

DRAFT COMMENT LETTER ON SBRM PROPOSED RULE

April ?, 2016

Ms. Karen Abrams
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Ms. Abrams:

SUBJECT: Comments on proposed rule for standardized bycatch reporting methodology

Please accept these comments on behalf of the North Pacific Fishery Management Council (Council), regarding the February 25, 2016 proposed rule on standardized bycatch reporting methodology (SBRM). Fisheries in the North Pacific are managed under a robust in-season catch accounting system (CAS), which is underpinned by our comprehensive observer program and recordkeeping and reporting requirements, and which has been determined to be compliant with the section 303(a)(11) of the Magnuson-Steven Act (MSA) as our SBRM. This CAS has evolved over many years and is a system which is often subject to minor adjustments to maximize its effectiveness in tracking bycatch, as well as many other important management aspects of our fisheries. The basic elements of the CAS are already captured in our FMPs, but we acknowledge that further specificity could be accomplished.

The proposed rule concerns us in at least three very general ways: First, it is not as if we suddenly adopted the elements of the CAS “as our SBRM” – rather, that CAS has developed over many years and is constantly evolving. Therefore, we would not be establishing an SBRM in response to the proposed rule, we would in essence be further explaining what we already do. This is similar to the rulemaking for annual catch limits (ACLs) which required our Council to make significant (and resource intensive) amendments to our FMPs to reflect what was already long-standing practice in the North Pacific. Our region may be in a somewhat unique position in this regard. It is our understanding that the impetus for this proposed rule is largely due to litigation issues in other regions, and we urge you to seriously consider the potential negative implications, including unnecessary workload, of the SBRM proposed rule to regions which are already in compliance with MSA requirements.

We are concerned that what should be a minor housekeeping amendment for the North Pacific (simply further specifying the elements of the CAS) could become a major amendment process, similar to our ACL experience. The proposed rule states that “*the description must provide an explanation of why the methodology is appropriate for the fishery...and must be based on a thorough analysis of the factors specified in paragraph (a)(2)(i) and (ii)...*”. Coupled with the provisions of section (c), discussed below, this proposed rule would likely require significant Council and agency resources, which seems unnecessary given that we already have an established SBRM.

Secondly, section (c) of the proposed rule (adaptable implementation) is of particular concern in that it requires us to precisely describe how we would make adjustments to the program in the future, including what specific adjustments would be authorized; why they would be needed; the process by which they would be adjusted; an explanation of why there would be adjustments; and, the limits of such adjustments. This presents us with the logically impossible requirement to foretell the future, and would handcuff our ability/flexibility to make adjustments to the SBRMs based on the actual fishery factors we may be experiencing at some point in the future. One of the keys to our successful CAS is the ability to respond to fishery conditions as they evolve. The process by which these adjustments are made is in fact the Council process itself, as authorized and defined by the MSA itself. Section (c) of the proposed rule seems to ignore the fundamental point of the Council process.

Third, as is often the case when the agency issues ‘guidance’, or ‘guidelines’, it is unclear whether this proposed rule constitutes ‘guidance’ to the Councils vs regulatory requirements upon the Councils. In various places throughout the proposed rule the phrase “*requirements for and guidance on*” is used. We would request that the rule provide additional clarity with regard to this question, and in order to allow for the most flexible and effective SBRM process, we strongly recommend that the agency issue these SBRM provisions as guidance, rather than as regulatory requirements. Guidance documents have been used very successfully for various issues faced by the Councils (and NMFS) – a recent example is the National Standard 10 Technical Memorandum issued by the agency to address safety at sea.

If the agency decides to proceed with a final rulemaking for SBRM clarity (rather than issuing guidance), we recommend that section (c) – Adaptable implementation - be deleted. It is unnecessary for MSA compliance and would severely limit our ability to develop effective SBRMs. In the event the agency does proceed with final rulemaking, we have provided more specific comments, as well as specific, suggested revisions in the attachment to this letter. We appreciate the opportunity to comment on this proposed rule, and urge the agency to make the necessary revisions which would allow for most effective SBRM development across very different fisheries in very different regional settings.

Sincerely,

Chris Oliver
Executive Director

CC: Mr. Alan Risenhoover
Dr. Jim Balsiger
Mr. Glenn Merrill
Regional Fishery Management Councils

ATTACHMENT 1: Specific Comments and Suggested Revisions

Comment: With regard to NEPA requirements, the agency is issuing what could be a significant regulatory requirement under a Categorical Exclusion determination, “*due to the procedural nature of this action*”, while acknowledging that compliance with the requirements will require preparation of an EIS (or EA) to support the implied FMP amendments. The provisions of the proposed rule are well beyond merely procedural. Further, it does not appear that the agency has conducted a Regulatory Impact Review as required by E.O. 12866. The agency should not proceed unless and until this analysis has been conducted and the public has an opportunity to review and comment on that analysis.

Comment: The agency has not articulated a clear reason why it has to initiate rulemaking rather than issuing a revised guidance document. Throughout this preamble, the Agency has argued that the Councils have inconsistently applied the guidance in the *Evaluating Bycatch* report. The agency could easily rectify this, by providing an updated guidance document. Requiring the Councils to revise their FMPs and conduct regular reviews will impose additional workload and costs for the Councils to address SBRMs that are already consistent with section 303(a)(11) of the MSA. This exposes the Councils and the Agency to additional threat of litigation, and is not necessary to meet the overall objective of this action. Conversely, the consideration of guidance documents does not necessitate a formal FMP amendment with the attendant costs to the Councils and agency to publish revised documents in the Federal Register, respond to public comment, and the commitment of staff resources. This proposed rule is inconsistent with National Standard 7, which requires that “management measures shall, *where practicable*, [emphasis added] minimize costs and avoid unnecessary duplication.” Duplication and costs can be avoided through revised policy guidance documents.

Comment: The agency states that rulemaking is necessary “*in order to prevent inconsistent implementation of the provision, on a region-by-region basis in response to fact specific litigation.*” This seems to fly in the face of the overall intent of the Councils to provide for fishery specific SBRMs as needed. In fact the preamble to the proposed rule makes this case by noting that “‘standardized’ does not mean that reporting methodologies must be standardized at a regional or *national* [emphasis added] level”, and “whether a methodology is appropriate for a fishery will depend on the specific circumstances of the fishery”. The proposed rule is internally inconsistent, and should be withdrawn and replaced with a more flexible guidance document.

Comment: The agency cites a number of cases, but fails to cite the most recent case pertaining to the North Pacific that agreed with NMFS’ claim that the CAS is the SBRM. The court evaluated aspects of the North Pacific observer program that plaintiffs claimed were inconsistent with SBRM and disagreed with their arguments. The court upheld 1) our approach to deploy observers through a scientific sampling plan; 2) the fact that coverage rates can vary with available funding; and 3) that we considered gear and fishery-specific data needs. Given these findings, it is not clear why the agency is requiring the Council to revisit the issue. Furthermore, the MSA has separate, specific provisions that outline fishery research plan requirements applicable to the North Pacific (see section 313). For these reasons, we believe that the agency should consider an exclusion to this SBRM proposed rule that is applicable to fisheries under the jurisdiction of the NPFMC.

Comment: Although implied through the preamble text, this proposed rule should clarify in the regulation text that it does not apply to the incidental catch of seabirds or marine mammals.

Comment: The preamble to the proposed rule and the regulatory text are internally inconsistent. In the preamble, the agency states: “*All FMPs have established SBRMs according to the requirements in 303(a)(11). This proposed rule would provide national guidance and improved clarity about implementing existing requirements.*” The preamble goes on to state: “[*T*]he Councils have sufficient flexibility to adjust implementation of an established SBRM in a way that is clear to the public, but that does not require an FMP amendment.” However, the regulatory text at § 600.1610(a) is highly prescriptive about the specific elements that must be contained in the FMP. For example, § 600.1610(a) contains requirements that “*The description must state the required bycatch data collection, recording, and reporting procedures for each fishery*” and then lists specific requirements. Section 600.1610(a) continues: “*In addition, the description must provide an explanation of why the methodology is appropriate for the fishery. The explanation must be based on a thorough analysis of the factors specified in paragraph (a)(2)(i) and (ii) of this section.*” It is not clear why these prescriptive requirements are imposed if all FMPs are already consistent with the MSA requirements for an SBRM. The agency should revise the regulatory text of § 600.1610 in several places to clearly reflect that the objective of this proposed rule is to provide guidance to the Councils on the implementation of SBRM. Since the agency has already concluded that all FMPs are already compliant with section 303(a)(11), it is not necessary to include prescriptive requirements on what must be included in the FMPs. In many places requirements that Councils “must” and “will” undertake specific actions are not required to effectively provide guidance. We have included revised regulatory text (below) which provides greater flexibility.

Comment: Section 600.1610(a)(1) effectively removes the Council’s discretion to make the appropriate determination about whether it needs to revise its FMPs or not. This is inconsistent with statements in the preamble that this “*does not require an FMP amendment.*” Section 600.1610(a) should be modified so that it makes clear that the first step would be for the Councils to review their FMPs to determine if their FMPs provide a clear description of the SBRM, and only if the Council determines it does not, should additional modifications be made in either the FMP, or as we clarify in another comment, through other reference documents. This proposed rule should not force the Councils to modify their FMPs if no such modification is required. We have included revised regulatory text that addresses this concern.

Comment: Section 600.1610(a)(1) should be revised to provide the Council’s with the discretion to include a more detailed description of the SBRM in the FMP, or in other reference documents. This regulatory change is necessary because many SBRMs are constantly evolving rather than a specific set of methodologies that can be fixed in the FMP. For example, the North Pacific Fishery Management Council and NMFS use an Annual Deployment Plan (ADP) process to determine the appropriate methodology for implementing observer coverage. Both the scientific sampling plan described in each ADP and the method for assigning observers to vessels and processing plants can change on an annual basis. Under the proposed provisions of § 600.1610(a)(1), it appears that an FMP would need to include a specific reference to the ADP process (which it already does), or to provisions for a specific annual ADP, which would be

outdated almost immediately upon approval of the FMP amendment. The highly prescriptive descriptions in the FMP are not necessary and are directly counter to the overall objective of this proposed rule, to provide the public with greater clarity about the provisions of an SBRM. We have included revised regulatory text to address this issue.

Comment: Section 600.1610(a)(2)(ii) states that: “*the methodology must be feasible from cost, technical, and operational perspectives....*” It is not clear who is undertaking this assessment. We assume that this assessment would be undertaken by the Councils since this entire regulation is applicable to the Councils’ FMPs. We have included revised regulatory text with the necessary specific changes.

Comment: Section 600.1610(d) requires that: “*All FMPs must be consistent with the rule within 5 years from the effective date of this rule.*” This provision is not necessary if Council’s have reviewed their FMPs and determined that their FMPs do need to be modified to provide a clear description of the SBRM in that FMP. We have included revised regulatory text with the necessary specific changes.

Suggested Revised Regulatory Text (insertions in **bold**, deletions in strikethrough)

Section 600.1610

(a) *Establishing a standardized reporting methodology – (1) Fishery Management Plan Contents.* All fishery management plans (FMPs) must clearly describe a standardized reporting methodology for each fishery managed under it. **Each Council should review their FMPs to determine if their FMPs provide a clear description of the standardized reporting methodology. After this review, the Council’s may revise or provide a description of the standardized reporting methodology by amending their FMPs to include the description, or may provide a description in other reference documents.** The description **should include** ~~must state~~ the required bycatch data collection, recording, and reporting procedures for each fishery, which may include, but are not limited to, one or more of the following: observer programs, electronic monitoring and reporting technologies, and self-reported mechanisms (e.g., recreational sampling, industry reported catch and discard data). In addition, the description **should provide** ~~must provide~~ an explanation of why the methodology is appropriate for the fishery. The explanation **should** ~~must~~ be based on a thorough analysis of the factors specified in paragraph (a)(2)(i) and (ii) of this section. The explanation may incorporate by reference analyses in FMPs, FMP amendments, Stock Assessment and Fishery Evaluation (SAFE) reports, or other documents.

(2) *Factors in establishing or reviewing a standardized reporting methodology.* Whether a methodology is appropriate will depend on the specific circumstances of the fishery, as guided by the following factors:

(i) *Required Factors.* Data resulting from the methodology must be useful, in conjunction with other relevant sources of data, in meeting the purpose described in § 600.1600 and fishery specific bycatch objectives. This requires Councils, when establishing or reviewing a methodology, to consider the conservation and management objectives regarding bycatch in the fishery and the quality of the data associated with the methodology. Councils **should** ~~must~~ also consider information about the characteristics of bycatch in the fishery, when available, such as

the amount of bycatch occurring in the fishery, the importance of bycatch in estimating the total mortality of fish stocks, and the importance of bycatch to related ecosystems. In addition, the **Council's should assess whether this methodology is ~~must be~~ feasible from cost, technical, and operational perspectives, and should ~~must~~ be designed to be implemented with available funding.**

(ii) *Additional Factors.* When establishing or reviewing a standardized reporting methodology, a Council may also consider the overall magnitude and/or economic impact of the fishery, and the scientific methods and techniques available to collect and report bycatch data that could improve the quality of the bycatch estimates.

(b) *Consultation.* A Council should consult with its scientific and statistical committee, advisory panels, and the NOAA science centers as appropriate on data elements, reporting frequency, and other design and methodology factors.

(c) *Adaptable implementation.* If a Council anticipates that adjustments will be necessary to implement the methodology, the Council may, consistent with the requirements of the MSA and other applicable law, consider adopting a process in an FMP to adjust implementation of the methodology. The Council may consider adopting such a process based on factors, which include, but are not limited to, available funding, management contingencies, or scientific priorities. If such a process is adopted, the FMP **should ~~must~~:**

(1) describe the process under which the implementation of a methodology will be adjusted;

(2) specify what adjustments (e.g., changes in the intensity, focus, or frequency of required bycatch data collection, recording, and reporting procedures) are authorized under the process;

(3) explain why the adjustments may be needed;

(4) describe how and when the adjustments will be made;

(5) describe the limits to the adjustments; and

(6) describe how the Council will determine that a reevaluation of the established methodology is warranted.

(d) *Review of FMPs.* **Unless a Council has determined an FMP provides a clear description of the standardized reporting methodology, that FMP ~~All FMPs~~ must be consistent with this rule within 5 years of the effective date of this rule. Thereafter, Councils should conduct a review of standardized reporting methodologies at least once every five years in order to verify continued compliance with the MSA and this rule.**