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**Via Electronic Submission (comments@safmc.net)**

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September 5, 2014

**Re: Standardized Bycatch Reporting Methodology**

Dear Dr. Crabtree and Mr. Hartig,

Please accept this letter on behalf of the Natural Resources Defense Council urging the South Atlantic Fishery Management Council (SAFMC) to implement an effective and legally-compliant system for monitoring and reporting bycatch. As we have noted in previous letters to the SAFMC, this system, known as the standardized bycatch reporting methodology (SBRM), is a required component of all fishery management plans (FMPs). Currently, there is no legally-compliant SBRM in place in the South Atlantic region. As a result, the SAFMC and the National Marine Fisheries Service (NMFS) are not meeting the mandates of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Furthermore, the lack of an effective SBRM frustrates sustainable fisheries management in the region. Accordingly, we urge that the Council and NMFS work expeditiously to implement an accurate and reliable SBRM for the fisheries in the region.

**Effective Bycatch Monitoring is Essential to Sustainable Fisheries in the South Atlantic**

It is widely acknowledged that bycatch poses significant threats to the health and sustainability of our fisheries.<sup>1</sup> In particular, NMFS has acknowledged that accurate bycatch data is essential

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<sup>1</sup> 50 C.F.R. § 600.350 (2013) (“Bycatch can . . . impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation.”); *id.* (“[B]ycatch can increase substantially the uncertainty concerning total fishing-related mortality, which makes it more difficult to assess the status of stocks, to set the appropriate [optimum yield (OY)] and define overfishing levels, and to ensure that OYs are attained and overfishing levels are not exceeded.”); J. Harrington et al., *Wasted Fishery Resources: Discarded Bycatch in the*

to effective fishery management. In 1998, NMFS released its first national bycatch plan, which recognized that “the first step in addressing any bycatch concern in a fishery is to identify and quantify the magnitude of the bycatch.”<sup>2</sup> NMFS acknowledged there was a “paucity” of data on the amount and type of bycatch, hindering “the effective conservation and management of [fishery] stocks.”<sup>3</sup> NMFS has since repeatedly emphasized that reliable and accurate bycatch data “are essential to managing the Nation’s fisheries.”<sup>4</sup> However, bycatch data are still limited, unreliable, or unavailable in many fisheries. NMFS’s 2011 National Bycatch Report explicitly recognized these bycatch “data limitations” and noted the continuing “need for reporting of accurate and comprehensive [bycatch] information.”<sup>5</sup>

In the Southeast, the failure to account for bycatch impedes effective fishery management and can result in overfishing and stock depletion that goes unnoticed and unaddressed. Accurate and comprehensive bycatch data is crucial for accounting for all sources of fishing mortality when setting and monitoring annual catch limits (ACLs) and establishing effective rebuilding plans for overfished species.<sup>6</sup> Current practice in the Southeast region is to set ACLs for nearly all stocks based on landings alone, ignoring fishing mortality from discards, which in some cases is the principal source of overfishing (*e.g.*, speckled hind and warsaw grouper). Although bycatch data are factored into the stock assessment process, only 14 of the 61 federally-managed stocks in the region that require ACLs use assessments as the basis of those ACLs. For the remaining 47 unassessed stocks, bycatch mortality remains unaccounted for in the ACL-setting mechanism, despite a clear legal mandate to do so.<sup>7</sup>

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USA, 6 Fish & Fisheries 350 (2005) [hereinafter *Wasted Fishery Resources*] (“[I]t is widely accepted that the ecological impacts of by-catch are substantial.”); NMFS National Bycatch Report Update 1 2013, at 4, *available at* [http://www.st.nmfs.noaa.gov/Assets/Observer-Program/bycatch-report/NBR\\_FirstEditionUpdate1.pdf](http://www.st.nmfs.noaa.gov/Assets/Observer-Program/bycatch-report/NBR_FirstEditionUpdate1.pdf) (“Biological impacts of bycatch have been demonstrated at the species, population/stock, and ecosystem levels. These impacts include declines in populations, reduced reproductive rates, and less-resilient ecosystems.” (citations omitted)); R.W.D. Davies et al., *Defining and Estimating Global Marine Fisheries Bycatch*, Marine Policy (2009) (“The role of bycatch in degrading marine ecosystems has made [it] one of the most significant nature conservation issues in the world today, with serious implications for up to 1 billion people who depend on fish as their principal source of protein.”).

<sup>2</sup> National Marine Fisheries Service, *Managing the Nation’s Bycatch: Priorities, Programs and Actions for the National Marine Fisheries Service 2* (1998) [hereinafter *Managing the Nation’s Bycatch*], *available at* [http://www.nmfs.noaa.gov/by\\_catch/docs/bycatchplanonline.pdf](http://www.nmfs.noaa.gov/by_catch/docs/bycatchplanonline.pdf), at 18.

<sup>3</sup> *Id.* at 2, 32.

<sup>4</sup> NMFS National Bycatch Report 2011, at 4, *available at* [http://www.nmfs.noaa.gov/by\\_catch/BREP2011/2011\\_National\\_Bycatch\\_Report.pdf](http://www.nmfs.noaa.gov/by_catch/BREP2011/2011_National_Bycatch_Report.pdf); *see also* NMFS National Bycatch Report Update 1 2013, *supra* note 1, at 6 (“[R]eliable and accurate quantitative information about bycatch is essential to the fisheries assessment and living marine resource management processes.”).

<sup>5</sup> NMFS National Bycatch Report 2011, *supra* note 4, at 10. NMFS also noted that “it is apparent that the authors of [earlier bycatch] reports encountered considerable difficulty in obtaining comprehensive and accurate catch and bycatch data.” *Id.*

<sup>6</sup> *See, e.g.*, NMFS National Bycatch Report Update 1 2013, *supra* note 1, at 5 (“Overall fishing mortality can be estimated only if reliable, quantitative information on retained catch and bycatch is available ... When reliable bycatch estimates are available, they can be incorporated into stock assessments.”).

<sup>7</sup> The National Standard One (NS 1) Guidelines, the legislative history of the MSA, judicial interpretation, and NMFS’s own stated positions all concur that bycatch must be accounted for in the ACL. The NS 1 Guidelines define an ACL as “the level of annual *catch* of a stock...that serves as the basis for invoking AMs.” 50 C.F.R. § 600.310(f)(2)(iv) (emphasis added). “Catch” is defined as “the total quantity of fish...” and “includes fish that are retained for any purpose, as well as mortality of fish that are discarded.” 50 C.F.R. § 600.310(f)(2)(i), (iv). On precisely the question of how ACLs should account for discards, the response to comments in the NS 1 Guidelines

The SAFMC recently recognized that improved bycatch data and analysis in the Southeast region “would provide a better understanding of the composition and magnitude of catch and bycatch, enhance the quality of data provided for stock assessments, increase the quality of assessment output, provide better estimates of interactions with protected species, and lead to better decisions regarding additional measures to reduce bycatch.”<sup>8</sup> NMFS has also concluded that “improvements in discard estimates...should be a high priority” in the South Atlantic, including the development of an observer program for the Snapper-Grouper, Coastal Migratory Pelagic and Dolphin-Wahoo fisheries.<sup>9</sup> There is no dispute that an effective SBRM is key to realizing these goals and to improving overall fishery management in the region.

### **The MSA’s Standardized Bycatch Reporting Methodology Requirement**

Recognizing that “the issue of bycatch reduction and the reduction of discard mortality [was] one of the most important challenges facing fisheries managers,” Congress amended the MSA in 1996 with the passage of the Sustainable Fisheries Act (SFA).<sup>10</sup> At the time, fishery resources were declining worldwide, with negative consequences for ecosystems, as well as the “social and economic identity” of communities dependent on fisheries.<sup>11</sup> According to Congress, this “dramatic reduction” in fish populations was, in part, caused by bycatch.<sup>12</sup> Thus, Congress amended the MSA with the intent of reducing bycatch and improving the health of our nation’s fisheries.

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stated that “all sources of fishing mortality, including dead discards and post-release mortality from recreational fisheries must be accounted for...” and “catch includes fish that are retained for any purposes, mortality of fish that have been discarded, allocations for scientific research, and mortality from any other fishing activity.” Magnuson-Stevens Act Provisions; Annual Catch Limits: National Standard Guidelines, 74 Fed. Reg. 3178, 3190 (Jan. 16, 2009). This interpretation follows Congress’s clear intent. The Senate Report from the Committee on Commerce, Science, and Transportation on the “Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2005” stated that “[c]atch of all species, whether targeted or taken as bycatch, whether retained or discarded, count toward the annual catch limits, and fisheries are closed when these limits are reached.” S. Rep. No. 109–229, at 23 (2006). A recent federal district court decision found that “bycatch must be accurately monitored and reported...to ensure accountability with annual catch limits.” *Oceana Inc. v. Locke*, 831 F. Supp. 2d 95, 110 (D.D.C. 2011). The decision quoted directly from NMFS’s brief, which stated: “[b]ecause the Act now requires the Council and NMFS to set annual catch limits for these stocks, and because bycatch counts against those catch limits, the total amount of bycatch must be accurately assessed to ensure that catch limits are not exceeded.” *See id.* (citing Def. Mot. at 12).

<sup>8</sup> SAFMC, Comprehensive Ecosystem-Based Amendment 3, App. F, at 8 (Feb. 2013) [hereinafter CEBA 3 2013]. At the March 2014 Council meeting, Dr. Laney stated: “Until we get decent estimates of bycatch, I think it is going to continue to...affect the quality of the assessment that we can generate...The sooner we can address it, the better.” SAFMC, Data Collection Committee Summary Minutes, at 5 (March 6, 2014) [hereinafter SAFMC March 2014 Minutes]. At the March 2013 Council meeting, the Chairperson of the Ad Hoc Data Committee, Dr. Duval, recognized the importance of accurate bycatch data to effective fisheries management. SAFMC, Ad Hoc Data Collection Committee Summary Minutes, at 15 (March 7, 2013) [hereinafter SAFMC March 2013 Minutes] (“We are taking management actions or considering management actions that very much depend on the quality of the bycatch information we have.”).

<sup>9</sup> CEBA 3 2013, *supra* note 8, at 77–78 (referencing NMFS National Bycatch Report 2011).

<sup>10</sup> H.R. Rep. No. 104–171, at 27. According to the SFA’s principal sponsor, the bycatch amendments were intended to “bring a stop to this inexcusable amount of waste.” 142 Cong. Rec. S10810 (daily ed. Sept. 18, 1996) (statement of Sen. Ted Stevens).

<sup>11</sup> H.R. Rep. 104–171, at 20.

<sup>12</sup> *Id.* at 27.

First, Congress added National Standard 9 (NS 9) to the MSA. Under NS 9, conservation and management measures must minimize bycatch to the extent practicable and, if bycatch cannot be avoided, minimize the mortality of unavoidable bycatch.<sup>13</sup> Congress recognized that in order to minimize bycatch, it was necessary to monitor the amount and type of bycatch occurring in each fishery. Thus, the SFA also added a requirement that all FMPs must “establish a standardized bycatch reporting methodology to assess the amount and type of bycatch occurring in the fishery.”<sup>14</sup> Congress explicitly stated that the SFA “*mandate[s]* the assessment of bycatch levels in each fishery.”<sup>15</sup> Thus, the SBRM provision imposes a nondiscretionary requirement on each fishery management council to establish SBRMs for all fisheries under its jurisdiction. The SFA included a deadline of two years (October 11, 1998) for fishery management councils to bring their FMPs into compliance with these mandatory provisions.<sup>16</sup>

NMFS’s NS 9 Guidelines require “[a] review and, where necessary, improvement of data collection methods, data sources, and applications of data *must* be initiated for *each* fishery to determine the amount, type, disposition, and other characteristics of bycatch and bycatch mortality in each fishery.”<sup>17</sup> In the publication of the Final Rule, NMFS noted that it had made changes to the language in the NS 9 Guidelines to reflect that councils have a nondiscretionary obligation to monitor and report bycatch.<sup>18</sup> Not only has NMFS mandated bycatch data collection, but by including a bycatch data requirement in its NS 9 Guidelines, NMFS recognizes that accurately monitoring bycatch is essential to the ultimate goal of bycatch reduction.<sup>19</sup>

According to NMFS, an SBRM is “the combination of data collection and analyses...used to estimate bycatch in a fishery.” NMFS has established protocols for SBRMs, stating that a satisfactory SBRM includes the following:

- At-sea observers;
- Other at-sea observations technologies (*i.e.*, electronic monitoring) as appropriate to complement observer programs;

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<sup>13</sup> 16 U.S.C. § 1851(a)(9).

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

<sup>15</sup> S. Rep. No. 104–276, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4078 (emphasis added).

<sup>16</sup> Sustainable Fisheries Act, Pub. L. No. 104–297, § 108(b), 110 Stat. 3559, 3575 (1996); *Pac. Marine Conservation Council, Inc.*, 200 F. Supp. 2d at 1197 (“By establishing a two-year deadline for amending FMP to meet the bycatch reduction requirements of 16 U.S.C. section (a)(11), Congress demanded timely action to reduce bycatch.”); *Conservation Law Found. v. Evans*, 209 F. Supp. 2d 1, 12 (D.D.C. 2001).

<sup>17</sup> 50 C.F.R. § 600.350(d)(1) (emphasis added). The courts have interpreted this provision as imposing a mandatory duty on NMFS and the councils. *See, e.g., Oceana, Inc. v. Locke*, 670 F.3d 1238, 1239 (D.C. Cir. 2011) (noting § 600.350(d) requires councils “to create a database on bycatch and bycatch mortality”); *Conservation Law Found.*, 209 F. Supp. 2d at 12–13 (“[U]nder their own SFA regulations, [NMFS] must review and, if necessary, improve ‘data collection methods’ for every fishery.” (quoting 50 C.F.R. § 600.350(d)(1))).

<sup>18</sup> *See* 63 Fed. Reg. at 24,213. The final rule reads: “To evaluate conservation and management measures relative to [NS 9] and other national standards, as well as to evaluate total fishing mortality, Councils *must* . . . [p]romote development of a database on bycatch and bycatch mortality in the fishery to the extent practicable.” 50 C.F.R. § 600.350(d). NMFS changed “shall” to “must” “to emphasize that the evaluation requirements of the Magnuson-Stevens Act under this national standard are not discretionary.” 63 Fed. Reg. at 24,213

<sup>19</sup> *See* 50 C.F.R. § 600.350(d).

- A sampling design with a scientific and statistically valid basis for estimating bycatch or total catch;
- Models for combining observer data with effort, landings, and/or other data to obtain accurate estimates of total bycatch or total catch;
- A performance standard for estimating bycatch or total catch with a recommended level of precision of no more than 20–30% coefficient of variation;
- Methods to identify and decrease sources of bias;
- Adherence to NMFS data-collection and estimation standards for data collected in NMFS-approved observer programs, other data that are used in estimating bycatch or total catch, and the resulting estimates of bycatch or total catch; and
- Outreach to industry and other constituents to encourage their participation in the development of SBRM goals, objectives and implementation plans.<sup>20</sup>

According to NMFS, an adequate SBRM includes a sampling design, models for combining different data, methods for identifying and decreasing bias in the data, and a performance standard that ensures statistically-reliable and accurate bycatch estimates.<sup>21</sup> The courts have consistently interpreted the SBRM requirement as imposing a nondiscretionary duty on fishery management councils and NMFS to ensure that all FMPs include SBRMs.<sup>22</sup> This nondiscretionary *methodology* must mandate techniques that ensure statistically-reliable estimates of bycatch, including through the use of observers.<sup>23</sup> Importantly, the D.C. Circuit recently held that NMFS cannot use “external operating constraints” such as funding as a basis for choosing whether to implement an SBRM or components thereof.<sup>24</sup> Courts interpreting the

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<sup>20</sup> National Marine Fisheries Service, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs* 102 (2004). At-sea observations, including live observers and possibly electronic video monitoring, are crucial to any effective SBRM. According to NMFS at-sea observers are “part of the preferred method for collecting bycatch data due to the effectiveness of at-sea observer programs.”

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *Oceana*, 670 F.3d at 1239 (“[T]he Fisheries Service has merely described but has not, as the Fisheries Act, requires, ‘established’ a ‘standardized reporting methodology’ to assess bycatch.”); *Pac. Marine Conservation Council, Inc.*, 200 F. Supp. 2d at 1200 (“[S]ection [1853(a)(11)] of MSA requires that bycatch assessment methods be established in the fishery management plan itself.”); *Conservation Law Found.*, 209 F. Supp. 2d at 12 (“Under the SFA, all fishing management plans must, by October 11, 1998, ‘establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.’” (citing 16 U.S.C. § 1853(a)(11); Pub. L. No. 104–297, § 108(b)). *Oceana*, 670 F.3d at 1243 (“Because the [SBRM] Amendment grants the Fisheries Service substantial discretion both to invoke and to make allocations according to a non-standardized procedure, we hold the Service did not ‘establish’ a standardized methodology under the Fisheries Act. At best the rule sets a benchmark from which the agency freely can and apparently does significantly depart in its annual allocation of observers.”); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 232 (D.D.C. 2005) (striking down an FMP amendment for failing to meet SBRM requirements because it gave “complete discretion to the Regional Administrator” and did “not set forth the substance of a reporting methodology for the . . . fishery except in a vague and conclusory fashion”); *Pac. Marine Conservation Council, Inc.*, 200 F. Supp. 2d at 1198–1200 (holding bycatch reporting program was “legally insufficient” because it permitted but did not require an observer program—“a program that the NMFS itself concedes is critical”).

<sup>23</sup> See *Pacific Marine Conservation Council, Inc. v. Evans*, 200 F. Supp. 2d at 1200 (holding that an amendment that did not mandate an at-sea observer program, but rather included an optional at-sea observer program, was legally insufficient because “the administrative record makes it clear that an adequate . . . observer program is essential to account for bycatch.”); *Oceana*, 384 F. Supp. 2d at 232–34, 236; *Oceana*, 670 F.3d at 1239, 1241–43.

<sup>24</sup> See *Oceana*, 670 F.3d at 1242–43 (striking down the Northeast Omnibus SBRM Amendment that required NMFS to fund and allocate observers to collect bycatch data, but allowed NMFS to invoke an exception if “external operational constraints would prevent the agency from fully implementing the required at-sea observer coverage

SBRM requirement have also held that FMP amendments that merely preserve an inadequate bycatch reporting program do not meet the MSA’s SBRM mandate.<sup>25</sup>

### **The SAFMC and NMFS Have Not Complied with the MSA’s SBRM Requirement**

Despite the importance of accurate and comprehensive bycatch data and the MSA’s clear SBRM requirement, the Council and NMFS have yet to include a mandatory, legally-compliant SBRM in its FMPs. Most fundamentally, current regulations related to bycatch monitoring in the region are not based on any mandatory methodology, but rather leave the decision as to which bycatch monitoring tools are used, such as observer coverage and vessel reporting, up to the discretion of the Science Research Director (SRD).<sup>26</sup> Moreover, the decision to select which, if any, vessels must employ any particular tool is not based on any clearly-defined methodology for data collection.

The current bycatch monitoring program in the South Atlantic, implemented under Amendment 15B to the Snapper-Grouper FMP, fails to meet the MSA’s SBRM requirement. That amendment selected the Atlantic Coastal Cooperative Statistics Program’s (ACCSP) Release, Discard and Protected Species Module as its *preferred* methodology, but did not implement it due to a lack of funding.<sup>27</sup> Instead, NMFS simply listed a number of data collection tools (e.g., logbooks, observers, MRFFS, vessel monitoring systems, etc.) that the SRD *could* adopt, but did not provide a methodology that would require the use of these tools to produce statistically-reliable bycatch data.<sup>28</sup> Importantly, the ACCSP standard requires at least 5% observer coverage in high priority fisheries and 2% coverage in all other fisheries.<sup>29</sup> There is currently zero observer coverage in the Snapper-Grouper, Golden Crab, and Dolphin-Wahoo fisheries, and some unspecified amount of observer coverage in the mackerel gillnet fishery from the shark and North Carolina State gillnet observer programs.<sup>30</sup> Even NMFS acknowledged that Amendment 15B did not implement any new requirements, stating that “the Final Rule [for Amendment 15B] does not explicitly impose any new reporting, record-keeping or other compliance requirements...because this rule simply specifies the types of requirements that *could be*

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level.”). If NMFS concluded operational constraints made compliance impossible, the amendment authorized NMFS to instead determine the “most appropriate number and allocation of observers,” rather than complying with the levels established in the Amendment. *Id.* at 1240. The D.C. Circuit held that the amendment was unlawful, explaining that “no reasonable interpretation of the statutory instruction to ‘establish a standardized methodology’ would allow the agency to reserve to itself effectively complete discretion to trigger an exemption.” *Id.* at 1242–43 (“Although the Service congratulates itself for having adopted an approach ‘particularly wise in this fiscal climate,’ the self-proclaimed wisdom of the approach cannot save it because the Congress, in its more commanding wisdom, has not authorized it.”).

<sup>25</sup> *Oceana*, 384 F. Supp. 2d at 236 (“When the agency recognizes that its existing [bycatch reporting] program is inadequate, a methodology that simply retains the status quo is unacceptable.” (citations and internal quotation marks omitted)); *Conservation Law Found.*, 209 F. Supp. 2d at 13 (holding FMP amendment that merely kept intact status quo when New England Fishery Management Council “concede[d]” that bycatch reporting measures “suffer[ed] from significant deficiencies” was arbitrary, capricious, and contrary to law);

<sup>26</sup> *See, e.g.*, 50 C.F.R. § 622.8(a)(6).

<sup>27</sup> *Id.* at 2–5. Five years later, the ACCSP Bycatch Module has still not been implemented.

<sup>28</sup> Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 15B; Reef Fish Fishery of the Gulf of Mexico, 74 Fed. Reg. 58,902, 58,902 (Nov. 16, 2009).

<sup>29</sup> CEBA 3 2013, *supra* note 8, at S-4.

<sup>30</sup> *Id.*

imposed to improve bycatch monitoring and assessment.”<sup>31</sup> Thus, Amendment 15B did not *establish* a standardized methodology as required by the MSA and instead merely preserved the inadequate status quo.

In 2011, in its National Bycatch Report, NMFS reviewed and graded bycatch reporting programs across the country. Several fisheries in the South Atlantic were graded as Tier 1, defined as having bycatch data that are “generally unreliable (*e.g.*, from unverified or potentially biased sources).”<sup>32</sup> These included the Coastal Migratory Pelagic Troll, Snapper-Grouper Bottom Longline, Snapper-Grouper Handline, and Black Sea Bass Pot Fisheries. NMFS therefore recommended that “improvements in discard estimates...should be a high priority” in the South Atlantic.<sup>33</sup> No changes to the SBRM regulations in the region have been adopted since that time.

A recent report from NOAA Fisheries’ Science Program Review of data collection and management in the Southeast described the limitations of the current system of bycatch monitoring in the commercial sector as follows:

“The main issue with the commercial discards is that the vast majority of the data is self-reported and highly uncertain. The primary reason for this is that there is very limited observer coverage in [the] Gulf of Mexico and *zero observer coverage in the South Atlantic*. This leads to large estimates of uncertainty (*e.g.*, annual bycatch estimates from the Gulf of Mexico shrimp fleet can be quite large and have CVs greater than 200%), incomplete spatial coverage of discard data, little size information, and almost no age data. Even when there is observer coverage to estimate discards, this discard rate is often then applied to the fleet based on self-reported estimates of effort. Increased electronic monitoring in lieu of observers in the absence of 100% retention requirements will not solve this issue.”<sup>34</sup>

The Council and NMFS both appear to acknowledge that the status quo is legally deficient. At the March 2013 Council meeting, the Executive Director of the Council stated that “we have not met the standards of the Magnuson Act...for our bycatch reporting.”<sup>35</sup> NMFS’s Regional General Counsel responded by saying that “...I’m not willing to tell you *on the record* that you haven’t met the mandates of the Magnuson Act,” but recommended that “I think that you could improve upon what has been done.”<sup>36</sup> As a result of this discussion, the General Counsel’s office agreed to review whether the South Atlantic regional FMPs were complying with the SBRM requirement. A year later, in March of 2014, the NMFS Assistant General Counsel reported that “[i]t is clear to me that you want to go with some sort of mandatory observer coverage,” and further advised that the Council “take a harder look at the standardized bycatch reporting methodology in place for each one of your FMPs, because I think that needs to be

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<sup>31</sup> *Id.* at 58,907 (emphasis added).

<sup>32</sup> NMFS National Bycatch Report 2011, *supra* note 4, at 5.

<sup>33</sup> CEBA 3 2013, *supra* note 8, at 77.

<sup>34</sup> NOAA Fisheries, Summary Report: Southeast Fisheries Science Center Science Data Collection Program Review, at 11 (2013) (emphasis added), *available at* [http://www.sefsc.noaa.gov/spr/SEFSC%20Data%20Peer%20Reviewer%27s%20Reports\\_June%202013.pdf](http://www.sefsc.noaa.gov/spr/SEFSC%20Data%20Peer%20Reviewer%27s%20Reports_June%202013.pdf).

<sup>35</sup> SAFMC March 2013 Minutes, *supra* note 8, at 9.

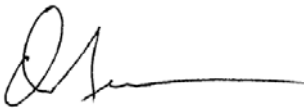
<sup>36</sup> SAFMC March 2013 Minutes, *supra* note 8, at 10 (emphasis added).

tightened up and made more clear to the public exactly what your methodology is and what is in place under each different fishery management plan.”<sup>37</sup>

Despite this advice, the Assistant General Counsel urged the SAFMC to delay taking any action on the regional SBRM until the Northeast region had resolved a question about how to better fund observer coverage. Unfortunately, what was not made clear to the Council at the time was that the question at issue about funding observers in New England did not pertain to the region’s SBRM, but rather to a separate, additional program to enhance observer coverage to monitor a bycatch cap for depleted river herring and shad species.<sup>38</sup> The question of funding the mandatory requirements of the Northeast SBRM, like the level of observer coverage necessary to meet the statistical performance measure contained in the SBRM, had been resolved by the D.C. Circuit court when it held that NMFS and the Council cannot use “external operating constraints” such as funding as a basis for choosing whether to implement an SBRM or components thereof.<sup>39</sup>

In conclusion, there is no legally-defensible reason for further delay in implementing the necessary components of a satisfactory SBRM in the South Atlantic region. We urge the Council and NMFS to expedite action to come into compliance with the now 18-year-old SBRM requirement.

Respectfully submitted,



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<sup>37</sup> SAFMC March 2014 Minutes, *supra* note 8, at 4.

<sup>38</sup> New England Fishery Management Council, Draft Discussion Document: Industry-Funded Monitoring Omnibus Amendment, 2 (Aug. 19, 2014) (“The New England and Mid-Atlantic Councils are interested in increasing monitoring and/or other types of data collection in some fishery management plans (FMPs) to assess the amount and type of catch, to monitor annual catch limits, and/or provide other information for management. *This increased monitoring would be above and beyond coverage required through the Standardized Bycatch Reporting Methodology (SBRM)...*”) (emphasis added).

<sup>39</sup> *Oceana*, 670 F.3d at 1242–43.