completed by the fisherman.

I am not completely familiar with the details of how fisheries are managed on the eastern seaboard of the United States nor am I fully cognisant of all the sensitivities which exist between the various sectors and stakeholders who participate in these fisheries. However, I feel that I am able to make some general comments on the nature of the "preferred alternatives" identified in the SBRM Public Hearing Document because such programmes tend to have strong similarities regardless of where they are implemented. I have experienced this universality myself, having worked extensively in western Canada as a salmon and groundfish scientist and also having worked in the New Zealand groundfish and shellfish fisheries.

Summary

The following is a summary of the main points of this submission:

- It is very unlikely that a single CV "performance standard" can be applied successfully to such a broad and diverse range of fisheries. While the application of such a standard may improve the existing situation, given that relatively little monitoring presently exists, I believe that it will also result in a large number of data collection programmes which will be poorly designed, badly applied and subsequently not properly analysed. Thus I believe that the overall goal of better monitoring and management of these fisheries will not be achieved, particularly in the short term.
- There is no substitute for dealing with each fishery unit (or grouping) individually and tailoring the monitoring to fit the situation. Therefore, a more productive approach

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would be to establish a process through which all stakeholders can participate in the establishment of the monitoring programme, including agreement on the overall management goals.

- Finally, my experience has shown that successful fishery monitoring programmes need the co-operation of the stakeholders being monitored. It is easy to mandate compulsory programmes, but they tend to be less successful (and more costly) than programmes that have been developed co-operatively.

General comments

The most relevant comment that I feel I can make is that collecting information from any fishery without clear objectives which are tightly integrated into the management of that fishery is not a sensible course of action. This seems to me to be the most fundamental flaw in the SBRM Public Hearing Document where the "preferred alternative" is to specify a single region-wide performance standard, specifically the "30% CV" for mean catch estimates, without reference to the management objectives the coefficient of variation (CV) standard is to serve, including conservation issues applying to these fisheries. That is because specifying a CV without knowing how the data will be used in the management or the science is like putting the "cart before the horse". The precision required for an estimate should always be tied to the purpose to which the estimate is put. To do otherwise is poor science and not good management practise.

I recognise that there is a lack of information to manage some aspects of these fisheries and the SBRM is an attempt to rectify important missing components needed for management. However, simply specifying a minimum level of observer coverage and/or specifying a target performance standard is probably not the best way to go about establishing the collection of data that can be used to manage these fisheries. My understanding is that the SBRM will apply to about 1,500 strata (where a stratum would be a species, fishery, time period cell) for which data would be collected. It is almost inconceivable that any agency would have the resources to go through a process of designing, implementing and finally analysing the data for such a large number of strata. Even 100 such strata would tax the capacity of any agency with which I am familiar. It is important to note that an observer on a vessel collecting information over a number of species will not achieve the 30% CV performance standard for each species collected. Instead, the 30% CV performance standard will require a separate sampling protocol for every species because each species is captured at different rates, even on the same vessel.

A frequent lapse in many observer programmes is the failure to adequately analyse the resulting data. Captain Ron Smolowitz, an independent gear technologist and consultant to the FSF, described to me the existence of observer bycatch information for a scallop dredge fishery in the Georges Bank Scallop Access Areas which takes yellowtail flounder as a bycatch. High levels of observer coverage are used to manage this fishery and there exist at least four years of good quality data. However, I understand that these data have not yet been analysed to see whether they have achieved a target CV performance standard nor has the design of this observer programme been adjusted based on the data collected. Given that resource constraints apply to all natural resource management regimes with which I am familiar, this example shows how difficult it is to achieve an adequate level of design, implementation and analysis for a single programme, let alone 1,500 cells.

Therefore, I believe that mandating a fixed CV performance standard on 1,500 strata and expecting that this will supply useful information that can be used in managing these fisheries is a recipe for failure. It is inconceivable to me that there would be sufficient resources, either in terms of personnel or of money, that could successfully undertake the design of such a large programme, let alone implement and evaluate the outcome of each and every stratum. The SBRM, as I think it will progress over time, will most likely result in a pattern of putting

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observers on vessels without a great deal of thought, collecting a large amount of data, some of which may be relatively useless and then allowing the data to moulder in a computer without being properly analysed.

An alternative approach

My experience has shown that this problem should be approached differently to achieve success. For instance, in New Zealand, the Ministry of Fisheries uses "Working Groups" (which are organised around specific fisheries or species groupings) to help it to perform the following tasks: a) setting priorities for which fisheries are to be monitored (usually on the basis of perceived problems), b) arranging for the scientific design of an observer programme to address the problems, c) critiquing and evaluating the design before implementation, d) overseeing the implementation of the design and e) arranging for an evaluation of the final product.

In New Zealand, Working Groups are comprised of knowledgeable and interested people who represent all components of fishery "stakeholders": government and industry scientists, managers, representatives from NGOs, recreational fishery groups and aboriginal groups. The Working Groups tend to work on a consensus basis, primarily putting forward material on which there is agreement. Occasionally there is dissension and a minority report will also be filed. But there is usually strong agreement on issues which involve fishery observer coverage because these issues tend to be straightforward and usually do not cause much difference in opinion.

It appears to me that what is missing in the SBRM Public Hearing Document is the establishment of a <u>process</u> – the development of fishery-specific methodologies – that will achieve the collection of useful information which can be used to manage bycatch in these fisheries without specifically mandating a fixed 30% CV for large number of separate strata. Such a process needs to be measured, thoughtful and directed towards where it will do the most good and will address the problems which require immediate attention. Resources are always limiting in natural resource management situations and they need to focussed on those problems which are perceived to be the most acute. This can be best done (in my experience) in a group setting where consensus can be reached. A motivated and well run Working Group will achieve a much better result than single individuals working in isolation, regardless of which agency or interest group they represent.

Additional issues concerning the design of observer programmes

I have a few additional points to add to this submission, which are technical but which have implications for the SBRM decision:

1. Observer coverage CVs often are calculated as if every tow is independent. This is not true because observer coverage takes place in the context of a fishing trip, a series of tows conducted by the same skipper. Experience has shown that sequential tows by the same skipper are correlated, which means they are not statistically independent. This means that more tows need to be observed to achieve the statistical performance standard of a 30% CV than would be required if all tows could be randomly selected. While this issue is not strictly relevant to the specification of the 30% CV performance standard, it is frequently overlooked and means that achieving the mandated performance standard is often much more difficult than envisioned.
2. There are also auxiliary issues associated with observer coverage. One of these is the "observer effect". That is, vessels perform differently when an observer is present. This effect is obviously most important when observer coverage is low, because there will be the greatest leverage. However, this effect may affect the calculation of the CVs and should be considered in the design of the programme.

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3. Another issue is how to handle downtime while the observer is on board. NGO commentary often suggests that commercial vessels use this opportunity to subvert the coverage afforded by an independent observer, although this effect may be less pronounced in fishery systems that are managed by a trip limit or by the number of days fished. More importantly, observer downtime will affect the estimate of the CV and should be included in the estimation of this quantity. Again, this is frequently an aspect of observer coverage which tends to be overlooked with the more usual response being to assume that every tow on a vessel with an observer is actually observed.

4. The method of calculating the CV will also be, to some extent, fishery (or stratum) dependent. For instance, fisheries that consist mainly of day trips will have different issues for calculating the CV compared to fisheries that go out for a week or more. This dichotomy shows the weakness of relying on a universal standard to ensure adequate coverage for all fishery strata and indicates that specifying a single target CV performance standard will not address all the relevant issues.

I bring up these points not because they are directly relevant to the decision of whether to implement the SBRM, but because they affect the design of the programme which is needed to achieve the mandated 30% CV and illustrate why specifying a single CV target is not adequate in itself. The calculation of the CV itself will be incorrect unless all factors which affect the CV are incorporated, and these will vary across fisheries or even within the same fishery, as they will differ by species. With these factors contributing complications in calculating the CV estimates, there is a danger that the focus of the SBRM programme will move to determining whether the performance standard was achieved, rather than ascertaining whether the data needed to manage the fishery were obtained.

Conclusion

My instinctive reaction to the SRBM proposal is that a single performance standard that applies to a range of objectives across a large number of fisheries is doomed to failure. Fisheries don't fit the "one size fits all" model. It is not sensible to expect that a single over-arching performance standard, such as specifying a 30% CV, will automatically result in satisfactory outcomes across a number of differing situations. Fisheries are complex and managing them requires careful consideration of the components of each situation individually. To do otherwise is a recipe for failure.

One final point: my experience has shown that observer programmes are much more successful when the participants support the project. Observers always are "extra" in that they interfere with the smooth operation of the vessel and potentially may affect the livelihoods of everyone on board. Therefore, it makes a lot of sense to design the programme in such a way that the co-operation of those most affected is secured. Mandating unrealistic solutions that are probably not achievable is not the best way to proceed. Instead, if a process where fishermen are allowed to have a real and significant input at the design level of the programme is developed, then the overall goals of the programme are much more likely to be achieved.

Sincerely yours,

Paul Starr

ATTACHMENT 2

CURRICULUM VITAE

Full Name: Paul J. Starr

Present Position: Consulting Fisheries Stock Assessment Scientist

Present Employer: self-employed

Present Work Addresses:
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New Zealand
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Academic Qualifications:

1973 Master of Science
University of British Columbia
Thesis title: Population dynamics and colonisation of *Sida crystallina* in Marion Lake, British Columbia.

1968 Bachelor of Science
Yale University
Thesis topic: Distribution of aquatic invertebrate fauna in cave ecosystems

Professional Positions Held:

2000 – present Consulting Fisheries Stock Assessment Scientist
Major clients:
- Canadian Groundfish Research and Conservation Society
- New Zealand Rock Lobster Industry Council
- New Zealand Seafood Industry Council

1997 – 2000 Chief Scientist
NZ Seafood Industry Council

1991 – 1997 Fisheries Stock Assessment Scientist
NZ Seafood Industry Council
(previously *New Zealand Fishing Industry Board*)

1982 – 1991 Senior Stock Assessment Biologist (chinook salmon)
Canadian Department of Fisheries and Oceans (DFO)
Biological Sciences Branch

1981 - 1982	Program Planner Canadian Department of Fisheries and Oceans Program Planning Branch
1980 - 1981	Management Biologist, Canadian Department of Fisheries and Oceans Fraser River Division Fisheries Branch
1976 - 1980	Biological Technician Canadian Department of Fisheries and Oceans Fraser River Division Fisheries Branch
1975 -1976	Fisheries Biologist Province of British Columbia Fish and Wildlife Branch
1973 - 1975:	Research Assistant University of British Columbia Institute of Animal Resource Ecology

Present Research/Professional Speciality:

- Experience in stock assessment of a variety of marine species, including deepwater demersal species (orange roughy, oreo, hoki and other species), inshore demersal species (snapper), shellfish (including lobster) and salmon (chinook, coho, sockeye, chum and pink).
- Experience in designing marine fisheries research programmes, including biomass tagging surveys, sampling of commercial and recreational catches, and research trawl surveys.
- Specialisation includes designing self-monitoring programmes for the collection of scientifically useable information in commercial potting, long line and trawl fisheries.
- Experience in the presentation and interpretation of fisheries data for the purposes of fishery management, including extensive participation in peer review working groups in Canada, New Zealand and the United States.
- Experience in providing advice to the fishing industry, to government policy makers, and to government negotiators in international fishing treaties.
- Experience in the New Zealand ITQ system, particularly in its implementation of research planning for fisheries assessment research, the evaluation of the research output and its integration into eventual management decisions.
- Specialisation in the interpretation and presentation of scientific information to all parts of the NZ Fishing Industry to allow informed decision making on scientific issues.
- Supervision and training of graduate students in a practical fisheries assessment and management environment.

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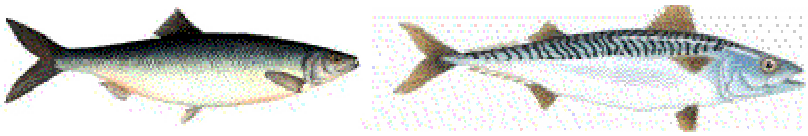

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F/V White Dove

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New Bedford, MA
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F/V Mary K
F/V Nordic Explorer
F/V Dona Martita
F/V Eastern Hunter
F/V Western Hunter
F/V Crystal Sea
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F/V Endeavor
F/V Challenger
F/V Voyager

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Associations:

American Pelagic Association

Garden State Seafood Association

December 29, 2006

VIA ELECTRONIC MAIL

Patricia A. Kurkul
Regional Administrator
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

RE: FISHERIES SURVIVAL FUND COMMENTS ON SBRM AMENDMENT

On behalf of the companies and vessels listed in our masthead, we are writing in support of the comments submitted to you today by Kelley Drye Collier Shannon (Shaun Gehan and David Frulla, on behalf of Fisheries Survival Fund) relative to the Standardized Bycatch Reporting Methodology Omnibus Amendment.

Their comments and suggestions reflect our needs, and will make the Omnibus Amendment workable for the Agency, the Councils and the affected industry.

As an industry, we advocate for sound fishery science and management. We believe the Omnibus Amendment, as currently written, could be very detrimental to your Agency's ability to manage the fisheries properly given the likelihood for litigation if and when the Agency is unable to fulfill the specific requirements of the Amendment as currently proposed.

Thank you,

/s/
Brady Schofield and Jeff Reichle

Conservation Law Foundation

December 29, 2006

Patricia A. Kurkul
Regional Administrator
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

Via electronic mail to: SBRMcomment@noaa.gov

Re: Comments on SBRM Amendment

Dear Ms. Kurkul,

The Conservation Law Foundation (CLF) submits the following comments on the omnibus Standardized Bycatch Reporting Methodology Amendment (Omnibus SBRM). We again acknowledge and thank the New England Fishery Management Council (NEFMC) and the National Marine Fishery Service (NMFS) for responding to our request in the fall of 2005 to decouple the draft SBRM, advanced by NMFS at that time from Groundfish Framework 42. The draft Omnibus SBRM amendment that will apply to all fisheries in New England is clearly a superior effort that has benefited from additional work. Developing and implementing a comprehensive SBRM based on the best available science is an important step toward achieving full compliance with the Magnuson-Stevens Act's bycatch requirements and addressing one of the most serious conservation and management issues facing fisheries management in New England.

While the proposed Omnibus SBRM demonstrates considerable effort by NMFS to develop a draft SBRM that would be a significant improvement over the existing patchwork of bycatch reporting measures, it simply continues to fail to meet the legal requirements of the Magnuson-Stevens Act (MSA), the National Environmental Policy Act (NEPA), and relevant court orders. CLF urged that these shortcomings be addressed throughout development of the Omnibus SBRM, thus it is unfortunate that at this time we must urge you to again withdraw the draft Omnibus SBRM in order to develop and analyze an appropriate range of alternatives addressing the legal shortcoming discussed below through a full Environmental Impact Statement (EIS). While we continue to seek expeditious implementation of SBRMs throughout New England's fisheries, the fact is that this SBRM will establish precedent for future SBRM's across the nation. Thus, while we are disappointed that more time will be required to complete the amendment, it is more important that it be done right and that further litigation on this matter is avoided if at all possible.

I. Bycatch Information is Critically Important to Effective Fisheries Management

The Northwest Atlantic ecosystem, the fish populations it supports, and fishing communities throughout New England continue to suffer due to depleted fish populations resulting from the failure of the existing groundfish management system to achieve its conservation and rebuilding goals. A

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significant contributing factor to the poor condition of N.E. stocks is the failure of New England fisheries managers to adequately implement measure to avoid and minimize bycatch.

As clearly set out in the Magnuson-Stevens Act, development of a SBRM to assess the amount and types of bycatch occurring in fisheries is a critical aspect of the Council's responsibility when writing fishery management plans, and it is the first step to fulfilling the Act's mandates to minimize bycatch and bycatch mortality. Without an accurate and precise assessment of bycatch, the Council and NMFS are simply hamstrung in their ability to develop management measures to account for the ecological and economic waste that is occurring in our fisheries. Without appropriate bycatch assessment and reporting, effective management is impossible.

II. The Omnibus SBRM Fails to Meet the Requirements of the Court Order Regarding the Development of a Standardized Bycatch Reporting Methodology

As you are aware, the Conservation Law Foundation brought two separate federal court cases resulting in decisions holding that the bycatch measures developed by the Council and NMFS for inclusion in the Groundfish FMP failed to meet the legal requirements of the Magnuson-Stevens Act (MSA).[1] While the proposed Omnibus SBRM Amendment is greatly improved over initial efforts, it is still inadequate and fails to meet the applicable legal requirements as set forth in the March 9, 2005 Order by the United States District Court for the District of Columbia. Specifically, the Federal Court ordered NMFS and the NEFMC to evaluate its bycatch reporting and assessment program, establish a standardized reporting methodology, specify observer coverage levels in their fishery management plans, and address other demonstrated shortcomings in their observer program.[2] In reaching this conclusion, the Court emphasized the following points:

1. NMFS violated the MSA when it failed to require any observers in the New England groundfish fishery.[3]

2. NMFS violated the MSA and ignored the best available science when it failed to take account of the report on bycatch and observers submitted by Oceana to NMFS as part of the Amendment 13 administrative record.[4]

3. NMFS violated the MSA when it failed to assess the bycatch problem by sector, gear type, and species.[5]

4. NMFS violated the MSA when it relied upon discredited methodologies for monitoring and reductions in bycatch in the New England groundfish fishery.[6]

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[1] *Conservation Law Foundation v. Evans*, 209 F. Supp. 2d (D.D.C. 2001); *Conservation Law Foundation v. Evans*, D.D.C. No. 04-811 ESH (March 9, 2005)(*consolidated as Oceana v. Evans).* In the 2001ruling, the Court explicitly criticized NMFS for relying upon bycatch reporting methods that were demonstrably inaccurate and inadequate. In the March 9, 2005 ruling, the Court referenced these earlier findings. *Oceana v. Evans,*. at 85.
[2] *Oceana v. Evans*, D.D.C. No. 04-811 at 85.
[3] *Id.* at 79-82.
[4] *Id.* at 83-84.
[5] *Id.* at 84-85.
[6] *Id.* at 85.

Upon entering these findings, the Court remanded the bycatch portion of Amendment 13 to NMFS with instructions to comply with the MSA.[7]

Given that NMFS has already delayed its compliance with the bycatch requirements of the MSA by over ten years, and now for more than five years following the ruling by Judge Kessler in December of 2001, we again request prompt compliance with the MSA and the March 9, 2005 Order. In order to do so, the following changes to the draft SBRM must be made.

1. Specify levels of Observer Coverage in the FMPs

The Court found that the groundfish FMP failed to specify a level of observer coverage in the fishery. Further, the Court rejected the argument by NFMS that is had met its SBRM obligations by stating an intention to achieve a certain level of observer coverage while retaining complete discretion for setting the actual level of observer coverage.[8] The draft Omnibus SBRM appears to take the same approach rejected by the Court by establishing mere performance targets in the SBRM while leaving the actual level of observer coverage entirely up to NMFS's discretion.

Further, insofar as the SBRM appears to undertake an allocation analysis for observer coverage based upon a certain level of days fished, it is not clear whether there is a mechanism in place to update the allocation analysis annually (or more often) in order to address changes in the fishery. The draft also indicates that the actual allocation of observers would be reduced based on funding, but there is no way to determine how this will occur and no standards are set for minimum levels of coverage. The Omnibus SBRM must set the stage for the Council and NMFS to specify the levels of observer coverage in all fisheries by gear type, sector, and/or other appropriate criteria.

2. Adequately Assess the Bycatch Problem by Fishery, Gear Type, and Species.

In reaching its conclusion that the SBRM needed to address bycatch by sector, gear type, and species, the Court considered the bycatch plan utilized in the Pacific Highly Migratory Fisheries (FMP) as a reference point for what a legally compliant SBRM in New England would look like.[9] As is evident by the Court's decision and a review of the Pacific FMP, to be useful in improving fisheries management the SBRM must specifically contemplate the changing dynamics of each fishery by gear type and species, and be integrated into each FMP. The draft Omnibus SBRM does not do this in a meaningful way, and therefore it is likely to fall well short of anticipating and adapting to future fishery conditions and management needs. As a starting point for addressing these shortfalls and making the SBRM a truly useful document, it should include a discussion of each fishery, gear type, and associated species interactions along with the fisheries management scheme. It should then consider and seek to anticipate the potential bycatch data needs in order to make appropriate recommendations for levels of observer coverage and other means for collecting bycatch data.

Further, the MSA's bycatch provisions contemplate that a broader range of species will be addressed than is covered by the Omnibus SBRM. Species not commercially targeted under fisheries managed by the New England or Mid-Atlantic Councils should be included. These

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[7] *Id.* at 85-86.
[8] *Id.* at 79-82.
[9] The Court noted specifically that the FMP evaluates various kinds of reporting for different types of fishing gear and vessels. (See CLF Mot. Ex. 2 (HMS FMP, August 2003) at Ch. 5, pp. 34-36 (previously provided as part of this record).

species should include those managed by the Atlantic States Marine Fisheries Commission, Highly Migratory Species, protected species (e.g., sea turtles), and species known to be at risk (e.g., wolfish, cusk, corals). Absent these species, the SBRM is incomplete and will fail to meet the MSA's intended goals.

3. Best Available Science Must be Applied in Establishing the SBRM

Performance standard

To be effective, the Omnibus SBRM must set a mandatory performance standard; it cannot be a mere target standard. The standard must clearly indicate how it is to be applied, and it needs to be set for each fishery, gear type and/or sector, and species.

Reporting

There should be, at a minimum, an annual report on bycatch for each fishery broken down by gear type, sector (as appropriate), area fished, species and other means as determined by the Council. All reports must be public.

Filters

The Omnibus SBRM proposes to reduce the initial observer allocations by applying a series of "importance filters." These filters would remove fishery mode/species combinations from the list of observer needs based on different criteria including the current database of fishery mode/species interactions. This approach is fundamentally flawed because it uses the existing poor observer data as the foundation for the calculation of the allocation. A better approach would be to establish a baseline level of observer coverage for a period of years and to then use this observer data to establish the appropriate use of future of statistical filters. Further, until there is a robust data set providing a high degree of confidence in the use of filers, no protected species or species at risk should be eliminated as a result of data shoing a low frequency of interaction because, by definition, a low frequency is likely in many instances due to the low abundance of protected species.

CLF is also concerned that filter 3 could result in the inappropriate removal of a fishery mode/species because the species could show up as a low volume in a very high volume fishery, yet the environmental impact could be significant. Recent evidence of bycatch of haddock in the herring mid-water trawl fishery is one example though, because of the severely depleted status of cod, a cod/herring trawl interaction could be even more serious. Filter 3 should be eliminated from the SBRM. Filter 4 is also of concern because it fails to establish a threshold value, a matter that should be analyzed through an appropriate EIS alternatives analysis.

III. Failure to Complete an Environmental Impact Statement or Meet Other Fundamental National Environmental Policy Act Requirements

1. The SBRM Will Have Significant Environmental Impacts Triggering the Need for an EIS

Contributing significantly to the shortfalls in the Omnibus SBRM is the failure to develop the Amendment through an EIS. Lack of an EIS limited the opportunities for public participation and stymied New England and Mid-Atlantic Council involvement, which in turn has significantly limited the range of alternatives considered and the substantive analysis of the issues.

As noted above, the first step to fulfilling the Act's mandates to minimize bycatch and bycatch mortality is the SBRM; if the SBRM fails to include an accurate and precise assessment of bycatch it is

impossible for the Council and NMFS to develop the management measures necessary to reduce the ecological and economic waste that is occurring in our fisheries. The decisions made as a result of the SBRM analysis will affect fisheries and other ocean life throughout the New England and Mid-Atlantic regions and will help form the basis for nearly all fundamental fisheries management tools including stock assessments and management measures to control fishing mortality and bycatch, itself. A poorly designed SBRM could result in significant environmental harm as bycatch issues are missed or their seriousness is not accurately assessed resulting in the severe depletion of a species.

It is difficult to imagine an action to be taken by NMFS with a greater potential to significantly affect the quality of the human environment, thus the agency must take a hard look at the environmental impacts of the Omnibus SBRM in a full EIS.

2. The SBRM Fails to Consider a Range of Alternatives

Fundamentally, the draft Omnibus SBRM only contains two alternatives for each decision point, one of which is the status quo, and fails to consider other reasonable alternatives. In some cases the identified alternative is so overly simplistic the result is in effect to have no alternative at all (e.g., whether to specify an SBRM review process). Development of a SBRM, like other major federal actions, requires consideration of an appropriate range of alternatives to comply with NEPA and the MSA. Additional alternatives should have been considered in many areas of the Omnibus SBRM, including for importance filters, bycatch reporting and monitoring mechanisms, performance standards, and bycatch review and reporting. The failure to consider a reasonable range of alternatives here at least partly stems from the decision early on not to undertake an EIS, thereby limiting public participation and the opportunity to develop additional alternatives.

IV. NMFS Should Specify Observer Coverage via Emergency Rule

Because the fishery management plans for New England continue to unlawfully fail to require any level of observer coverage, NMFS must take action immediately by emergency rule to establish an adequate level of coverage during the period of time it takes to develop a legally compliant SBRM through an EIS. The observer coverage established through emergency rule must be based on the best available science. In instances where draft SBRM or other information does not represent the best available science for setting the level observer coverage necessary to assure accurate and precise estimates of bycatch for a given gear type or sector, NMFS should establish observers on at least 20 percent of all days fished (trips) consistent with the Oceana report on bycatch discussed in the March 9, 2005 federal court ruling (e.g., 20 percent).[10]

Thank you for considering these comments. The Conservation Law Foundation looks forward to working with NMFS, the NEFMC and other interested parties to address the concerns raised in these comments. Should you have questions regarding these comments or wish to discuss any of the issues further, please contact me at rfleming@clf.org or by telephone at 207.729.7733.

Sincerely yours,

/S/_____
Roger Fleming
Senior Attorney

[10] *Oceana v. Evans*, D.D.C. No. 04-811 at 84-85.

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