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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 1512–01999–6969–02]

RIN 0648–BF51

Standardized Bycatch Reporting Methodology

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule interprets and provides guidance on the requirement of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) that all fishery management plans (FMPs), with respect to any fishery, establish a standardized reporting methodology to assess the amount and type of bycatch occurring in a fishery. The final rule establishes requirements and provides guidance to regional fishery management councils and the Secretary of Commerce regarding the development, documentation, and review of such methodologies, commonly referred to as Standardized Bycatch Reporting Methodologies (SBRMs).

DATES: Effective February 21, 2017.

ADDRESSES: Copies of the Categorical Exclusion/Regulatory Impact Review (RIR)/Final Regulatory Flexibility Act Analysis (FRFAA) prepared for this action can be obtained from: Karen Abrams, National Marine Fisheries Service, 1315 East West Highway, Room 13461, Silver Spring, MD 20910. An electronic copy of the CE/RIR/RFAA documents as well as copies of public comments received can be viewed at the Federal e-rulemaking portal: *http://www.regulations.gov/* (Docket ID: NOAA–NMFS–2012–0092).

FOR FURTHER INFORMATION CONTACT: Karen Abrams, 301–427–8508, or by email: *karen.abrams@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 303(a)(11) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires that any fishery management plan (FMP) prepared by a regional fishery management council (Council) or the Secretary of Commerce with respect to any fishery establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality (16 U.S.C. 1853(a)(11)). *See also* 16 U.S.C. 1854(c) and (g) (authorizing Secretarial FMPs. Hereafter, ''Council'' includes the Secretary of Commerce as applicable when preparing FMPs or amendments under 16 U.S.C. 1854(c) and (g). *See* 50 CFR 600.305(d). This standardized reporting methodology is commonly referred to as a ''Standardized Bycatch Reporting Methodology'' (SBRM). This final rule, which is promulgated pursuant to 16 U.S.C. 1855(d), sets forth NMFS' interpretation of section 303(a)(11) and establishes national requirements and guidance for developing, documenting, and reviewing SBRMs. A proposed rule for this action was published on February 25, 2016 (81 FR 9413), with public comments accepted through April 25, 2016.

Section 303(a)(11) was added to the MSA by the Sustainable Fisheries Act of 1996 (SFA). The MSA does not define ''standardized reporting methodology'' or any of the words contained within the phrase. Similar to section 303(a)(11), National Standard 9 (NS9) (16 U.S.C. 1851(a)(9)) requires that conservation and management measures ''shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.'' However, NS9 does not address SBRM.

Prior to this rulemaking, NMFS never issued regulations that set forth the basic requirements of the SBRM provision. To implement the 1996 SFA Amendments, NMFS developed NS9 guidelines in 1998, and amended these guidelines in 2008. *See* 50 CFR 600.350. The guidelines provide several clarifications about bycatch requirements under the MSA, but do not interpret the SBRM requirement. In 2004, NMFS published *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs* (NOAA Technical Memorandum NMFS–F/SPO–66, October 2004, hereafter referred to as *Evaluating Bycatch*), a report that was prepared by the agency's National Working Group on Bycatch (available at *http://www.nmfs.noaa.gov/by_catch/SPO_final_rev_12204.pdf*). The report did not provide, or purport to provide, the agency's interpretation of the basic requirements of complying with MSA section 303(a)(11). *See Evaluating Bycatch* at Chapters 3, 4, and 5 and Appendix 5 (discussing regional bycatch and fisheries issues, reporting/monitoring measures, and precision goals for bycatch estimates, but noting that goals ''may in some instances exceed minimum statutory requirements'').

Additional background information—including NMFS' rationale for developing this rule, statutory and historical background, and the purpose and scope of the rule—can be found in the proposed rule that published on February 25, 2016 (81 FR 9413). Copies are available from NMFS (*see* **ADDRESSES**), or can be viewed electronically at the Federal E-Rulemaking portal for this action: *http://www.regulations.gov.*

Separate from this rulemaking, which solely addresses reporting methodologies for bycatch as defined under the MSA, NMFS has engaged in a broad range of activities since the 1970s to address its bycatch-related responsibilities under the MSA, the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and other relevant statutes and international agreements. More specifically, NMFS, the Councils, and multiple partners have implemented management measures to minimize bycatch and bycatch mortality in fisheries (*e.g.,* time and area closures); developed and/or researched bycatch reduction technologies for fishing gear (*e.g.,* turtle excluder devices and circle hooks); convened multi-stakeholder take reduction teams to address marine mammal bycatch; supported national research programs, such as the Bycatch Reduction Engineering Program; promoted the adoption of bycatch reduction measures in international regional fishery management organizations; and published a series of biennial National Bycatch Reports and Updates since 2011 that provide a historical summary of fishery- and species-specific bycatch estimates on an annual basis for major U.S. fisheries around the country, to cite a few examples. NMFS also has a database from which members of the public can query bycatch estimates from the National Bycatch Reports and Updates. *See http://www.st.nmfs.noaa.gov/observer-home/first-edition-update-1.* To build on its bycatch efforts, this year in February 2016, NMFS issued for public comment a draft *National Bycatch Reduction Strategy* that aims to coordinate NMFS' efforts to address bycatch under the various mandates it is charged with carrying out to further advance its work in addressing bycatch both domestically and internationally.

NMFS received numerous public comments on the draft strategy and is working to address those comments and finalize the strategy. For more information on NMFS' 40 year commitment to addressing bycatch, *see http://noaa.maps.arcgis.com/apps/MapSeries/index.html?appid=e5d4037090054fa2843a6ab522c9b73b.*

I. Overview of the Major Aspects of the Final Rule

Section 600.1600 explains the purpose and scope of an SBRM and § 600.1610 clarifies the requirements for establishing and reviewing SBRMs. The rule requires that an FMP identify the required procedure or procedures that constitute the SBRM for the fishery. The rule also requires that the FMP, or fisheries research plan authorized under 16 U.S.C. 1862, explain how the SBRM meets the purpose described under § 600.1600, based on an analysis of (1) the characteristics of the bycatch occurring in the fishery, (2) the feasibility of the methodology from cost, technical and operational perspectives, (3) the uncertainty of the data resulting from the methodology, and (4) how the data resulting from the methodology are used to assess the amount and type of bycatch occurring in the fishery. Finally, the rule provides that a Council should give guidance to NMFS on how to adjust the implementation of the SBRM consistent with the FMP, and requires periodic reviews of SBRMs.

Below is further explanation of the major aspects of the final rule. In addition to streamlining the final rule to improve clarity and organization, NMFS has made several changes in the final rule to respond to public comments. The changes are discussed below and in sections II (Response to Comments) and III (Changes from Proposed Action) of this preamble.

A. Scope of Rule

Establishing an SBRM is a requirement of the MSA. Therefore, this rule is based on the MSA's definition of ''bycatch,'' which includes fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program. 16 U.S.C. 1802(2). NMFS' NS9 guidelines clarify that ''[a] catch-and-release fishery management program is one in which the retention of a particular species is prohibited. In such a program, those fish released alive would not be considered bycatch.'' 50 CFR 600.350(c)(2). NMFS received several comments on the rule's definition of ''bycatch.'' To clarify its intent to rely on the MSA's definition of ''bycatch,'' NMFS has revised the final rule at § 600.1605(b) to add reference to the MSA definition. Summaries of the comments received on the definition of bycatch and NMFS' responses may be found in section II (Response to Comments) of this preamble.

B. Purpose of an SBRM

Based on the statutory language of section 303(a)(11) of the MSA, the final rule clarifies in § 600.1600 that the purpose of an SBRM is to collect, record, and report bycatch data in a fishery that, in conjunction with other information, are used to assess the amount and type of bycatch occurring in the fishery and inform the development of conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality. Consistent with this purpose, § 600.1605(a) defines ''standardized reporting methodology'' with reference to procedures used to collect, record, and report bycatch data in a fishery. Section 600.1605(a) clarifies that bycatch assessment procedures are not part of an SBRM, and thus do not need to be described as part of the methodology in an FMP. A Council may include such a description if it so chooses and could provide this description by incorporating by reference information from a Stock Assessment and Fishery Evaluation (SAFE) report or other documents.

As explained in the proposed rule (*see* 81 FR 9413 at 9414–9415), activities to collect, record, and report bycatch data in a fishery are connected to, but distinct from, the methods used to assess bycatch and the development of measures to minimize bycatch or bycatch mortality. NMFS received numerous comments on the linkage between bycatch data collection and bycatch assessment. Having carefully considered public comment on this issue, NMFS has decided to maintain the distinction between data collection and bycatch assessment in the final rule. NMFS continues to believe that it is important to be clear about the key policy choices and objectives associated with establishing an SBRM, and not confuse those choices with statistical and technical approaches for estimating bycatch that are inherently scientific and data dependent, or with the policy choices associated with developing measures to minimize bycatch or bycatch mortality. *See* ''Activities Associated with an SBRM'' in the proposed rule and ''Distinction Between Data Collection and Data Assessment'' in section II of this preamble for further information and explanation of this issue.

While recognizing the distinction between data collection and bycatch assessment, NMFS affirms the important linkage between these activities. To reinforce this link, NMFS has revised § 600.1610(a)(2)(iv) to require a Council to address how the data resulting from an SBRM are used to assess the amount and type of bycatch in the fishery and to consult with its Science and Statistical Committee (SSC) and/or regional NMFS science centers on SBRM design considerations (*e.g.,* data elements, sampling designs, sample sizes, and reporting frequency). NMFS also cross-references this requirement in § 600.1600. *See* section I. E. 4. *Data Use* of this preamble for further explanation.

C. Meaning of ''Standardized''

Section 303(a)(11) requires that ''Any fishery management plan . . . with respect to any fishery, shall . . . establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.'' 16 U.S.C. 1853(a)(11). Section 303(a)(11) does not require regional or national standardization; rather, the requirement to establish a standardized reporting methodology applies to each FMP with respect to any fishery managed under it. Consistent with the statutory language, this rule defines ''standardized reporting methodology'' as an established, consistent procedure or procedures used to collect, record, and report bycatch data in a *fishery,* which may vary from one fishery to another. *See* 600.1605(a) (emphasis added).

A Council establishes the SBRM based on the requirements outlined in this rule and the purpose of an SBRM (*see* § 600.1600). The definition of ''standardized reporting methodology'' envisions that a Council may include more than one data collection, recording, and reporting procedure in its SBRM. As acknowledged in § 600.1610(a)(2)(i), the amount and type of bycatch occurring in a fishery may vary based on different fishing activities and operations (*e.g.,* gear types used, how gear is deployed, gear selectivity, fishing effort, fishing locations). In light of the above, a Council could decide that a combination of procedures is appropriate for a fishery. In such a case, the FMP must still identify what the established, consistent procedures are for the fishery. For example, in a fishery in which vessels use trawl nets and gill nets, a Council could determine that different procedures are appropriate for the different gear types. The Council would then be required to identify the

required, consistent procedures for both gear types in the FMP. *See* section I. E. 1. and the response to comment 9 in section II of this preamble for further explanation.

D. FMP Contents

Section 600.1610(a)(1) requires every FMP to identify the required procedure or procedures that constitute the SBRM for the fishery. Such procedures may include, but are not limited to, observer programs, electronic monitoring and reporting technologies, and self-reported mechanisms. This rule does not prescribe the use of particular procedures.

Section 600.1610(a)(1) also requires Councils to explain in an FMP, or a fishery research plan authorized under 16 U.S.C. 1862, how the SBRM meets the purpose described in § 600.1600, based on an analysis of requirements (set forth in § 600.1610(a)(2) and described below). The FMP, or fishery research plan under 16 U.S.C. 1862, may reference analyses and information in other FMPs, FMP amendments, SAFE reports, or other documents. Consistent with current practices, the rule encourages Councils to work together and collaborate on SBRMs for fisheries that operate across multiple jurisdictions, as appropriate.

NMFS amended the final rule to refer to 16 U.S.C. 1862, a provision that authorizes the North Pacific Fishery Management Council to prepare a fisheries research plan for any fishery under its jurisdiction (except salmon) that requires observers and establishes a system of fees to pay for the costs of implementing the plan. The North Pacific Council has established a fisheries research plan that requires an observer program as authorized under 16 U.S.C. 1862, and the program constitutes the SBRM for the fisheries covered thereunder. Given that, this rule allows the North Pacific Council to explain in its fisheries research plan how the SBRM for those fisheries meets the statutory purpose of an SBRM.

Finally, § 600.1610(a)(1) explains that, in addition to proposing regulations necessary to implement the standardized reporting methodology, a Council should provide in an FMP, or a fishery research plan authorized under 16 U.S.C. 1862, guidance to NMFS on how to adjust implementation of the methodology consistent with the FMP. That section cites to the National Standard 6 guidelines (50 CFR 600.335), which provide guidance on taking variations and contingencies into account. NMFS notes that, to the extent that adjustments are needed to an SBRM beyond what is established in an FMP, an FMP amendment would be required. This text in § 600.1610(a)(1) replaces § 600.1610(c) (adaptable implementation) because public comments expressed confusion over that proposed provision. NMFS reiterates that every FMP must establish an SBRM. NMFS did not intend to imply otherwise in the proposed § 600.1610(c) (at 81 FR 9413, February 25, 2016). Rather, NMFS' intent in the proposed § 600.1610(c) (at 81 FR 9413, February 25, 2016), and now in § 600.1610(a)(1), is to recognize that fisheries management occurs in a highly variable environment and there are numerous biological, social, and economic variables that may affect the operational aspects of implementing data collection and reporting programs that constitute an SBRM. In light of this, NMFS strongly recommends that Councils provide direction, as needed, to NMFS about how to adjust the implementation of an SBRM consistent with the FMP. NMFS believes that its approach in § 600.1610(a) will promote efficiency and transparency by encouraging a Council to consider implementation and operational issues up-front during the development of an SBRM. *See* response to comment 29 and 48 for further explanation.

E. Fishery-Specific Analysis

MSA section 303(a)(11) requires that FMPs establish SBRMs, but beyond the fact that an SBRM must meet its statutory purpose, section 303(a)(11) provides no other guidance on the considerations that should go into developing an SBRM. Therefore, NMFS has discretion to interpret section 303(a)(11) and establish reasonable considerations and requirements. Based on NMFS' experience with implementing section 303(a)(11), and taking into consideration public comment on the proposed rule, this final rule requires that all Councils conduct a fishery-specific analysis that addresses the following when establishing or reviewing an SBRM: (1) The characteristics of the bycatch occurring in the fishery, (2) the feasibility of the methodology from cost, technical and operational perspectives, (3) the uncertainty of the data resulting from the methodology, and (4) how the data resulting from the methodology are used to assess the amount and type of bycatch occurring in the fishery. The first and second requirements were included in the proposed rule and have been revised minimally in response to comments. With respect to the third and fourth requirements, NMFS has, in response to public comments, clarified and elaborated upon the proposed requirement that a Council address ''the quality of the data associated with the methodology'' (*see* proposed § 600.1610(a)(2)(i) at 81 FR 9413, February 25, 2016). Below is further explanation of these four requirements.

In response to comments, NMFS has removed text that required consideration of the conservation and management objectives regarding bycatch in the fishery (*see* proposed § 600.1610(a)(2)(i) at 81 FR 9413, February 25, 2016), and text stating that a Council may consider the overall magnitude and/or economic impact of the fishery (*see* proposed § 600.1610(a)(2)(i) at 81 FR 9413, February 25, 2016). The reasons for these changes are provided in the responses to comments 44 and 46.

1. Characteristics of Bycatch in the Fishery

Section 600.1610(a)(2)(i) provides that a Council must address information about the characteristics of bycatch in the fishery when available, including, but not limited to, the amount of bycatch occurring in the fishery, the importance of bycatch in estimating the fishing mortality of fish stocks, and the effect of bycatch on ecosystems. Section 600.1610(a)(2)(i) recognizes that the amount and type of bycatch occurring in the fishery may vary based on different fishing activities and operations. Bycatch can be affected by several aspects of a fishery, including gear types used, how gear is deployed, gear selectivity, fishing effort, fishing locations, and existing management measures. A Council may consider these operational aspects when selecting the collection, monitoring, and reporting procedures that constitute the SBRM for a fishery.

2. Feasibility

Section 600.1610(a)(2)(ii) requires that the implementation of an SBRM be feasible from cost, technical, and operational perspectives. Data collection, reporting, and recording procedures can be expensive, logistically challenging to design and implement, involve new and cutting-edge technologies, and necessitate the consideration of the safety of human life at sea. Having carefully considered public comments, NMFS continues to believe that it is reasonable and appropriate for a Council to analyze issues of feasibility when establishing or reviewing an SBRM and to ultimately choose a methodology that is in fact feasible (*i.e.,* capable of being implemented) from cost, technical, and operational perspectives. If a Council proposes an FMP or FMP amendment

with an SBRM that is not feasible, NMFS may disapprove or partially disapprove the FMP amendment. In response to public comments, NMFS clarifies in the final rule that feasibility concerns do not exempt an FMP from the requirement to establish an SBRM. NMFS reiterates that the requirement to establish an SBRM is a statutory requirement applicable to all FMPs.

Proposed § 600.1610(a)(2)(i) at 81 FR 9413, February 25, 2016, would have required SBRMs to be designed to be implemented with available funding. In response to comments, NMFS has deleted this provision. *See* section II (the responses to comments on ''Consideration of Feasibility, Costs, and Funding'') of this preamble. Instead, NMFS explicitly acknowledges in § 600.1610(a)(2)(ii) that costs and funding may vary from year to year, and requires a Council to address how implementation of the SBRM may be adjusted while continuing to meet the purpose described under § 600.1600. If a Council chooses to establish an SBRM that may be adjusted in response to changes in costs or funding, the Council should provide guidance to NMFS on how to adjust the implementation of the SBRM consistent with the FMP, as provided in § 600.1610(a)(1) (*see* section I. D. of this preamble).

As an example, NMFS notes that the resources available for observer programs may vary from year to year. To address this variability in resources, the North Pacific Council uses an Annual Deployment Plan, a component of its fisheries research plan authorized under 16 U.S.C. 1862, to describe how NMFS and the Council will annually deploy observers given changes in funding, costs, and effort consistent with the FMP. As another example, in New England and the Mid Atlantic, if the available funding is insufficient to meet the SBRM performance standard, the SBRM Omnibus Amendment for New England and Mid-Atlantic fisheries (80 FR 37182, June 30, 2015) (currently the subject of litigation) establishes a non-discretionary formulaic process for prioritizing how the available observer sea-days would be allocated to maximize the effectiveness of the SBRM. NMFS reiterates that, regardless of resource constraints, all FMPs must establish an SBRM that meets the purpose described in § 600.1600.

3. Data Uncertainty

Section 600.1610(a)(2)(iii) requires Councils to address the uncertainty of the data resulting from the SBRM. This section also requires that an SBRM be designed so that the uncertainty associated with the resulting bycatch data can be described, quantitatively or qualitatively. Eliminating data uncertainty is not an end in itself, but the rule recognizes that Councils should seek to minimize uncertainty in the resulting data, recognizing that different degrees of uncertainty may be appropriate for different fisheries.

4. NMFS received numerous public comments requesting that the final rule include specific standards for accuracy, precision, or statistical reliability of bycatch estimates and data. *See* section II for comments and responses related to ''Consideration of Quality and Use of Data.'' After considering public comments and consulting with agency scientists, NMFS does not believe it is appropriate to establish accuracy, precision, or reliability standards for bycatch data or estimates to be applied across all fisheries. As explained in ''Purpose of an SBRM'' above, bycatch assessment or estimation is not considered part of an SBRM under this rule. Moreover, as explained in the responses to comments, the specific characteristics of each fishery and its bycatch vary widely from region to region and from fishery to fishery. For example, during development of this rule, agency scientists noted that bycatch estimates for species with low encounter rates will have lower precision than commonly encountered bycatch species. Establishing bycatch data or estimation standards across all fisheries could result in an overly intensive sampling effort that may not be needed for bycatch assessment or management purposes, would not be feasible, and would be an inefficient use of agency resources. Instead, this rule requires that Councils address the uncertainty of the data resulting from an SBRM and design an SBRM so that the uncertainty associated with the resulting bycatch data can be described, quantitatively or qualitatively. As reflected in § 600.1600, there may be other relevant sources of data beyond the data provided by an SBRM that are used to develop bycatch estimates for the fishery (*e.g.,* fishing effort, fishery independent data, commercial landings data). Understanding the quality of data resulting from an SBRM and other sources is important in the assessment of bycatch and will assist Councils in developing conservation and management measures that, to the extent practicable, minimize bycatch, and minimize the mortality of bycatch. For example, a Council may choose to adopt measures that are more conservative in instances where bycatch data is a large component of fishing mortality and is highly uncertain. *Data Use*

Section 600.1610(a)(2)(iv) requires a Council to address how the data resulting from an SBRM are used to assess the amount and type of bycatch occurring in the fishery. As explained in the ''Purpose of the SBRM'' section above, this provision was added in part to clarify and reinforce the link between an SBRM and the assessment of bycatch data. Section 600.1605(a) clarifies that, although bycatch assessment is not part of the SBRM, bycatch assessment must be considered as described in this provision. *See* responses to comments 16 and 25 (explaining the role of NMFS science centers in providing scientific information and analyses and how catch and landings information is made available).

Section 600.1610(a)(2)(iv) also incorporates the consultation provision of the proposed rule's § 600.1610(b) (81 FR 9413, February 25, 2016). NMFS received comments during the public comment period asking the agency to clarify the consultation process. In response to comments (*see* ''Consideration of Quality and Use of Data'' in section II of this preamble), NMFS clarifies in the final rule that, related to its consideration of data use, a Council must consult with its SSC and/or the regional NMFS science center on reporting methodology design considerations such as data elements, sampling designs, sample sizes, and reporting frequency. Information provided through the consultation process will enable a Council to develop an SBRM that incorporates scientific input and that will provide data that can be used, in conjunction with other relevant sources of data, to assess the amount and type of bycatch occurring in the fishery.

Finally, § 600.1610(a)(2)(iv) requires Councils to consider the scientific methods and techniques available to collect, record, and report bycatch data that could improve the quality of bycatch estimates. As bycatch data collection technologies improve, NMFS anticipates that a Council will consider those technological advances when establishing and reviewing SBRMs in accordance with the review timeline specified in § 600.1610(b). *See* response to comment 47.

F. Review of FMPs

Section 600.1610(b) states that all FMPs must be consistent with this rule within 5 years of its effective date. To verify consistency with this rule, Councils, in coordination with NMFS, must conduct a review of their existing SBRMs. The review should provide

information sufficient for NMFS to determine whether an FMP needs to be amended. The review should be documented, but does not need to be contained in an FMP.

There are several potential outcomes of the review. NMFS could determine that there are FMPs with existing SBRMs that are consistent with this rule, in which case no FMP amendments would be necessary. Other FMPs may describe SBRMs more expansively than the definition in this final rule. For example, they may contain components that are consistent with this rule, along with additional components that are not precluded by this rule, but are not minimally required. Those FMPs also may not require further amendments if NMFS determines they are consistent with this rule. Still other FMPs may describe procedures or activities that comprise an SBRM, but do not explain them in a manner consistent with this rule. In such cases, changes to an FMP, or a fisheries research plan, may be warranted. Consistent with current practices, NMFS encourages Councils to work together and collaborate on SBRM reviews and potential FMP amendments for fisheries that operate across multiple jurisdictions, as appropriate.

After the initial review, Councils, in coordination with NMFS, should periodically review SBRMs to verify continued compliance with the MSA and this rule. Such a review should be conducted at least once every 5 years. Section 600.1610(b) is consistent with the review and improvement of data collection methods, data sources, and applications described under the NS9 guidelines at 50 CFR 600.350(d)(1).

II. Response to Comments

NMFS solicited public comments on the proposed rule for 60 days (February 25 through April 25, 2016), and during that time made presentations to four of the eight Councils and the Highly Migratory Species Advisory Panel. NMFS received 25 substantive comment letters on the proposed rule during the public comment period. Of those, six were form letters that had 65,961 signatures, and 1,382 of those signatories provided individualized add-on comments. The other 19 substantive comment letters were from non-governmental organizations, industry groups/commissions, Councils, and individuals. Summaries of the substantive comments that we received concerning the proposed rule, and our responses to all of the significant issues they raise, are provided below. Comments of a similar nature were grouped together where appropriate.

Need and Effect

Comment 1: Several commenters noted a need for clarification as to whether the proposed rule establishes national requirements or guidance. Some commenters stated that the preamble to the proposed rule stated that the rule is intended to ''establish national requirements and guidance,'' but in fact it provides broad guidelines and few mandatory requirements. Another commenter requested clarification as to whether the proposed rule constitutes guidance to the Councils versus regulatory requirements upon the Councils.

Response: This rule sets forth NMFS' interpretation of the SBRM provision under MSA section 303(a)(11) (16 U.S.C. 1853(a)(11)) and requirements for establishing and reviewing SBRMs consistent with that interpretation. Many provisions of the rule are mandatory. The rule does not, however, prescribe specific details on the types of data collection and reporting procedures needed for each fishery. Instead, the rule requires Councils to undertake a fishery-specific analysis of the SBRM appropriate for the fishery and establish an SBRM that meets the purpose described in § 600.1600.

Comment 2: One commenter suggested that, in order to allow for the most flexible and effective SBRM process, the agency should issue these SBRM provisions as guidance, rather than a rule.

Response: As explained in the preamble to the proposed rule, NMFS has never issued regulations that set forth the basic requirements of MSA section 303(a)(11). In the absence of a national SBRM regulation, Councils have taken varying approaches to interpreting the provision, with some adopting the recommendations in *Evaluating Bycatch* and others interpreting the requirement in a different way. Litigation has also influenced the development of SBRMs in some regions. In light of the varying existing approaches, NMFS believes that an analysis and articulation of the basic requirements of section 303(a)(11) through a rulemaking is necessary in order to achieve greater consistency in establishing, documenting, and reviewing SBRMs. Public comment received on the proposed rule has greatly assisted NMFS in evaluating different approaches to interpreting the SBRM provision and developing this final rule. With regard to flexibility, this rule recognizes the diversity of fisheries across the country by allowing for a fishery-specific evaluation of the type of SBRM that is appropriate for a fishery, consistent with the requirements of the MSA and this rule.

Comment 3: One commenter stated that the preamble to the proposed rule did not cite a recent North Pacific case that affirmed that the Alaska Region's catch accounting system (CAS) is an SBRM. In light of that case, the commenter requested that the agency consider excluding fisheries under the jurisdiction of the North Pacific Fishery Management Council (NPFMC) from requirements of this rule.

Response: NMFS has prevailed in several SBRM lawsuits, including *The Boat Co.* v. *Pritzker,* No. 3:12–cv–0250–HRH, (D. Alaska Aug. 6, 2014), the North Pacific case mentioned by the commenter. However, as explained in response to comment 2, NMFS believes that it is important to have a national rulemaking applicable to all FMPs. NMFS recognizes that there is a North Pacific-specific observer provision under section 313 of the MSA, 16 U.S.C. 1862, that provides for use of a fisheries research plan. NMFS has revised this final rule in § 600.1610 to account for this provision.

Definition of Bycatch

Comment 4: A commenter requested clarification on the distinction between bycatch and discards.

Response: The distinction between bycatch and discards is clearly laid out in MSA's definitions section and in NMFS' NS9 guidelines. The MSA defines bycatch as fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program. 16 U.S.C. 1802(2). The MSA defines ''economic discards'' as fish which are the target of a fishery, but which are not retained because of an undesirable size, sex, or quality, or other economic reasons (16 U.S.C. 1802(9)), and the term ''regulatory discards'' as fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell (16 U.S.C. 1802(38)). As explained in NMFS' NS9 guidelines, ''[b]ycatch includes the discard of whole fish at sea or elsewhere, including economic discards and regulatory discards. . . .'' 50 CFR 600.350(c)(1).

Comment 5: One commenter recommended that the regulatory text be revised to more clearly indicate that bycatch does not include incidental catch of seabirds or marine mammals. Other commenters recommended

expanding the scope of the rule to provide guidance on the reporting of all types of bycatch, including marine mammals and seabirds. With regard to marine mammal bycatch, one commenter noted that a lack of guidance could lead to ineffective monitoring if Council actions are not integrated with efforts by the relevant take reduction teams.

Response: The requirement to establish an SBRM is a requirement of the MSA. Thus, this rule—which interprets the SBRM provision—is based on the MSA's definitions of ''bycatch'' and ''fish.'' These definitions exclude marine mammals and birds. *See* 16 U.S.C. 1802(2) and (12). In response to comment, NMFS has revised the final rule at § 600.1605(b) to add references to the MSA definitions.

This rule does not preclude Councils from developing programs to collect, record, and report information about marine mammal mortality and injury and seabird interactions or unintentional mortality; however, the MSA does not require Councils to do so to be in compliance with the requirements of section 303(a)(11). Marine mammals are protected under the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.,* which NMFS administers. NMFS is committed to working with the Councils and Take Reduction Teams (TRTs) to reduce bycatch of marine mammals. TRTs provide recommendations to NMFS on measures to reduce marine mammal mortalities and serious injuries in commercial fisheries. NMFS uses these recommendations to develop and implement take reduction plans. TRTs also provide input to NMFS on evaluating the effectiveness of these take reduction plans; such input often includes discussion and recommendations for observer coverage levels to monitor marine mammal bycatch. In previous years, NMFS has augmented observer coverage in specific fisheries to monitor marine mammal bycatch. As such, any marine mammal monitoring will be closely coordinated with monitoring required by an SBRM.

Comment 6: A commenter noted that NMFS' U.S. National Bycatch Report, which reports on all bycatch, defines bycatch broadly as ''discarded catch of any living marine resource plus unobserved mortality due to a direct encounter with fishing gear.'' The commenter stated that NMFS needs better data for the report, so the rule should define bycatch in a similar way.

Response: NMFS is not changing the definition of bycatch in the final rule for the reasons explained in the response to comment 5. NMFS notes that the National Bycatch Report is not a requirement under the MSA or other law. Since 2011, NMFS has issued the National Bycatch Report and its Updates to inform the public about bycatch and provide a cross-program perspective to inform agency priorities and planning related to bycatch mandates under the MMPA, ESA, MSA, and other statutes and international agreements. Given the varying definitions of bycatch under these authorities, the National Bycatch Report and its Updates use a broader definition of bycatch than the MSA; they include information about fish, as well as marine mammal and seabird interactions. Therefore, in preparing the National Bycatch Report and its Updates, NMFS compiles information from numerous sources, including, but not limited to, observer data, logbooks, vessel trip reports, dealer reports, landing receipts, surveys, and stock assessments; these documents do not rely solely on data provided by SBRMs. The more narrow definition of bycatch in the MSA, and the resulting scope of this final rule, will not hinder future versions of the National Bycatch Report.

NMFS also notes that the National Bycatch Report and its Updates provide a compilation of bycatch information and national and regional overviews to document bycatch in fisheries over time. They are not, however, used for day-to-day management of fisheries. The 2011 First Edition of the Report used data available in 2005, Update 1 (2013) used 2010 data, and Update 2 (2016) used 2011–2013 data. U.S. National Bycatch Report, First Edition Update 2 (February 2016) at p. 9 (*see http://www.st.nmfs.noaa.gov/Assets/Observer-Program/bycatch-report-update-2/NBR%20First%20Edition%20Update%202_Final.pdf*). NMFS has created a custom database that allows members of the public to query bycatch estimates that have been published in the National Bycatch Report Updates. Members of the public can access the database at *http://www.st.nmfs.noaa.gov/observer-home/first-edition-update-1.*

Comment 7: Several commenters submitted comments on the definition of bycatch with respect to recreational fishing. One commenter suggested that fish released alive under recreational fishing be included as bycatch to be monitored as part of an SBRM. The commenter stated that recreational fishing can be a large component of the total catch. Further, recreational bycatch can be a significant source of mortality, and in some cases, exceeds the amount of fish caught and kept. Another commenter requested that the rule include an exemption for ''catch and release'' fishing and asked whether ''no possession'' implies that encounters are ''catch and release.''

Response: NMFS does not agree with the suggestion to broaden the definition of bycatch in this rule to cover all fish released alive under recreational fishing. ''[F]ish released alive under a recreational catch and release fishery management program'' are excluded from the MSA definition of bycatch. 16 U.S.C. 1802(2). NMFS' NS9 guidelines clarify that ''[a] catch-and-release fishery management program is one in which the retention of a particular species is prohibited. In such a program, those fish released alive would not be considered bycatch.'' 50 CFR 600.350(c)(2).

NMFS agrees that release mortality is an important issue, and the agency has taken steps to understand and address this issue. In August 2014, NMFS published a Technical Memorandum entitled *Fisheries Release Mortality,* which summarized NMFS-funded fish release mortality research over the past 15 years, identified release mortality data gaps, compiled mortality estimates used by NMFS, and identified criteria to help scientists and managers focus release mortality resources (NOAA Technical Memorandum NMFS–F/SPO–142, July 2014). In February 2016, NMFS released an Action Plan for Fish Release Mortality Science, which identifies national goals and objectives for estimating and reducing discard and release mortality for fish in commercial and recreational fisheries (*https://www.st.nmfs.noaa.gov/ecosystems/bycatch/discard-and-release-mortality*). NMFS directs commenters to these documents for further information regarding the agency's efforts to address and evaluate release mortality in both commercial and recreational fisheries.

Interpretation of ''*Standardized*''

Comment 8: Several commenters stated that NMFS' proposed definition of ''standardized reporting methodology'' in § 600.1605(a) is contrary to Congress' intent and the ordinary meaning of the word ''standardized.'' Commenters asserted that the MSA requires that SBRMs be standardized at the national, regional, or ecosystem level. In general, many of these commenters expressed concern that without regional, ecosystem, or national standardization, it will be difficult or impossible to assess the bycatch of species between fisheries or within multispecies fisheries; compare or combine data across fisheries or regions; understand ecosystem, regional, or national bycatch trends; or minimize bycatch. One commenter recommended

standardization according to gear type, specifically, reporting of bycatch by gear as a ratio of bycatch per unit effort to catch per unit effort (BPUE: CPUE). One commenter agreed that the proposed definition reflects the statutory language, but urged NMFS to direct managers to consider monitoring fish caught as bycatch that are managed in separate FMPs and by different management entities. One commenter also noted that the rule should be revised in light of NMFS' acknowledgment in the 2011 U.S. National Bycatch Report that it is difficult to compare or combine bycatch data across fisheries or regions due to differences in bycatch data, including the quantity and quality of data and reporting in pounds vs. individuals.

Response: NMFS is not changing its fishery-level approach to standardization in the final rule. The rule at § 600.1605(a) defines ''standardized reporting methodology'' with reference to a fishery, consistent with MSA section 303(a)(11). That section requires that ''Any fishery management plan . . . with respect to any fishery, shall . . . establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.'' 16 U.S.C. 1853(a)(11). The characteristics of bycatch in a fishery vary based on the fishing activity and operations. Therefore, requiring that SBRMs be standardized at the regional or national level would constrain the ability to tailor bycatch data programs to the needs of specific fisheries. However, consistent with current practices, the final rule encourages Councils to work together and collaborate on SBRMs for fisheries that operate across multiple jurisdictions, as appropriate.

NMFS does not agree that this rule will make it more difficult to assess the bycatch of species between fisheries or within multispecies fisheries; compare or combine data across fisheries or regions; understand ecosystem, regional, or national bycatch trends; or minimize bycatch. Unit conversion is a standard approach to dealing with data disparities. The agency routinely compiles data from varied sources and uses mathematical conversions and analytical tools to understand the data at the necessary scale.

With regard to gear type, as discussed in the preamble (*see* section I. C.), a Council may determine that different collection, recording, and reporting procedures are appropriate within a fishery for different gear types. However, because different fishing activities and operations (including but not limited to gear type) may affect the amount and type of bycatch that occurs in a fishery and thus the types of reporting procedures that may be needed in a fishery, NMFS does not agree that SBRMs across a region or the country must be standardized by gear type. Furthermore, NMFS is not making changes to the rule in response to the suggestion to report bycatch by gear as a ratio of bycatch per unit effort to catch per unit effort (BPUE: CPUE). This suggestion pertains to how data might be displayed or synthesized when assessing the amount and type of bycatch. As explained previously, this rule pertains to the requirements for the collection, recording and reporting of bycatch data.

With respect to the National Bycatch Report, NMFS reiterates that the Report is not required under the MSA. Nevertheless, since 2011, NMFS has issued a National Bycatch Report and its Updates that provide a national- and regional-level look at bycatch. *See* response to comments 6 and 26 for further information on the National Bycatch Report. For the Second Edition of the National Bycatch Report (to be published in late 2017), NMFS is working to develop length-weight conversion factors for use in the Report. The use of conversion factors is not new; for example, NMFS has used such conversion factors in the pelagic longline fisheries based in Hawaii and American Samoa (*https://pifsc-www.irc.noaa.gov/library/pubs/DR-16-004.pdf*). Unit conversion and mathematical analysis is a standard approach to dealing with data disparities.

Comment 9: One commenter asserted that the inclusion of ''subset of a fishery'' in § 600.1605(a) is inconsistent with the MSA. Another commenter asked what a sub-''set'' is, noting that it might be difficult in some fisheries to define a ''set'' and that, for many fisheries, collecting data at the ''set'' level would be extremely burdensome. The commenter expressed concern that fine-scale data collection might encourage inaccuracies and non-compliance with reporting requirements.

Response: The intent of the proposed rule's § 600.1605(a) (81 FR 9413, February 25, 2016) was to acknowledge that different fishing activities and operations can affect the amount and type of bycatch that occurs, and thus the types of reporting procedures that may be needed. Bycatch can be affected by, among other things, the gear types used, how gear is deployed, gear selectivity, fishing effort, fishing locations, and existing management measures. In response to this comment, NMFS has amended § 600.1610(a)(2)(ii) to recognize that the amount and type of bycatch occurring in a fishery may vary based on different fishing operations. NMFS has also removed ''subset'' and refers simply to ''fishery'' in § 600.1605(a), to reflect the language of MSA section 303(a)(11). NMFS notes that the MSA's definitions of ''fishery'' and ''stock of fish'' are broad. *See* 16 U.S.C. 1802(13) (defining ''fishery'' as one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and . . . any fishing for such stocks), and 16 U.S.C. 1802(42) (defining a ''stock of fish'' as a species, subspecies, geographical grouping, or other category of fish capable of management as a unit). Given the broad definition of ''fishery'' and the purpose of an SBRM, NMFS continues to believe that a Council, when developing an SBRM, may take into consideration different fishing activities and operations. For example, if there is fishing for a stock using trawl nets and gill nets, a Council may determine that different data collection, recording, and reporting procedures are appropriate for the two gear types. In such case, the FMP must identify what the established, consistent procedures are for both gear types. *See also* section I. C.

Comment 10: One commenter noted that in the Greater Atlantic Region, the current SBRM is designed by ''fishing modes,'' which, in some cases, may not meet the statute's definition of a ''fishery.'' The commenter recommended that it be made clear that this approach meets the requirements of the statute.

Response: NMFS is not making revisions to the final rule in response to this comment. NMFS approved the SBRM Omnibus Amendment for New England and Mid-Atlantic fisheries in June 2015, after reviewing the amendment for consistency with the MSA and other applicable law. Moreover, the SBRM Omnibus Amendment is currently the subject of litigation.

Comment 11: NMFS received comments that the lack of standardization in the proposed rule conflicts with the requirements of National Standard 3 (NS3).

Response: This rule is consistent with NS3, which requires, to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. 16 U.S.C. 1851(a)(3). The

NS3 guidelines provide guidance for interpreting a ''management unit'' in the context of a ''fishery.'' *See* 50 CFR 600.320(d) (defining management unit as ''a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives'') and (d)(1) (explaining that ''choice of a management unit depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives''). As explained in response to comment 8, this final rule defines standardized reporting methodology with regard to a ''fishery.'' Thus, NMFS does not see any conflict between the two provisions. To the extent there is any conflict, NMFS notes that NS3 contains the qualifier, ''to the extent practicable.''

Comment 12: One commenter recommended establishing minimum standards for federal bycatch reporting and offered to work with NMFS to define these standards and identify what can be done to help those Councils whose fisheries do not meet the minimum standards.

Response: This final rule establishes minimum standards for the collection, recording, and reporting of bycatch data under MSA section 303(a)(11). NMFS looks forward to working with all Councils as they review their FMPs under this final rule.

Purpose of a Standardized Reporting Methodology

Comment 13: Many commenters stated that the proposed rule's § 600.1605(a) (81 FR 9413, February 25, 2016) is flawed because it defines standardized reporting methodology only with regard to collection, recording, and reporting of bycatch data, and not the assessment or analysis of that data. Several commenters asserted that this approach is contrary to the plain language of the MSA and Congressional intent, and that courts have found that bycatch assessment is a required component of SBRM.

Response: NMFS disagrees that an assessment methodology is a required part of SBRM, but agrees that an SBRM needs to meet its intended purpose, which includes collecting data that can be used to assess the amount and type of bycatch in a fishery. The proposed rule acknowledged this nexus between the SBRM and the assessment of bycatch. To reinforce this link, NMFS has added to § 600.1600 explanatory language from the proposed rule preamble stating that the purpose of an SBRM is to collect, record, and report bycatch data in a fishery that, in conjunction with other relevant sources of information, are used to assess the amount and type of bycatch occurring in a fishery and to inform the development of conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality. In addition, NMFS has added a new paragraph (iv) to § 600.1610(a)(2) that requires a Council to address how the data resulting from an SBRM are used to assess the amount and type of bycatch in the fishery, and requires the Council to consult with its SSC and/or regional NMFS science centers on SBRM design considerations (*e.g.,* data elements, sampling designs, sample sizes, and reporting frequency). NMFS believes this approach is consistent with the plain language of section 303(a)(11) of the MSA, which requires that an FMP establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that minimize bycatch and bycatch mortality to the extent practicable. 16 U.S.C. 1853(a)(11). Section 303(a)(11) requires a reporting methodology, not an *assessment* methodology. Other section 303(a) provisions explicitly require that assessments be included in an FMP, but this is not the case for section 303(a)(11). *See e.g.,* 16 U.S.C. 1853(a)(3) (requiring FMP to assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery), and 16 U.S.C. 1853(a)(4) (requiring that FMPs assess and specify . . . the capacity and extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield . . .). NMFS disagrees that its interpretation is contrary to Congressional intent. In support of their comments, commenters cited Senate Report 104–276, which states that the Sustainable Fisheries Act (S. 39) ''would mandate the assessment of bycatch level in each fishery'' (S. Rep. No. 104–276, at 99 (1996)). This report discussed a version of a Senate bill that was reported out of committee on May 23, 1996, which would have required that FMPs ''assess the amount and type of bycatch occurring in the fishery.'' That text was not enacted.

NMFS recognizes that some district courts have described the SBRM requirement as a bycatch assessment methodology or have asserted that section 303(a)(11) requires the assessment of bycatch in the fishery. *See, e.g., Oceana* v. *Locke,* 831 F.Supp.2d 95 (D.D.C. 2011); *Pac. Marine Conservation Council* v. *Evans,* 200 F. Supp.2d 1194 (N.D. Cal. 2002). NMFS considered this case law in developing the proposed rule. After taking public comment into consideration, and reconsidering relevant case law, NMFS continues to believe that the approach taken in this final rule is appropriate and consistent with the MSA, for the reasons explained above. To the extent that courts have described the SBRM provision as an ''assessment methodology,'' NMFS notes that the cases did not engage in a comprehensive review of the statutory construction of the SBRM provision. Reading section 303(a)(11) in context with other provisions of the MSA, NMFS believes that the final rule's definition of ''standardized reporting methodology,'' which does not include assessment methods, is consistent with the MSA.

Comment 14: Several commenters asserted that data collection and assessment are inextricably linked. Where, how, how much, and what type of data is collected determines how those data may be analyzed and used to come up with bycatch estimates. If the design of an SBRM is disconnected from the needs of the bycatch assessment process, there will be a waste of resources and effort, and scientists and managers will not have reliable data they need to get an accurate accounting of bycatch, reduce uncertainty in the assessment of species, and better manage the fishery to minimize bycatch. Other commenters agreed that fishery managers must consider data methodologies in tandem with assessment methodologies to make sure that data will actually be usable to ''assess the amount and type of bycatch occurring in a fishery.''

Response: NMFS affirms that an SBRM must meet its statutory purpose, which includes collecting data that can be used to assess the amount and type of bycatch occurring in a fishery. The final rule does not delink data collection and assessment. Rather, as explained in response to comment 13, NMFS has revised the final rule to reinforce this nexus.

Estimating or assessing bycatch often requires a variety of highly technical data that can vary based on fishery, region of the country, and type of bycatch involved. Relevant data may come from observer program databases, logbooks, commercial landings databases, the NMFS Marine Recreational Information Program database, or other sources. As explained in the preamble of the proposed rule (81 FR 9413, February 25, 2016), a variety of different models or approaches may be used to synthesize these data to assess, evaluate, or estimate bycatch. Given that the assessment/estimating of

bycatch is a scientific matter, and science is a dynamic process with new findings constantly advancing the state of knowledge (*see* National Standard 2 guidelines, 50 CFR 600.315(a)(5)), NMFS does not believe that an FMP—which is a management and policy document that can take a long time to amend—must specify the approaches and methods that scientists must use to make such assessments or estimations. If a Council wants to include such methods in its SBRM, the Council may do so, but is not required to.

Uncertainty in data is a reality of fisheries management. *See* NS9 guidelines, 50 CFR 600.350(d)(2) (stating that due to limitations in available information, fishery managers ''may not be able to generate precise estimates of bycatch and bycatch mortality of other effects'' for management alternatives). NMFS' National Standard 2 guidelines provide that mandatory measures not be delayed due to incomplete data, but management decisions should recognize the risks associated with the sources of uncertainty and gaps in the scientific information. *Id.* § 600.315(a)(2), (a)(6)(v). Consistent with these guidelines, and in response to comments, NMFS has revised the proposed rule regulatory text by adding language to § 600.1610(a)(2) in a new paragraph (iii) to require a Council to address uncertainty and design an SBRM so that uncertainty associated with the resulting bycatch data reported to the Secretary can be described, quantitatively or qualitatively. NMFS clarifies in that subsection that Councils should seek to minimize uncertainty in the resulting data, recognizing that different degrees of data uncertainty may be appropriate for different fisheries. *See* comment and response 31, *infra,* discussing data quality issues.

Comment 15: Several commenters asserted that NMFS must not step away from prior guidance in *Evaluating Bycatch* that ''the combination of data collection and analyses that is used to estimate bycatch in a fishery constitutes the SBRM for that fishery.''

Response: NMFS acknowledged in the notice of proposed rulemaking that Appendix 5 of *Evaluating Bycatch* describes SBRM as the combination of data collection and analyses that is used to estimate bycatch in a fishery. However, as previously noted, *Evaluating Bycatch* is a technical memorandum; neither the memorandum nor its appendices established binding policy or agency interpretation of MSA section 303(a)(11). NMFS is issuing this rule to set forth its interpretation of section 303(a)(11). In developing this rule, NMFS undertook a comprehensive evaluation of section 303(a)(11), including the language of the provision and its context in the overall statutory scheme for fisheries management established by Congress in the MSA. *See* ''Purpose of an SBRM'' above, responses to comments 13 through 17, and ''Activities Associated with an SBRM'' in the proposed rule (discussing distinction between data collection/reporting and assessment) (81 FR 9413, February 25, 2016). NMFS believes that it is important to be clear about the key policy choices and objectives associated with establishing a reporting methodology, and not confuse those choices with statistical and technical approaches for estimating bycatch that are inherently scientific and data dependent, or with the policy choices associated with developing measures to minimize bycatch or bycatch mortality. After careful analysis and consideration of public comments, NMFS has decided not to retain the approach from *Evaluating Bycatch.*

Comment 16: One commenter states that, assuming the agency's proposed rule for SBRM was in place, Councils and scientists would now have no guidance for how to actually assess bycatch. There is no guidance provided, and none promised, on how to model the amount, type, and scope of bycatch with the (likely) piecemeal and uneven data provided by SBRMs.

Response: NMFS relies on expertise from six regional science centers to provide scientific information and analyses for fishery management. Providing guidance in this rule on how to assess bycatch is inappropriate and unnecessary given the dynamic nature of science and existing guidance and scientific processes. Notably, National Standard 2 (NS2), 16 U.S.C. 1851(a)(2), requires that conservation and management measures be based on the best scientific information available, and NMFS has provided guidance on NS2 at 50 CFR 600.315.

Best scientific information available includes, but is not limited to, models, data, analyses, and scientific assessments, and new scientific findings constantly advance the state of knowledge. *Id.* § 600.315(a)(4)–(5). As explained in the NS2 guidelines, scientific information is not conducted in a vacuum, but is subject to peer review, consistent with the guidelines and the Office of Management and Budget Final Information Quality Bulletin for Peer Review. *Id.* § 600.315(a)(6)(vii). Moreover, each Council has a Scientific and Statistical Committee that is responsible for providing the Council with ongoing scientific advice. *Id.* § 600.315(c) and 16 U.S.C. 1852(g)(1).

Comment 17: One commenter supports the clarification that the SBRM consists of the data collection and reporting programs, and is distinct from the methods used to assess bycatch and the measures to minimize bycatch. The proposed rule preamble indicated that a Council may include other elements (such as the analytic approach used to assess bycatch), and the commenter suggested adding this point to the regulatory text.

Response: NMFS thanks the commenter for expressing support for its approach. However, NMFS does not believe that changes to the regulatory text are necessary. As explained in the proposed rule preamble (81 FR 9413, February 25, 2016), this rule describes the basic requirements of the SBRM provision of section 303(a)(11) of the MSA. A Council may, but is not required to, add other relevant information to its FMP beyond the basic requirements of this rule.

Comment 18: One commenter stated that the underlying purpose of an SBRM might affect its design, as data provided by these programs can be used a number of different ways, and the design needs to be appropriate for these uses. For example, the design of an SBRM may be very different if it is primarily used to support stock assessments rather than fishery management decisions. In the former case, an argument could be made that the responsible science center should have extensive input in its development. On the other hand, if intended primarily to address the requirements placed on managers to minimize bycatch to the extent practicable, the Council's needs should have more weight. The proposed rule should suggest a clear discussion in the SBRM about how its design addresses the needs of scientists and managers.

Response: The rule requires that an FMP, or a fishery research plan authorized under 16 U.S.C. 1862, explain how an SBRM meets the purpose described in § 600.1600, based on an analysis of requirements in § 600.1610(a)(2). The purpose of SBRM is two-fold: Provide data that, in conjunction with other relevant sources of information, are used to assess the amount and type of bycatch occurring in a fishery and for informing the development of conservation and management measures to minimize bycatch. Given this purpose, § 600.1610(a)(2) requires a Council to address the characteristics of bycatch in the fishery, the feasibility of the SBRM, data uncertainty, and data use. NMFS

acknowledges in the final rule that different SBRMs may be appropriate for different fisheries due to the inherent variability among fisheries. Scientific input is an important aspect of developing an SBRM, thus § 600.1610(a)(2)(iv) requires a Council to consult with its SSC and/or regional NMFS science center on SBRM design considerations.

Comment 19: One commenter asserted that the SBRM rule should follow a precautionary, ecosystem-based approach that can be applied uniformly to all fisheries to count, cap and control bycatch.

Response: For the reasons explained in responses to comments 1, 2, 8 and other comments, this final rule takes a fishery-specific approach to establishing SBRMs. NMFS believes that this rule will ensure the standardized collection, recording, and reporting of bycatch data for each fishery. A uniform approach to count, cap, and control bycatch across all fisheries is not required under the MSA, and is not practical or cost effective, given the variability in fishery characteristics. *See* response to comment 8 for further explanation. NMFS believes that this rule is consistent with and complementary to the agency's policy for ecosystem-based fisheries management. NMFS strongly supports implementation of Ecosystem-Based Fisheries Management (EBFM) to better inform and enable decisions regarding trade-offs among and between fisheries (commercial, recreational, and subsistence), aquaculture, protected species, biodiversity, and habitats. Recognizing the interconnectedness of these ecosystem components will help maintain resilient and productive ecosystems (including human communities), even as they respond to climate, habitat, ecological, and other environmental changes. *See http://www.st.nmfs.noaa.gov/Assets/ecosystems/ebfm/Final-EBFM-Policy-PDS-Review-5.20.2016-final-for-PDS.pdf.* This rule is consistent with the EBFM policy statement because it provides for a national approach to establishing and reviewing SBRMs and will improve NMFS' understanding of the impacts of a fishery on non-target stocks. Such information will help NMFS and the Councils consider the ecosystem-level trade-offs that are a key component of EBFM.

Comment 20: One commenter stated that in order for data to be ''useful'' (*see* proposed § 600.1610(a)(1)(i) at 81 FR 9413, February 25, 2016), clear criteria must be set so that standardized bycatch data can be fed into the calculation of annual catch limits (ACL) and fully considered in the implementation of accountability measures (AM). Bycatch must be accurately assessed because it counts against a stock's catch limit. Bycatch must be monitored to comply with both the SBRM provision in MSA section 303(a)(11) and ACL/AM requirements in MSA section 303(a)(15).

Response: NMFS has deleted the term ''useful'' and revised the final rule to require that Councils address data use and data uncertainty when establishing or reviewing an SBRM. *See e.g.,* responses to comments 13 and 31 through 33. Data resulting from SBRMs may be used to inform management decisions beyond bycatch-related ones, and NS2 provides the standard for data used to inform such decisions: Conservation and management measures shall be based on the ''best scientific information available.'' 16 U.S.C. 1851(a)(2). For the reasons explained in responses to comments 31 through 33, NMFS is not establishing national standards for accuracy of data or estimates in this final rule.

NMFS notes that SBRMs (16 U.S.C. 1853(a)(11)) and ACLs/AMs (16 U.S.C. 1853(a)(15)) are separate statutory requirements, which should not be conflated. *See Oceana* v. *Locke,* 831 F.Supp.2d 95 (D.D.C. 2011). Detailed guidance on establishing ACL/AM mechanisms is provided in the National Standard 1 (NS1) guidelines (50 CFR 600.310). To the extent that data from an SBRM are used in specifying ACLs, this final rule complements the NS1 guidelines. The NS1 guidelines state that the ''acceptable biological catch'' accounts for scientific uncertainty in the estimate of the overfishing limit for a stock or stock complex. 50 CFR 600.310(f)(2)(ii). Section 600.1610(a)(2)(iii) also addresses uncertainty, requiring that an SBRM be designed so that uncertainty associated with the resulting data can be described quantitatively or qualitatively. This is consistent with the NS2 guidelines (50 CFR 600.315), which provide guidance on uncertainty and issues related to use of the best scientific information available. Moreover, the NS1 guidelines refer to mortality of fish that are discarded (50 CFR 600.310(f)(2)(i)), and § 600.1610(a)(2)(i) of this final rule requires that, when developing an SBRM, a Council must address, among other things, ''the importance of bycatch in estimating the fishing mortality of fish stocks.''

Types of Data Collection, Recording, and Reporting Procedures

Comment 21: One commenter recommended eliminating the ''self-reported mechanisms'' option provided for in the proposed rule's § 600.1610(a) (81 FR 9413, February 25, 2016) to help eliminate bias in data collection.

Response: NMFS does not agree with this comment; self-reported mechanisms are important to include as a potential reporting procedure because they are cost effective, feasible, and already available and appropriate for use in various fisheries to report bycatch data. Self-reported mechanisms (such as logbooks that include bycatch reporting) usually are required of all fishery participants, and therefore represent a near-census of the fishery. The costs of logbook programs are typically low, and, concerns regarding safety are limited to concerns that already exist with fishing operations, which are substantial for fishermen but basically nonexistent for those processing logbooks. However, NMFS recognizes that an SBRM based solely on logbooks will not be appropriate for all fisheries. That is why the rule requires Councils to undertake a fishery-specific analysis of SBRMs. Further, the rule requires that an SBRM be designed so that the uncertainty associated with the data resulting from the SBRM can be described. Management decisions should recognize the risks associated with that uncertainty. *See* National Standard 2 guidelines, 50 CFR 600.315.

Comment 22: Many commenters recommended reporting bycatch data and estimates in a manner that is useful for stakeholders, managers, and scientists.

Response: NMFS agrees with this comment. The final rule states that the purpose of an SBRM is to collect, record, and report bycatch data that, in conjunction with other relevant sources of information, can be used to assess bycatch and inform the development of conservation and management measures. Any SBRM established by a Council must achieve this purpose, thereby ensuring that bycatch data resulting from an SBRM will be useful for stakeholders, managers, and scientists.

Comment 23: Several commenters recommended requiring observer programs and/or electronic monitoring to promote the collection of accurate data and mitigate against data collection bias. One commenter stated other agency documents have recognized the benefits of observers for quantifying and estimating bycatch. However, the proposed rule does not require trained observers.

Response: NMFS disagrees that the rule should require the implementation of observer or electronic monitoring programs. Observer and electronic monitoring programs are not the only ways to collect, record, and report

bycatch, and the MSA does not require their inclusion in every SBRM. *See* 16 U.S.C. 1853(a)(11), (b)(8). NMFS recognizes that observer programs are used in many fisheries for collecting bycatch data. However, observer programs are costly and logistically challenging, and such programs may not be needed in all fisheries. Requiring every SBRM to include an observer program would not be an efficient use of resources. Further, it is NMFS' policy to encourage the consideration of electronic technologies to complement and/or improve existing fishery-dependent data collection programs to achieve the most cost-effective and sustainable approach that ensures alignment of management goals, data needs, funding sources and regulations. *See* NMFS Policy Directive 30–133, Policy on Electronic Technologies and Fishery-Dependent Data Collection (May 3, 2013). However, the adoption of new technologies raises numerous fishery-specific technical, legal, and policy issues, and, as with observer programs, electronic monitoring programs may not be needed or feasible in a particular fishery. Recognizing the diversity of fisheries across the country, this rule requires Councils to undertake a fishery-specific evaluation to determine the SBRM appropriate to a fishery, while still achieving the purpose of an SBRM as described in § 600.1600.

Comment 24: A commenter requested that intercept surveys be explicitly mentioned in § 600.1610(a) as an example of a self-reported mechanism.

Response: The types of self-reported mechanisms identified in § 600.1610(a)(1) are examples; this list is not exhaustive or limiting. NMFS agrees that intercept surveys are a type of self-reported mechanism, along with others, that could be included in an SBRM.

Comment 25: A commenter requested written reports for the Councils (and the public) from NMFS each year that minimally report by species and sector how many fish were landed and how many were released. To track Council progress towards minimizing bycatch, the commenter suggested a report in December on the first 6 months of the year and a final report in June showing landings and released fish by sector by species for the previous year. The commenter also requested that preliminary bycatch information by sector be provided at each Council meeting when landings information is presented.

Response: Catch and landings data and estimates/assessments are available through a variety of means, including, but not limited to, stock assessments and other scientific documents and reports, SAFE reports, annual Fisheries of the United States reports, the National Bycatch Reports and national reports to international committees. Landings data can be accessed online using NMFS' species information system at *https://www.st.nmfs.noaa.gov/sisPortal/sisPortalMain.jsp.*

Comment 26: One commenter stated that locating specific data and metadata about bycatch is an ongoing issue because various data are reported in disparate reports. The commenter suggested including a provision to require the movement to housing of data in a single source (such as a data warehouse) to improve standardizing, documenting, and accessing data.

Response: Since 2011, NMFS has published a series of National Bycatch Reports and Updates that provide information on fishery- and species-specific bycatch estimates for major U.S. fisheries around the country. Some of the estimates contained in the National Bycatch Reports and Updates are also published in other NMFS documents such as its marine mammal stock assessment reports. Additionally as stated in response to comment 6 and 25, NMFS has created a custom database that allows members of the public to query bycatch estimates that were published in the National Bycatch Report Updates. (Members of the public can access the database here: *http://www.st.nmfs.noaa.gov/observer-home/first-edition-update-1*). *See* responses to comments 8 and 9 for an explanation as to why section 303(a)(11) and this rule do not require data collection to be standardized at the national level.

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Comment 27: One commenter stated that the required factors for SBRMs (proposed § 600.1610(a)(2)(i), (ii) at 81 FR 9413, February 25, 2016) are minimal and lack specificity. Details of establishing and reviewing SBRMs are left to Councils, and NMFS has no enforcement mechanism to ensure SBRMs are established and no option to take over if a Council fails to establish an SBRM. NMFS should revise the rule to make SBRMs mandatory. In addition, the rule should prescribe and detail each aspect of bycatch data collection and assessment to allow uniformity of information that can be aggregated and compared, ideally not only nationally but also internationally.

Response: The requirement to establish an SBRM is mandatory under MSA section 303(a)(11). Section 600.1600 and the proposed rule preamble (81 FR 9413, February 25, 2016) explicitly state that this is an MSA requirement. In response to public comments, NMFS has included in the final rule revisions that clarify the requirements (initially referred to as ''factors'' in the proposed rule) for establishing and reviewing an SBRM. Section 600.1610(a)(1) provides that an FMP, or a fishery research plan as authorized under 16 U.S.C. 1862, must explain how the methodology meets the purpose described in § 600.1600, based on an analysis of the requirements set forth in § 600.1610(a)(2): Characteristics of bycatch, feasibility, data uncertainty, and data use. NMFS disagrees that methodology needs to be standardized at a national or international level. *See* comments and responses 1, 2, 8, and 9. With regard to data assessment, this rule requires a Council to address data use and data uncertainty and to consult with its SSC and/or NMFS science centers. *See* comments and responses 16, and 31 through 33. NMFS does not believe more prescriptive text is needed regarding data collection and assessment.

Under the MSA, Councils are in the first instance responsible for developing FMPs and addressing mandatory FMP requirements, including SBRMs. NMFS has a seat on each Council. NMFS will use its regular procedures for approval of FMPs and FMP amendments to ensure that FMPs and their implementing regulations are consistent with the MSA and other applicable laws. NMFS notes that MSA section 304(c) specifically addresses when NMFS may prepare an FMP.

Comment 28: NMFS received comments stating that its proposed regulations regarding the contents of FMPs and the factors that a Council must consider in establishing or reviewing an SBRM are too prescriptive. One commenter recommended revising 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 SBRMs. The commenter recommended changes to the regulatory text to provide greater flexibility.

Response: As explained previously, the purpose of this rule is to set forth the basic requirements of MSA section 303(a)(11). *See* comments and responses 1 and 2 (explaining the effect and need for rule). NMFS does not believe the rule is overly prescriptive, as it takes a fishery-specific approach, and does not prescribe specific details on the methodology needed for each fishery.

Comment 29: A commenter stated that § 600.1610(a)(1) should be revised to allow Councils to include a more detailed description of the SBRM in

other documents than the FMP. For example, the North Pacific Fishery Management Council and NMFS use an Annual Deployment Plan (ADP) process to determine the scientific sampling plan and method for assigning observers to vessels and processing plants. This can change from year to year. Under proposed § 600.1610(a)(1) at 81 FR 9413, February 25, 2016, 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. This is not necessary and is directly counter to the overall objective of this proposed rule, which is to provide the public with greater clarity about the provisions of an SBRM.

Response: Each FMP must identify the required procedure or procedures that constitute the SBRM for a fishery. *See* § 600.1610(a)(1). In addition, an FMP, or fishery research plan as authorized under 16 U.S.C. 1862, must explain how an SBRM meets the purpose described in § 600.1600, based on an analysis of four requirements under § 600.1610(a)(2). The rule provides that the FMP or fisheries research plan may reference analyses and information in other documents. NMFS has also revised § 600.1610(a)(1) to state that, in addition to any proposed implementing regulations, a Council should also provide in its FMP, or fishery research plan authorized under 16 U.S.C. 1862, guidance to NMFS on how to adjust implementation of an SBRM consistent with the FMP. In the North Pacific, the ADP referenced by the commenter is a component of the fishery research plan, thus NMFS and the Council may continue to use the ADP to determine annually the scientific sampling plan and method for assigning observers to vessels and processing plants, consistent with the fisheries research plan and FMP. *See* comment and response 48 for additional explanation.

Consideration of Quality and Use of Data

Comment 30: One commenter expressed support for the requirement for Councils to consider data quality.

Response: NMFS appreciates the support regarding the consideration of data quality. In the final rule, NMFS has elaborated on the concept of data quality by requiring Councils to address both the uncertainty of the data and the use of the data resulting from the SBRM. *See* comments and responses on ''Purpose of a Standardized Reporting Methodology'' and comments and responses 31 through 36.

Comment 31: Several commenters asserted that the rule must incorporate standards for precision and accuracy, or should provide guidance that SBRMs produce statistically accurate, precise, and/or reliable estimates of bycatch. Another commenter stated that while the MSA does not specify a specific level of accuracy or precision, it does require that SBRMs produce data that are accurate and reliable enough to satisfy the statutory requirement to develop measures to minimize bycatch and bycatch mortality. Commenters cited several court decisions regarding SBRMs and accuracy or reliability of data. Some commenters also asserted that the proposed rule would result in data that is contrary to the agency's guidelines for National Standard 2 (NS2).

Response: NMFS agrees that an SBRM must meet its statutory purpose. *See* response to comment 13 for further explanation. To that end, the final rule requires Councils to explain how a chosen SBRM meets its statutory purpose, based on an analysis of the characteristics of bycatch in the fishery, the feasibility of the SBRM, the uncertainty of the data associated with an SBRM, and the use of the data resulting from an SBRM. *See* comments and responses 32 through 36 for further discussion related to data use and uncertainty considerations.

In this final rule, however, NMFS is not establishing national standards for precision, accuracy, or reliability of bycatch estimates or data. NMFS clarifies in this rule that Councils should seek to minimize uncertainty in the resulting data, recognizing that different degrees of data uncertainty may be appropriate for different fisheries. However, the specific characteristics of each fishery and its bycatch vary widely from region to region and from fishery to fishery. NMFS believes that it is important for Councils to address the characteristics of bycatch in a particular fishery and also address data use, data uncertainty, and feasibility considerations in the context of that fishery. To ensure robust scientific advice in establishing or reviewing SBRMs, § 600.1610(a)(2)(iv) requires a Council to consult with its SSC and/or regional NMFS science centers on reporting methodology design considerations, such as data elements, sampling designs, sample sizes and reporting frequency, all of which contribute to the level of data quality.

The SBRM provision in section 303(a)(11) of the MSA does not specify reliability, accuracy, precision, or other qualifiers regarding bycatch data or estimates. NMFS recognizes that some courts have addressed bycatch estimates or the quality of data in the context of particular FMPs or amendments. *See, e.g., NRDC* v. *Evans,* 168 F.Supp.2d 1149, 1154 (N.D. Cal. 2001) (finding that NMFS failed to address the SBRM requirement and its ''duty to obtain accurate bycatch data''); and *Oceana* v. *Evans,* 384 F.Supp.2d 203, 234–235 (D.D.C. 2005) (finding that NMFS failed to analyze what type of program would ''succeed in producing the statistically reliable estimates of bycatch needed to better manage the fishery'' and to address an accuracy concern in a scientific study). However, these opinions were based on the specific FMPs before the courts, and did not engage in comprehensive analysis of the statutory construction of the SBRM provision. NMFS believes that the approach in the final rule is consistent with MSA section 303(a)(11) and will ensure that SBRMs achieve the statutory purpose for SBRMs (§ 600.1600), while allowing Councils to address the unique circumstances of particular fisheries.

NMFS disagrees that the rule would result in data that is contrary to the NS2 guidelines. NS2 requires that conservation and management measures be based on the best scientific information available. 16 U.S.C. 1851(a)(2). It does not require NMFS to produce statistically reliable data or data that achieves a particular level of precision for the bycatch estimates. In fact, the NS2 guidelines recognize that there may be data limitations in different fisheries. *See* 50 CFR 600.315(a)(3) (noting that ''data-poor'' fisheries may require use of simpler assessment methods and greater use of proxies for quantities that cannot be directly estimated). Consistent with the NS2 guidelines at § 600.315(a)(2) and § 600.315(a)(6)(v), and in response to comments, NMFS has revised § 600.1610(a)(2) by adding a new paragraph (iii) that requires a Council to address uncertainty and to design SBRMs so that uncertainty associated with the resulting bycatch data reported to the Secretary can be described quantitatively or qualitatively.

Comment 32: Many commenters stated that the SBRM rule will result in poor data and, as a result, managers will not be able to sustainably manage fisheries. Commenters asserted that an accurate accounting of bycatch in fisheries is critical to fulfilling the requirements of the MSA to account for all sources of mortality in fisheries management, prevent overfishing, rebuild overfished stocks, and minimize

the amount of bycatch and mortality of unavoidable bycatch.

Response: NMFS disagrees that the rule will adversely affect data collection and fishery management efforts. The rule reinforces that an SBRM must meet its statutory purpose and sets forth requirements for establishing and reviewing SBRMs. For example, the rule includes a requirement that Councils address the uncertainty of the data resulting from an SBRM and that Councils design an SBRM so that the uncertainty of the data can be described. The rule clarifies that Councils should seek to minimize uncertainty in the resulting data, recognizing that different degrees of data uncertainty may be appropriate for different fisheries. The rule also includes a requirement that Councils address how the data resulting from the SBRM are used and consult with their SSCs and/or the regional science centers on SBRM design considerations. NMFS believes that the rule's requirements, along with periodic review of SBRMs, will ensure that SBRMs produce bycatch data that, along with other sources of data, can be used to assess and estimate bycatch and inform the development of conservation and management measures.

The NS2 and NS9 guidelines acknowledge that all scientific data come with a level of uncertainty. *See* response to comment 31 (discussing 50 CFR 600.350(d)(2), § 600.315(a)(2), and § 600.315(a)(6)(v)). As the NS2 guidelines note, science is a dynamic process and new scientific findings constantly advance the state of knowledge. *Id.* § 600.315(a)(5) (stating that best scientific information is, therefore, not static and ideally entails developing and following a research plan). The key thing is to account for uncertainty when considering fishery management decisions. *See e.g.,* 50 CFR 600.315(a)(2) and § 600.315(a)(6)(v) (providing for acknowledgment of uncertainties in scientific information used to inform decision making); and § 600.310(f)(1)(vi) and § 600.310(f)(2)(i) (describing under NS1 guidelines sources of scientific uncertainty and requiring that acceptable biological catch control rule account for scientific uncertainty and the Council's risk policy). NMFS notes that the requirement to establish an SBRM (16 U.S.C. 1853(a)(11)) is a separate statutory requirement from annual catch limits and other overfishing provisions (16 U.S.C. 1853(a)(15) and 1851(a)(1)) and from rebuilding provisions (16 U.S.C. 1854(e)). These various provisions should not be conflated.

Comment 33: One commenter stated that without any guidance on the level of accuracy and precision of the data, it is unclear to what extent the data will be ''useful'' in assessing bycatch to inform management decisions. The commenter stated that the rule itself does not need to specify what constitutes ''useful,'' but it should recommend a clear process, like SSC consultation, that will define ''useful.'' Another commenter stated that NMFS should clarify the language in § 600.1610(b) requiring consultation with a council's SSC, advisory panels, and the NOAA science centers to ensure that bycatch estimation can be appropriately considered with respect to establishing a reporting methodology. Another commenter stated that SBRMs should be designed based on the best scientific statistical and sampling methods available to collect and analyze that data.

Response: In response to comments, NMFS has deleted reference to ''data that are useful'' in the final rule. Instead, NMFS specifies that an SBRM must meet its statutory purpose set forth in § 600.1600, and requires under § 600.1610(a)(2)(iv) consultation with the SSC and NOAA science centers. Specifically, NMFS has revised the final rule to require in § 600.1610(a)(2)(iv) that a Council consult with its SSC and the NOAA science centers on methodology design considerations such as data elements, sampling designs, sample sizes, reporting frequency, and the scientific methods and techniques available to collect, record, and report bycatch data that could improve the quality of the bycatch estimates. Information provided through the consultation process will enable a Council to develop an SBRM that incorporates scientific input and that will provide data that can be used to assess the amount and type of bycatch occurring in the fishery.

Comment 34: Some commenters expressed support for *Evaluating Bycatch,* which recommended the use of at-sea observers and observational technologies, a statistically valid sampling design, a goal to achieve levels of precision of 20 to 30 percent coefficient of variation (CV), models for combining data to assess bycatch, and adherence to data collection and estimation standards. One commenter asserted that, without further study, NMFS cannot step away from the recommendations in *Evaluating Bycatch.* The commenter stated that the memorandum may represent the ''best available science'' and, if so, NMFS must rely upon it and incorporate it in this rule.

Response: NMFS disagrees that *Evaluating Bycatch* should be incorporated into this rule: It was not developed as the agency's interpretation of MSA section 303(a)(11), and it conflates the establishment of a reporting methodology with methods to assess/estimate bycatch. However, NMFS closely reviewed *Evaluating Bycatch* when developing this rule and drew upon concepts and approaches from that report. For example, the report noted that the choice of which monitoring methods are used in a particular fishery is based on consideration of a range of factors, *e.g.,* quality of data, credibility, timeliness, cost, safety. *See Evaluating Bycatch* at 23. With regard to estimates of bycatch from observer data, the report provides CV recommendations, but lists numerous caveats for using precision goals in the context of bycatch reporting/monitoring programs. *See id.* at 103 (noting that there may be circumstances where meeting precision goals for bycatch estimates would not be an efficient use of public resources, funding and logistical constraints may prevent attainment of goals, etc.). NMFS also notes that this rule takes a fishery-specific approach and requires Councils to address bycatch characteristics, data quality, data use, and feasibility, which are considerations reflected in *Evaluating Bycatch.*

Evaluating Bycatch continues to be available as a resource; it contains information that may be helpful when developing SBRMs, such as discussion of regional bycatch and fisheries issues, the advantages and disadvantages of different reporting/monitoring measures, and precision goals for bycatch estimates. However, the report is from 2004, so it would be important for a Council to consider whether more updated information is available when establishing or reviewing an SBRM.

Comment 35: Adequate monitoring of bycatch of fish as well as other living marine resources should be required in the proposed rule. The 2005 report entitled, ''How Much Observer Coverage is Enough to Adequately Estimate Bycatch?'' should be reviewed carefully to assist the Fisheries Service in developing standardized criteria for bycatch monitoring.

Response: In developing this final rule, NMFS considered the Babcock and Pikitch report, ''How Much Observer Coverage is Enough to Adequately Estimate Bycatch?'' NMFS is very familiar with this report, as NMFS has addressed the report in past litigation over SBRMs. As explained in the response to comment 13, assessing and estimating bycatch is not included in the definition of an SBRM. However, the rule requires, among other things,

consideration of data uncertainty and data use in developing and reviewing SBRMs. The Babcock and Pikitch report is one source among many sources of information available to Councils and NMFS when developing and reviewing SBRMs.

NMFS notes that the report focuses on the use of observers for collecting, recording, and reporting bycatch data. The MSA provides that observers may be used, but are not required to be used, for data collection. *See* 16 U.S.C. 1853(b)(8) (providing for observers as a discretionary FMP measure). The report acknowledges that there is a range of observer coverages that may be more or less appropriate for a fishery. The report also notes that determining the appropriate level of sampling effort is an iterative process. This final rule similarly acknowledges that different SBRMs will be appropriate for different fisheries, and provides for scientific input into development of SBRMs and periodic review of SBRMs.

Comment 36: One commenter stated that NMFS should conduct scientific studies on accuracy/bias, precision, management uncertainty, and electronic monitoring advances to determine how to set standardized criteria for bycatch monitoring and reporting.

Response: NMFS strives to continually improve the science underlying its fishery management programs. Pursuant to 16 U.S.C. 1881c, NMFS prepares, in cooperation with the Councils and states, a strategic plan for fisheries research. The NMFS Office of Science and Technology's 2013 Strategic Plan identifies a variety of activities to improve data collection and data assessments for a variety of purposes, including bycatch analyses. *See https://www.st.nmfs.noaa.gov/Assets/Strategic-Plans/ST%20Strategic%20Science%20Plan%20%202013.pdf.* NMFS recently initiated a review and update of this plan. Furthermore, in February 2016, NMFS released a draft *National Bycatch Reduction Strategy* (draft Strategy). *See http://www.nmfs.noaa.gov/sfa/fisheries_eco/bycatch/docs/national-bycatch-strategy-2-23-16-web.pdf.* The first objective of the draft Strategy is to strengthen monitoring and data collection programs through cost-effective use of new and existing tools (*e.g.,* observers, logbooks, and electronic technologies) to collect bycatch data that inform agency bycatch priorities. NMFS received multiple public comments on the draft Strategy and is now working to finalize it and develop action plans. Once the strategy is finalized, NMFS plans to develop regional and national action plans in coordination with stakeholders to identify specific actions that reflect regionally specific bycatch priorities, including research and monitoring priorities. Another example of NMFS' commitment to continually improving our data collection programs is NMFS' Policy on electronic technologies and fishery-dependent data collection programs. *See* NMFS Policy Directive 30–133, Policy on Electronic Technologies and Fishery-Dependent Data Collection (*http://www.nmfs.noaa.gov/op/pds/documents/30/30-133.pdf*).This policy provides guidance on the adoption of electronic technology solutions in fishery dependent data collection programs. Electronic technologies include the use of vessel monitoring systems, electronic logbooks, video cameras for electronic monitoring, and other technologies.

To the extent the commenter is recommending studies to support development of national, uniform bycatch reporting requirements, NMFS disagrees with the recommendation, as this rule takes a fishery-specific approach to the SBRM requirement. *See* the responses to comments 8 through 12.

Consideration of Feasibility, Costs, and Funding

Comment 37: Several commenters stated that the SBRM provision of section 303(a)(11) does not say that an FMP must include SBRM if it is ''feasible'' or ''practicable''; the statute requires FMPs to establish SBRM without any qualifying condition. Commenters assert that the provisions of the proposed rule relating to feasibility, including consideration of costs and funding, are contrary to the plain language of the statute. Commenters also cite *Oceana* v. *Locke,* 670 F. 3d 1238 (D.C. Cir. 2011), for the proposition that the MSA requires NMFS to establish SBRM without regard to any consideration of practicability (*i.e.,* costs or funding). Commenters also argue that NMFS may not import a ''practicable'' standard from National Standard 7 (NS7), and may not use reducing costs as an excuse to implement weakened management measures that will not achieve the MSA's primary conservation requirements.

Response: NMFS agrees that the requirement to establish a standardized reporting methodology is mandatory for all FMPs. However, NMFS disagrees that the MSA precludes consideration of feasibility from cost, technical, and operational perspectives when establishing such a methodology. Beyond the fact that an SBRM must meet its statutory purpose, section 303(a)(11) does not specify *any* considerations for establishing a standardized reporting methodology; therefore, NMFS has discretion to interpret the MSA and establish reasonable considerations and requirements. Data collection, reporting, and recording programs can be expensive, logistically challenging to design and implement, involve new and cutting-edge technologies, and necessitate the consideration of the safety of human life at sea. Therefore, it is reasonable and appropriate for a Council to analyze issues of feasibility when establishing or reviewing an SBRM and to ultimately choose a methodology that is in fact feasible (*i.e.,* capable of being implemented) from cost, technical, and operational perspectives. *See* response to comment 38 (describing budget and funding challenges).

Contrary to commenters' assertion, *Oceana* v. *Locke,* 670 F. 3d 1238 (D.C. Cir. 2011), does not preclude consideration of costs. In that case, the court noted that the second clause of section 303(a)(11) (regarding bycatch minimization measures) includes the phrase ''to the extent practicable,'' but that phrase does not appear in the first clause that requires establishing SBRMs. *Oceana* v. *Locke* held that costs and funding are not an excuse to forego establishing SBRMs. Consistent with the opinion, NMFS has revised § 600.1610(a)(2)(ii) in this rule to state explicitly that feasibility concerns do not exempt an FMP from the requirement to establish SBRM. NMFS disagrees that the opinion prohibits *any* consideration of costs or funding.

Commenters assert that NMFS cannot consider NS7 (conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication) in interpreting section 303(a)(11) because they are separate statutory provisions. MSA sections 301 (National Standards) and 303 (FMP Contents) are separate provisions, but NMFS disagrees that the agency may not consider them both in developing this rule. FMPs must comply with mandatory FMP requirements under section 303(a)—such as the SBRM provision—*and* also the National Standards under section 301. *See* 16 U.S.C. 1853(a) and 16 U.S.C. 1851(a). In addition, it is important to consider the SBRM provision in the context of the statute as a whole.

Commenters further argue that even if it is permissible to consider NS7, NS7 requires that costs be minimized ''where practicable, not absolutely,'' citing *Connecticut* v. *Daley,* 53 F.Supp.2d 147,

172–73 (D. Conn. 1999). This rule requires that an SBRM be feasible from cost and other perspectives, not that costs be minimized absolutely. Commenters also cite *N. Carolina Fisheries Ass'n, Inc.* v. *Gutierrez,* 518 F.Supp.2d 62, 91–92 (D.D.C. 2007), for the proposition that Congress intended that ''a focus on the economic consequences of regulations not subordinate th[e] principal [conservation] goal of the MSA.'' NMFS notes that the cited language did not address NS7, as commenters assert, but NS8. NS8 requires, in relevant part, that FMP measures ''shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities'' and ''to the extent practicable, minimize adverse economic impacts on such communities'' 16 U.S.C. 1851(a)(8). Whether an SBRM can be implemented from cost and other perspectives is different than an analysis of economic impacts on communities. Moreover, NS8 makes explicit reference to MSA conservation requirements, whereas NS7 does not. In any event, as explained above, this rule does not allow a Council to forego establishing an SBRM based on high costs or low funding.

Comment 38: NMFS received several comments on the requirement in the proposed rule that all SBRMs must be designed to be implemented within available funding. Some commenters supported the requirement, some asked for clarification, and some opposed the requirement. One commenter requested that NMFS clarify that if funds are not available from current funding sources, then there is no requirement to implement the SBRM. One commenter noted that future funding for monitoring programs is unknown, so it is not clear how a Council can be expected to address ''feasibility'' when designing an SBRM or how it can design an SBRM to be implemented within available funding. The commenter suggested a more thorough discussion of how a Council is supposed to design a program for an uncertain funding amount. Other commenters asserted that NMFS controls the availability for funding for SBRMs. These commenters stated that the proposed rule therefore would allow the agency to disapprove the establishment of an SBRM based on a self-imposed funding problem.

Response: SBRMs are mandated by statute, and NMFS has revised § 600.1610(a)(2)(ii) to state explicitly that feasibility concerns do not exempt an FMP from this statutory mandate. In response to public comment, NMFS has deleted reference to designing an SBRM to be ''implemented with available funding,'' but has retained the requirement that an SBRM must be feasible from cost, technical, and operational perspectives. For example, although an increase in observer coverage levels in a certain fishery may reduce the uncertainty of the data resulting from the SBRM, such an increase may not be feasible from a cost or safety standpoint or may result in only an incremental improvement in data quality. Under this rule, Councils would evaluate whether such an increase is justified in light of the purpose of the methodology and feasibility and other requirements under § 600.1610(a)(2).

NMFS is charged with fulfilling a wide range of requirements under the MSA, MMPA, ESA, and other statutes. These mandates include, but are not limited to, ending overfishing and rebuilding fish stocks, protecting and recovering threatened and endangered species, reducing bycatch, enforcing laws and regulations, and combating illegal, unreported, and unregulated fishing internationally. Addressing all of these mandates and requirements is a challenging undertaking for NMFS, particularly in light of increasing legal mandates and budget constraints.

When Congress establishes a program or activity, it must decide how to finance it. Typically programs and activities are financed by appropriating funds from the U.S. Treasury. NMFS requests Congressional appropriations through the President's budget request to support statutory and regulatory requirements. Through this annual appropriations process, funding is provided for NMFS' many mandates. In addition to providing the necessary funds, a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent specific statutory authorization, operate beyond the level that can be paid for by its appropriations. 72 Comp. Gen. 164, 165 (1993). In light of these considerations, and given that procedures to collect, report, and record bycatch data can be extremely costly, NMFS believes that it is important to require that SBRMs be feasible from cost as well as other perspectives.

NMFS acknowledges that Congressional appropriations may change over time, and appropriated funds may, consistent with federal appropriations law, be allocated to implement various statutory mandates and to respond to changes in conditions and priorities across the country. However, even though it may not be possible to anticipate future funding levels for procedures to collect, record, and report bycatch with complete certainty, the Councils would not be developing SBRMs in a vacuum. NMFS has a seat on each Council, and meets regularly with the Council Coordination Committee. The Councils and NMFS are able to consider the trends in costs and in appropriations levels in recent years. For example, NMFS notes that funding for observer programs has been relatively stable over the past two years, with approximately $43.7 million appropriated by Congress for observer programs in FY 2015 and FY 2016.

Comment 39: One commenter stated that SBRMs should be functional at a variety of funding levels. If funding is insufficient for monitoring a particular management regime, then the regime should be made more precautionary (*e.g.,* bigger buffers), rather than foregoing SBRMs or moving forward with inadequate funding. The commenter states that ACLs, AMs, and SBRMs are all key, interconnected components of a sustainable fishery. If the FMP design is demanding, then the SBRM must be too. If there is insufficient funding, the FMP design and the SBRM both need to be scaled back. NMFS should give guidance about how to revise FMP components to balance the level of an SBRM that is feasible.

Response: NMFS agrees that an SBRM should be functional at varying funding levels. Section 600.1610(a)(2)(ii) explicitly acknowledges that funding may vary from year to year, and requires a Council to address how implementation of the methodology may be adjusted while continuing to meet the purpose described under § 600.1600. NMFS believes this consideration is important, given the potential variability in funding levels, the desire for timely and efficient SBRM implementation, and the fact that FMP amendments can take a long time to develop and implement. This consideration is particularly important when developing SBRMs that have data collection procedures that may be more susceptible to changes in funding (*e.g.,* observer programs). NMFS notes that the SBRM provision under MSA section 303(a)(11) is not couched in terms of an annual requirement as is the case with ACLs. Even if a funding shortfall in a particular year affects the implementation of an SBRM that does not necessarily mean that the SBRM is failing to meet its purpose or that it needs to be amended.

Data resulting from SBRMs may be used to inform management decisions

beyond bycatch-related ones, but, as explained in response to comment 20, SBRMs and ACLs/AMs are separate statutory requirements that should not be conflated. NMFS does not believe that further guidance is needed regarding buffers, given existing guidance related to scientific and other uncertainties. The NS1 guidelines, 50 CFR 600.310, describe how the Councils should consider uncertainty when specifying ACLs and AMs. The NS2 guidelines, 50 CFR 600.315, provide guidance on using data that is uncertain in management decisions. In addition, the NS6 guidelines, 50 CFR 600.335, address how to take into account variations in fisheries (*e.g.,* biological and economic uncertainties and uncertainties from changes in fishing practices).

Comment 40: One commenter requested that NMFS clarify in the proposed rule's § 600.1610(a)(2)(ii) (81 FR 9413, February 25, 2016) who would be doing the assessment that a methodology is feasible from cost, technical, and operational perspectives.

Response: NMFS has clarified § 600.1610(a)(2) to state that the Councils are required to address feasibility and comply with other requirements of the section. Section 600.1605(b) defines ''Council'' in the same manner as in 50 CFR 600.305. Therefore, the word ''Council'' includes the Regional Fishery Management Councils and the Secretary of Commerce, as applicable. Per MSA section 304(a), NMFS approves, disapproves, or partially approves Council-developed FMPs and FMP amendments for consistency with the MSA and other applicable law. 16 U.S.C. 1854(a).

Comment 41: Two comments were related to the costs, including industry costs, associated with observer programs and electronic monitoring. One commenter stated that industry should not be required to pay for observer coverage. One commenter asked about the costs to monitor groundfish, and noted that there are some legal questions to address before electronic monitoring can be implemented.

Response: NMFS recognizes that electronic monitoring and observer programs can be costly and logistically challenging to implement. However, a discussion of the particular costs and challenges associated with monitoring programs in specific fisheries is beyond the scope of this rule.

Comment 42: One commenter stated that NMFS cannot justify to Congress the need for more funds related to bycatch data collection if the agency prevents Councils from designing good SBRMS, and, therefore, from assessing data needs and identifying capacity shortfalls.

Response: With respect to the quality and use of the data resulting from SBRMs, please see responses to comments 30 through 36. With respect to budget requests, NMFS works with the Department of Commerce and the Office of Management and Budget (OMB) to request Congressional appropriations through the President's budget to Congress each fiscal year in accordance with relevant laws, regulations, and administrative procedures. NMFS uses information about bycatch research and data collection needs contained in a variety of reports and strategic planning processes to inform this budget planning and formulation process (*e.g.,* the strategic plan for fisheries research required by 16 U.S.C. 1881c of the MSA, National Observer Program strategic reviews and annual reports, SAFE reports, and numerous other documents). However, the development of NMFS-related funding requests contained in the President's yearly budget submission to Congress is beyond the scope of this rule.

Characteristics of Bycatch and Other Considerations

Comment 43: Several commenters expressed support for the requirement for Councils to consider characteristics of bycatch in the fishery. One commenter noted that this requirement is more useful and important when establishing conservation and management measures. The commenter recommends that this sentence be moved to 50 CFR 600.1610(a)(2)(ii) as additional factors that the Councils may consider. Another commenter asserted that SBRMs should be designed to provide more certain bycatch data in fisheries where discard mortality is identified as an important source of fishing mortality.

Response: This rule requires Councils to undertake a fishery-specific analysis to establish an SBRM that meets the purpose described in § 600.1600 of this final rule. To perform such an analysis, NMFS believes that the specific characteristics of bycatch in that fishery need to be addressed. *See* response to comment 9 and section I.C. (discussing consideration of different fishing activities and operations).

NMFS agrees that considering the importance of bycatch as part of fishing mortality is an important consideration when establishing or reviewing SBRMs. More specifically, § 600.1610(a)(2)(i) provides that a Council must address information about the characteristics of bycatch in the fishery when available, including, but not limited to, the amount of bycatch occurring in the fishery, the importance of bycatch in estimating the fishing mortality of fish stocks, and the effect of bycatch on ecosystems. NMFS believes that a fishery-specific evaluation of bycatch as stated above, in conjunction with considerations of feasibility, data use, and data uncertainty will result in an SBRM that meets the purpose as described in § 600.1600.

Comment 44: Some commenters stated that NMFS does not have discretion to decide not to require or establish an adequate SBRM, due to financial constraints or any other factors, such as the ''overall magnitude and/or economic impact of the fishery.''

Response: As explained in response to comment 38, section 303(a)(11) of the MSA requires all FMPs to establish an SBRM, and NMFS has revised § 600.1610(a)(2)(ii) to state that feasibility concerns (which include costs and funding) do not exempt an FMP from this mandate. NMFS has removed the text about considering the overall magnitude and/or economic impact of the fishery from the final rule, because NMFS believes that it is not necessary given existing guidance for NS7 and National Standard 8.

Comment 45: One commenter suggested the incorporation of guidance to ensure the proper identification of bycatch species to reduce misidentification errors. The commenter also suggested including consideration of the status of bycatch species.

Response: Incorporating guidance for proper identification of bycatch species is beyond the scope of this rule. NMFS has created numerous species identification guides, some of which include information about the bycatch species' management status. For example, a NMFS shark identification guide for the recreational fishery of the U.S. Atlantic and Gulf of Mexico specifies which shark species are prohibited and must be released (*see http://www.nmfs.noaa.gov/sfa/hms/species/sharks/rec_shark_id_placard.pdf*). NMFS also has created a guide to help Alaska fishery observers identify coral species that may occur as bycatch (*see http://www.afsc.noaa.gov/FMA/PDF_DOCS/Coral_Tutorial_2014.pdf*). NMFS believes this guidance is more appropriately accomplished through these identification guides.

Comment 46: Several commenters commented on the proposed rule's § 600.1610(a)(2)(i) (81 FR 9413, February 25, 2016), which would require Councils to consider the conservation and management

objectives regarding bycatch in the fishery. One commenter asked whether this was intended to address something different than the bycatch provisions in MSA section 303(a). One commenter suggested clarifying that this does not establish a requirement that each FMP identify specific bycatch objectives beyond those required in section 303(a)(11).

Response: The intent of proposed § 600.1610(a)(2)(i) (81 FR 9413, February 25, 2016) was to provide for a fishery-specific analysis when establishing an SBRM. To clarify that this rule is not requiring Councils to identify specific bycatch objectives beyond those required by section 303(a)(11) and NS9, NMFS has removed reference to ''conservation and management objectives regarding bycatch.'' Further, NMFS believes that it is not necessary to state this as a requirement in § 600.1610(a)(2), because all SBRMs must meet the purpose described in § 600.1600, which includes reference to ''inform[ing] the development of conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality.''

Comment 47: One commenter stated that SBRMs can and should describe the methodology by which bycatch data will be incrementally improved with new efficiencies, techniques, and funding.

Response: NMFS disagrees with this comment as this rule, existing National Standard guidelines, and NMFS strategic plans already provide sufficient direction on improving bycatch data. This rule includes a provision for Councils to review SBRMs at least every 5 years, and in § 600.1610(a)(2)(iv), requires Councils to consider scientific methods and techniques available to collect, record and report bycatch data that could improve the quality of bycatch estimates. In addition, the NS 9 guidelines provide guidance on improving data collection methods, data sources, and applications of data for each fishery to determine the amount, type, disposition, and other characteristics of bycatch and bycatch mortality in each fishery for purposes of NS9 and MSA sections 303(a)(11) and 303(a)(12). 50 CFR 600.350(d)(1). NMFS notes that it also has ongoing initiatives to address bycatch and to strengthen monitoring programs. *See* response to comment 36 for further explanation of these initiatives.

Adaptable Implementation

Comment 48: NMFS received mixed comments on the adaptable implementation provision (proposed § 600.1610(c) at 81 FR 9413, February 25, 2016). Some expressed support for it as it provides flexibility during implementation and others recommended changes to or elimination of the provision. One commenter indicated that the provision would support a Council's efforts to look at ways to increase and improve methodologies for data collection practices. One commenter stated that, before operational adjustments are made, managers should ensure that they can effectively collect and report data consistently across jurisdictions to inform the management of bycatch species. Another commenter stated that this provision frustrates congressional intent to have national-level standardization, and also allows for non-transparent processes to adjust SBRMs. The commenter asserted that changes to an SBRM must be made through an FMP amendment to safeguard public participation and ensure that impacts will be more fully considered. One commenter requested deleting § 600.1610(c), as it would severely limit a Council's ability to develop effective SBRMs and change SBRMs based on fishery characteristics in the future.

Response: Fisheries management occurs in a highly variable environment, and from year to year, there can be changes in available funding, equipment, methods for recording and transmitting data, fishing activity, and other changes. NMFS' intent in proposing § 600.1610(c) was to emphasize that, when developing an SBRM, it is important to consider implementation and operational issues that might arise. *See* 50 CFR 600.335(b) (noting in National Standard 6 guidelines that a regime ''must be flexible enough to allow timely response to resource, industry, and other national and regional needs''). NMFS, Councils, and stakeholders all have an interest in smooth implementation of SBRMs, and FMPs can take a long time to amend. In response to public comments and to clarify its intent, NMFS has deleted proposed § 600.1610(c) at 81 FR 9413, February 25, 2016. Instead, § 600.1610(a)(1) clarifies that in addition to proposing regulations necessary to implement the SBRM, a Council should also provide in its FMP, or in a fishery research plan authorized under 16 U.S.C. 1862, guidance to NMFS on how to adjust implementation of an SBRM, consistent with the FMP. See National Standard 6 guidelines, 50 CFR 600.335. This text refers to adjustments ''consistent with the FMP.'' To the extent that changes would be needed to an SBRM beyond what the FMP established, an FMP amendment would be needed. NMFS believes that this approach will encourage transparency. The rule requires a Council to address implementation and operational issues up-front during the development of an SBRM and encourages a Council to provide guidance to NMFS on SBRM implementation.

Consistent with the SBRM established in an FMP, a Council could provide for adjustments in how an SBRM is implemented through regulations (*see, e.g.,* SBRM Omnibus Amendment (80 FR 37182, June 30, 2015)). Councils may also provide other guidance to NMFS via non-regulatory mechanisms. As an example, the North Pacific Groundfish FMP uses an Annual Deployment Plan (ADP) to address practical and operational implementation issues. *See* comment and response 29 for further explanation of the ADP. When a Council is considering whether to provide for regulations and/or other guidance to implement an SBRM, some questions that may be helpful include: What are the implementation and operational issues that might arise (*see e.g.,* variations and uncertainties described in NS6 guidelines); what type of adjustments or guidance might be helpful to address these issues; would certain adjustments result in an SBRM not meeting its purpose (*see* § 600.1600); and what would happen if there is an unexpected funding shortfall. NMFS disagrees that SBRMs need to be standardized at a national level in order to have data to inform management decisions. *See* comments and responses 13 (explaining purpose of SBRMs and consideration of data use and quality) and 8 (explaining interpretation of ''standardized'').

Comment 49: One commenter stated that allowing adjustments to the bycatch methodology to be based on factors such as funding, management contingencies, or scientific priorities could be interpreted to authorize the type of budgetary exemption from SBRM requirements that has been found contrary to the MSA, citing *Oceana* v. *Locke,* 670 F.3d 1238 (D.C. Cir. 2011).

Response: As explained in responses to comments 37 and 38, MSA section 303(a)(11) requires that all FMPs establish an SBRM, and NMFS has clarified in § 600.1610(a)(2)(ii) that ''feasibility concerns do not exempt an FMP from the requirement to establish a standardized reporting methodology.'' NMFS disagrees that *Oceana* v. *Locke* precludes a Council from considering implementation and operational issues and trying to plan for them. *See*

response to comment 37 for further discussion of the court case. Section 600.1610(a)(1) provides that a Council must explain how an SBRM, which may include an implementation adjustment mechanism, meets the statutory purpose of an SBRM (*see* § 600.1600), based on an analysis of the requirements in § 600.1610(a)(2) (characteristics of bycatch, feasibility, data quality and data use).

Review of FMPs

Comment 50: Some commenters stated that the Sustainable Fisheries Act of 1996 (SFA) required the agency to establish SBRM regulations by 1998, thus the 5 year review period would unreasonably delay SBRM implementation to 21 years after it was required by Congress.

Response: NMFS disagrees with these comments. Section 108(a) of the SFA added several provisions to section 303(a) of the MSA, including section 303(a)(11). (*See* Pub. L. 104–297, 110 Stat. 3559, sec. 108 (Oct. 11, 1996)). Section 108(b) of the SFA required that each Council submit to the Secretary of Commerce amendments to each FMP to comply with the amendments made in section 108(a) not later than 24 months after the date of enactment. *Id.* The Act did not require NMFS to promulgate a national SBRM rulemaking. As explained in the preamble to the proposed rule, NMFS is promulgating this rule pursuant to section 305(d) of the MSA (16 U.S.C. 1855(d)) to clarify NMFS' interpretation of the SBRM provision and provide for periodic review of SBRMs.

Comment 51: NMFS received several comments on the 5-year timeline for reviewing FMPs for consistency with the rule. One commenter supported the timeline, but given concerns about workload for the Councils, recommended extending subsequent SBRM reviews to 10 years or on an as needed basis. Another commenter noted that if a Council is provided with updated estimates of bycatch at each Council meeting along with the estimates of recreational and commercial landings, the ability to monitor bycatch on an ongoing basis will also reduce the need for a comprehensive review from 5 to 10 years. Another commenter recommended that a review be conducted after 5 years of data are available, rather than 5 years after implementation.

Response: Data collection and reporting methods, conservation and management issues, and bycatch characteristics may change considerably in a 5-year timeframe. Therefore, NMFS believes that review in 5 years (and not a longer period) is appropriate. NMFS notes that there are several other FMP review processes that are on 3 to 5 year review timeframes. These include catch share programs, essential fish habitat, scientific research and other reviews. From an efficiency and resource standpoint, Councils may want to consider conducting SBRM reviews in conjunction with other ongoing FMP reviews as much as possible. Further, this provision is consistent with the NS9 guidelines, which refer to the review and improvement of data collection methods, data sources, and applications. 50 CFR 600.350(d)(1).

Comment 52: One commenter urged NMFS to seriously consider the potential negative implications, including unnecessary workload, of the rule on regions which are already in compliance with MSA requirements. Section 600.1610(a)(1) 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 through other reference documents. The provision requiring that all FMPs must be consistent with the rule within 5 years is not necessary if Councils have reviewed their FMPs and determined that their FMPs do not need to be modified.

Response: The proposed rule provided Councils with a 5-year time frame to review and, if necessary, amend their existing FMPs for consistency with the rule. NMFS continues to believe that there is a need for this review. However, the final rule clarifies that a Council does not need to amend an FMP if NMFS determines that it is consistent with this rule.

Other Comments

Comment 53: Some commenters requested that NMFS extend the comment period for the proposed rule an additional 60 days.

Response: NMFS believes that the 60-day comment period provided the public with a meaningful opportunity to comment on the proposed rule, and therefore, declined to extend this period. Considering the nature and scope of the proposed rule, NMFS believes that 60 days was an adequate timeframe for interested persons to understand the issues raised and submit to the agency written comments with information and arguments relevant to those issues. Furthermore, several Councils are actively working on SBRM-related issues and would benefit from the guidance and interpretation that this rule would provide. If, as a result of reviewing their FMPs for consistency with the MSA and this rule, Councils amend their FMPs, the public will have another opportunity to comment on any specific actions proposed by a Council.

Comment 54: Given the critical nature of bycatch data collection, one commenter urged the agency to provide resources to improve collection, recording, and reporting of bycatch as soon as possible.

Response: NMFS has made SBRM data collection programs a priority. NMFS continually seeks to improve data collection, recording, and reporting through a variety of mechanisms. *See* response to Comment 47 for more information.

Comment 55: Commenters stated that the proposed rule would undermine the following agency and Council efforts to improve fisheries data, modernize data collection programs, and integrate ecosystem considerations into fisheries management: Ecosystem-Based Fishery Management Policy, National Bycatch Reduction Strategy, Action Plan for Fish Release Mortality Science, Regional Electronic Monitoring and Reporting Implementation Plans, and MRIP Implementation Plan. Commenters also asserted that the proposed rule would prevent the agency from implementing hard caps and performance objectives in the West Coast drift gillnet fishery and would facilitate the further collapse of the New England groundfish fishery.

Response: NMFS disagrees that this rule would negatively affect ongoing efforts to improve fisheries data, modernize data collection, and implement ecosystem based fisheries management. This rule interprets basic requirements of the SBRM provision and does not prescribe or otherwise change ongoing policy and science initiatives. Because the rule interprets the basic requirements for establishing SBRMs, NMFS also disagrees with the comment that suggests the rule would prevent the establishment of hard caps in the West Coast drift gillnet fishery or undermine the New England groundfish fishery. The commenter presumes that this rule will diminish the quality of bycatch data and thus the assessment of bycatch and the Council's ability to adopt management measures to address bycatch. NMFS addresses this concern in responses to comments regarding the ''need and effect'' and ''distinction between data collection and assessment''.

Comment 56: One commenter stated that bycatch is a significant issue in recreational and commercial fisheries in

the Southeast, citing red snapper and red grouper as examples. The commenter stated that sufficient SBRMs in the fishermen logbooks and observer coverage would provide much more certain data leading to a more robust assessment used for management.

Response: NMFS notes that an SBRM is a requirement of an FMP and that Councils do not establish SBRMs ''in the fishermen logbooks and observer coverage.'' To the extent that this commenter is recommending specific changes to the SBRMs in particular fisheries (*e.g.,* red snapper and red grouper), this comment is beyond the scope of this rulemaking. The purpose of this rule is to describe the minimum requirements for establishing an SBRM. The specific SBRMs for each fishery are established through individual FMPs and the Council process as guided by the MSA and this rule. This rule requires that all FMPs be consistent with this rule within 5 years of the effective date of this rule. As individual FMPs are reviewed by the Councils, stakeholders will have additional opportunities to provide input on fishery and regional-specific issues associated with particular SBRMs.

Comment 57: One commenter stated that it is unclear if the Pacific Islands, the Southeast and Southwest have implemented SBRM. The Caribbean Fishery Management Council does not appear to have established SBRMs at all. For example, there is no mention of SBRM in FMPs for Queen Conch, Reef Fish, Spiny Lobster, or Corals and Reef Associated Plants and Invertebrates.

Response: All FMPs have established SBRMs consistent with the MSA and implement them through different mechanisms. NMFS acknowledges that the documentation and explanation in FMPs for SBRMs varies considerably. This rule, by clarifying the basic requirements for establishing SBRMs, will strengthen existing SBRMs and ensure greater transparency as Councils review and potentially update their FMPs for consistency with this rule.

Comment 58: NMFS received comments disagreeing with the agency's decision to not prepare an environmental impact assessment (EIS) or environmental assessment (EA). The commenters stated that a categorical exclusion under the National Environmental Policy Act (NEPA) is not appropriate.

Response: NMFS believes a categorical exclusion is appropriate for this action. Under sections 5.05 and 6.03c.3(i) of NOAA's Administrative Order (NAO) 216–6, as preserved by NAO 216–6A, ''Compliance with the National Environmental Policy Act, Executive Orders 12114, Environmental Effects Abroad of Major Federal Actions; 11988 and 13690, Floodplain Management; and 11990, Protection of Wetlands,'' the following types of actions may be categorically excluded from the requirement to prepare an EA or EIS: ''. . . policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature, or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case . . .'' In this instance, a categorical exclusion is appropriate for this action because NMFS cannot meaningfully analyze potential environmental, economic, and social impacts at this stage. This rule provides guidance on establishing and reviewing SBRMs. While the rule explains how the development, documentation, and review of SBRMs should be addressed, the rule does not mandate specific conservation or management measures for any fishery. There is considerable diversity in federally managed fisheries and FMPs, and the Councils and NMFS have discretion to develop different conservation and management alternatives consistent with the MSA and other law. It is not clear what Councils will or will not do in response to this rule. Thus, it is not possible to predict any concrete impacts on the human environment without the necessary intervening actions of the Councils (*e.g.,* consideration of SBRMs for specific fisheries). Any analysis of potential impacts would be speculative at best.

None of the exceptions for Categorical Exclusions provided by section 5.05c of NAO 216–6 apply. While there is controversy concerning the SBRM rule, the controversy is primarily related to different views on how section 303(a)(11) of the MSA should be interpreted. The rule would not, in itself, have uncertain environmental impacts, unique or unknown risks, or result in cumulatively significant impacts on a fishery, protected species, or habitat, as it does not prescribe specific outcomes for FMPs. When a given Council or the Secretary prepares and submits a new FMP or FMP amendment or other regulatory action, at that time, biological, economic, and social impacts of the amendment/action would be subject to NEPA analysis.

Comment 59: NMFS received one comment stating that the agency should not proceed unless a Regulatory Impact Review as required by E.O. 12866 has been conducted and the public has an opportunity to review and comment on that analysis. The commenter noted that the rule will require significant agency and Council resources.

Response: NMFS conducted a draft Regulatory Impact Review and determined the rule is not significant for the purposes of Executive Order 12866. Additionally, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. These conclusions were stated in the ''Classification'' section of the proposed rule proposed at 81 FR 9413, February 25, 2016. NMFS prepared a final Regulatory Impact Review before issuing this rule. That review analyzed the impact of this rule on the agency, the Councils, and small entities, and is summarized in the ''Classification'' section of this preamble.

III. Changes From Proposed Rule

In the first sentence of § 600.1600, ''with respect to any fishery'' was added after ''fishery management plan'' to reflect the text of section 303(a) of the MSA. The second sentence of § 600.1600 was revised in response to public comment to clarify the purpose of a standardized reporting methodology.

In § 600.1605(a), NMFS made minor changes to the definition of ''standardized reporting methodology.'' First, in response to public comment, NMFS removed ''subset of a fishery'' from the definition. Second, NMFS combined the first and second sentences of the proposed definition. Third, NMFS added a sentence to the end of the definition to clarify the link between an SBRM and the assessment of bycatch.

Section 600.1605(b) was revised to add reference to the MSA's definitions of ''bycatch'' and ''fishery'' in 16 U.S.C. 1802. Other minor revisions were made to the citations in § 600.1605(b).

In § 600.1610(a)(1), the first sentence was revised to clarify the information that must be identified in an FMP. The first part of the second sentence of the paragraph was modified for clarity. Instead of ''The description must state the required bycatch data collection, recording, and reporting procedures for each fishery, which may include . . .'', the second sentence of § 600.1610(a)(1) now begins: ''The required procedures may include. . . .''

In response to comments and to make clear that an SBRM must achieve its statutory purpose, the third sentence of § 600.1610(a)(1) now requires a Council

to explain ''how an SBRM meets the purpose described in 50 CFR 600.1600, based on an analysis of the requirements under § 600.1610(a)(2),'' in place of the proposed rule's requirement that a Council explain ''why the methodology is appropriate for the fishery.'' The third sentence requires that this explanation be contained in an FMP or a fishery research plan authorized under 16 U.S.C. 1862, a North Pacific-specific provision of the MSA.

Consistent with current practices, § 600.1610(a)(1) states that Councils should work together and collaborate on standardized reporting methodologies for fisheries that operate across multiple jurisdictions, as appropriate.

Also in § 600.1610(a)(1), NMFS clarifies that in addition to proposing regulations necessary to implement the standardized reporting methodology, a Council should also provide in its FMP, or a fishery research plan authorized under 16 U.S.C. 1862, guidance to NMFS on how to adjust implementation of a standardized reporting methodology, consistent with the FMP. See National Standard 6 guidelines, 50 CFR 600.335. This text replaces § 600.1610(c) of the proposed rule, which described an adaptable implementation process for SBRMs. NMFS removed § 600.1610(c) and added the new sentence in § 600.1610(a)(1) in response to public comments expressing confusion over the process described in proposed rule's § 600.1610(c) (81 FR 9413, February 25, 2016).

In § 600.1610(a)(2), NMFS clarified what a Council is required to address when establishing or reviewing an SBRM. Also in § 600.1610(a)(2), NMFS broke out the ''required factors'' and ''additional factors'' of the proposed rule's paragraphs (a)(2)(i) and (a)(2)(ii) into four subparagraphs to improve the organization and clarity of the paragraph.

In § 600.1610(a)(2)(i), NMFS deleted the requirement that ''[d]ata resulting from the methodology must be useful, in conjunction with other sources of data, in meeting the purpose described in § 600.1600 and fishery-specific bycatch objectives.'' This requirement is no longer necessary because, as detailed above, § 600.1610(a)(1) requires that all SBRMs meet the purpose described in § 600.1600. NMFS also deleted the requirement that Councils ''consider the conservation and management objectives regarding bycatch in the fishery'' proposed in § 600.1610(a)(2) in response to public comment expressing confusion about this provision. NMFS believes that it is not necessary to state this as a requirement in § 600.1610(a)(2) because all SBRMs must meet the purpose described in § 600.1600, which includes reference to ''inform[ing] the development of conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality.''

In § 600.1610(a)(2)(i), NMFS created a distinct subparagraph for the requirement that all Councils address information about the characteristics of bycatch in the fishery. The proposed rule required Councils to ''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 the final rule, NMFS changed ''such as'' to ''including but not limited to'' to clarify that Councils must address all three types of information, where such information is available. In the same sentence, NMFS replaced ''total mortality'' with ''fishing mortality'' because bycatch mortality is part of fishing mortality (*i.e.,* fish dying due to fishing activity) and not a component of natural mortality which is part of total mortality. For purposes of clarity, NMFS also changed ''the importance of bycatch to related ecosystems'' to ''the effect of bycatch on ecosystems.'' NMFS also added text in § 600.1610(a)(2)(i) to acknowledge that the amount and type of bycatch occurring in a fishery ''may vary based on the operations of the fishery.''

In response to public comment, NMFS removed text from § 600.1610(a)(2)(ii) stating that ''a Council may also consider the overall magnitude and/or economic impact of the fishery.'' NMFS believes that this information is already addressed in NMFS' National Standards 7 and 8 guidelines.

In § 600.1610(a)(2)(ii), NMFS created a distinct subparagraph regarding feasibility. NMFS added ''The implementation of a standardized reporting'' to the beginning of the sentence requiring that the ''methodology must be feasible from cost, technical, and operational perspectives'' for purposes of clarity. In response to public comment, NMFS deleted the requirement that a methodology ''be designed to be implemented with available funding.'' In place of this text, NMFS added a sentence to the end of § 600.1610(a)(2)(ii) that explains in recognition that costs and funding may vary from year to year, a Council must also address how implementation of the standardized reporting methodology may be adjusted while continuing to meet the purpose described under § 600.1600.

In § 600.1610(a)(2)(iii), NMFS created a distinct subparagraph regarding data uncertainty. This subparagraph expands on the requirement in proposed § 600.1610(a)(2)(i) at 81 FR 9413, February 25, 2016, that a Council consider the quality of the data associated with the methodology when establishing or reviewing an SBRM. In place of this requirement, § 600.1610(a)(2)(iii) clarifies that a Council must address the uncertainty of the data resulting from the standardized reporting methodology. The standardized reporting methodology must be designed so that the uncertainty associated with the resulting bycatch data can be described, quantitatively or qualitatively. The Council should seek to minimize uncertainty in the resulting data, recognizing that different degrees of data uncertainty may be appropriate for different fisheries. NMFS made these changes in response to public comment and for purposes of clarity.

In § 600.1610(a)(2)(iv), NMFS created a distinct subparagraph regarding data use. To clarify the link between an SBRM and the assessment of bycatch, this first sentence of this subparagraph states: ''A Council must address how data resulting from the standardized reporting methodology are used to assess the amount and type of bycatch occurring in the fishery.'' NMFS also moved the proposed consultation provision (in § 600.1610(b) at 81 FR 9413, February 25, 2016) to this subparagraph, in response to public comment and to clarify the consultation process. Therefore, the second sentence of § 600.1610(a)(2)(iv) states: ''A Council must consult with its scientific and statistical committee and/or the regional National Marine Fisheries Service science center on reporting methodology design considerations such as data elements, sampling designs, sample sizes, and reporting frequency.'' NMFS made the consultation mandatory in the final rule. NMFS also removed reference to ''advisory panels,'' which was included in the consultation provision of the proposed rule, because the consultation is scientific in nature and is outside the scope of the advisory panel's role.

NMFS moved the text stating that ''a Council may also consider...the scientific methods and techniques available to collect and report bycatch data that could improve the quality of bycatch estimates'' from proposed § 600.1610(a)(2)(ii) (at 81 FR 9413, February 25, 2016) to § 600.1610(a)(2)(iv), because NMFS believes this provision relates to data

use. In this sentence, NMFS changed ''may'' to ''must'' in the final rule, and added ''record'' between ''collect'' and ''report'' to mirror NMFS' definition of a standardized reporting methodology.

Also in § 600.1610(a)(2)(iv), NMFS added a sentence at the end of the paragraph clarifying that different standardized reporting methodology designs may be appropriate for different fisheries.

To comport with the organizational changes in the final rule, NMFS changed § 600.1610(d) to paragraph (b). To clarify that a Council must undertake a review of their FMPs for consistency with the rule, NMFS added that a Council, in coordination with NMFS, must conduct a review of its FMPs for consistency with this rule. To clarify that a Council does not have to amend an FMP within 5 years of the effective date of the rule if the FMP is in compliance with the rule, NMFS also added that a Council does not need to amend an FMP if NMFS, in consultation with the Council, determines that the FMP is consistent with this rule. Although the Council initiates a review of SBRMs, that review should be done in coordination with NMFS; therefore NMFS added ''in coordination with NMFS'' to the second and last sentences of § 600.1610(b).

Minor, non-substantive grammatical changes were also made in the final regulatory text to improve clarity.

IV. National Environmental Policy Act

NMFS has made a determination to apply a Categorical Exclusion to this action under the National Environmental Policy Act. This action qualifies for a Categorical Exclusion because it is a regulation ''of an administrative, financial, legal, technical or procedural nature, or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case. . . .'' *See* NOAA's Administrative Orders 216–6 and 216–6A. If and when, as a result of reviewing an FMP for consistency with the MSA and this rule, a Council amends a specific FMP and/or fishery research plans, the Council and/or NMFS would prepare a NEPA analysis, as appropriate.

V. Classification

Pursuant to section 301(b) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the Magnuson-Stevens Act and other applicable law.

This rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration during the proposed rule stage that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule (see page 9417 at 81 FR 9413, February 25, 2016). In summary, this action interprets and provides guidance on section 303(a)(11) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which requires that all Fishery Management Plans (FMPs) ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in a fishery'' (16 U.S.C. 1853(a)(11)). Because the action does not directly regulate any small entities, it will not directly alter the behavior of any entities operating in federally managed fisheries, and thus no direct economic effects on small entities (as described within the proposed action) are expected to result from this action. Therefore, no small entities will be directly affected by this action, and a reduction in profits for a substantial number of small entities is not expected. *See* 81 FR 9413, February 25, 2016. No public comments were received regarding this certification.

NMFS notes that on January 26, 2016, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries, effective February 26, 2016 (81 FR 4469). The rule increased the size standard for Seafood Product Preparation and Packaging (NAICS code 311710) from 500 to 750 employees. Furthermore, on December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only. *See* 80 FR 81194, December 29, 2015. The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *See* 80 FR 81194, December 29, 2015. Pursuant to the RFA, and prior to July 1, 2016, the certification was developed for this regulatory action using SBA's size standards prior to February 26, 2016. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standards discussed above and has determined that the new size standards do not affect analyses prepared for this regulatory action. Further, because the action does not directly regulate any entities, any new size standard will not directly alter the behavior of any entities operating in federally managed fisheries, and thus no direct economic effects on commercial harvesting businesses, marinas, seafood dealers/wholesalers, or seafood processors are expected to result from this action. Thus, no small entities will be directly affected by this action and a reduction in profits for a substantial number of small entities is not expected, and NMFS has determined that the certification established during the proposed rule stage is still appropriate for this final action.

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Bycatch, Fisheries, Standardized Reporting Methodology.

Dated: January 6, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for 50 CFR part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. Add subpart R to read as follows:

Subpart R—Standardized Bycatch Reporting Methodology

Sec.

§ 600.1600 Purpose and scope.

Section 303(a)(11) of the Magnuson-Stevens Act requires that any fishery management plan (FMP) with respect to any fishery shall establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery. 16 U.S.C. 1853(a)(11). The purpose of a

standardized reporting methodology is to collect, record, and report bycatch data in a fishery that, in conjunction with other relevant sources of information, are used to assess the amount and type of bycatch occurring in the fishery and inform the development of conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality. This subpart sets forth requirements for and guidance on establishing and reviewing a standardized reporting methodology.

§ 600.1605 Definitions and word usage.

(a) *Definitions.* In addition to the definitions in the Magnuson-Stevens Act and § 600.10, *standardized reporting methodology* means an established, consistent procedure or procedures used to collect, record, and report bycatch data in a fishery, which may vary from one fishery to another. Bycatch assessment is not part of the standardized reporting methodology, but must be considered as described in § 600.1610(a)(2)(iv).

(b) *Word usage.* The terms ''bycatch'' and ''fishery'' are used in the same manner as in 16 U.S.C. 1802. The terms ''must'', ''should'', ''may'', ''will'', ''could'', and ''can'' are used in the same manner as in § 600.305(c). The term ''Council'' is used in the same manner as in § 600.305(d)(10), and includes the regional fishery management Councils and the Secretary of Commerce, as appropriate (16 U.S.C. 1854(c) and (g)).

§ 600.1610 Establishing and reviewing standardized bycatch reporting methodologies in fishery management plans.

(a) *Establishing a standardized reporting methodology*—(1) *Fishery management plan contents.* An FMP must identify the required procedure or procedures that constitute the standardized reporting methodology for the fishery. The required procedures 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). The FMP, or a fishery research plan authorized under 16 U.S.C. 1862, must explain how the standardized reporting methodology meets the purpose described in § 600.1600, based on an analysis of the requirements under § 600.1610(a)(2). The FMP, or fishery research plan authorized under 16 U.S.C. 1862, may reference analyses and information in other FMPs, FMP amendments, Stock Assessment and Fishery Evaluation (SAFE) reports, or other documents. Councils should work together and collaborate on standardized reporting methodologies for fisheries that operate across multiple jurisdictions, as appropriate. In addition to proposing regulations necessary to implement the standardized reporting methodology, a Council should also provide in its FMP, or a fishery research plan authorized under 16 U.S.C. 1862, guidance to NMFS on how to adjust implementation of a standardized reporting methodology consistent with the FMP. See National Standard 6 guidelines, § 600.335.

(2) *Requirements for standardized reporting methodology.* The FMP must establish a standardized reporting methodology as provided under § 600.1610(a)(1) that meets the specific purpose described in § 600.1600. Due to the inherent diversity of fisheries, different standardized reporting methodologies may be appropriate for different fisheries. However, when establishing or reviewing a standardized reporting methodology, a Council must address the following:

(i) *Information about the characteristics of bycatch in the fishery.* A Council must address information about the characteristics of bycatch in the fishery, when available, including, but not limited to: The amount and type of bycatch occurring in the fishery, which may vary based on different fishing activities and operations; the importance of bycatch in estimating the fishing mortality of fish stocks; and the effect of bycatch on ecosystems.

(ii) *Feasibility.* The implementation of a standardized reporting methodology must be feasible from cost, technical, and operational perspectives. However, feasibility concerns do not exempt an FMP from the requirement to establish a standardized reporting methodology. Recognizing that costs and funding may vary from year to year, a Council must also address how implementation of the standardized reporting methodology may be adjusted while continuing to meet the purpose described under § 600.1600.

(iii) *Data uncertainty.* A Council must address the uncertainty of the data resulting from the standardized reporting methodology. The standardized reporting methodology must be designed so that the uncertainty associated with the resulting bycatch data can be described, quantitatively or qualitatively. The Council should seek to minimize uncertainty in the resulting data, recognizing that different degrees of data uncertainty may be appropriate for different fisheries.

(iv) *Data use.* A Council must address how data resulting from the standardized reporting methodology are used to assess the amount and type of bycatch occurring in the fishery. A Council must consult with its scientific and statistical committee and/or the regional National Marine Fisheries Service science center on reporting methodology design considerations such as data elements, sampling designs, sample sizes, and reporting frequency. The Council must also consider the scientific methods and techniques available to collect, record, and report bycatch data that could improve the quality of bycatch estimates. Different standardized reporting methodology designs may be appropriate for different fisheries.

(b) *Review of FMPs.* All FMPs must be consistent with this subpart by February 21, 2022. Therefore, a Council, in coordination with NMFS, must conduct a review of its FMPs for consistency with this subpart. A Council does not need to amend an FMP if NMFS determines that it is consistent with this subpart. Thereafter, Councils, in coordination with NMFS, should conduct a review of standardized reporting methodologies at least once every 5 years in order to verify continued compliance with the MSA and this subpart.

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