

September 24, 2007

Patricia Kurkul
NMFS Northeast Regional Office
One Blackburn Drive
Gloucester, MA 01930

RE: Comments on Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment

Dear Ms. Kurkul:

On behalf of Public Employees for Environmental Responsibility (PEER), I am submitting the following comments on the proposed Northeast Region Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment.

PEER's principal concern is with the conversion of the observer program for the Mid-Atlantic and New England Councils from one controlled by the National Marine Fisheries Service (NMFS) to an industry-funded program. Under the SBRM Amendment, industry would select, finance and evaluate observers, in a manner similar to that in the North Pacific Groundfish Observer Program (NPGOP).

This key aspect of the SBRM Amendment would lead to conditions which are contrary to the intent of the Magnuson-Stevens Fishery Conservation and Management Act and inimical to responsible resource protection for the following reasons:

I. Industry Funding and Control Would Create the Appearance of Conflict-of-Interest and Raise the Threat of Bias

In its 2004 paper on the NPGOP Service Delivery Model (http://www.fakr.noaa.gov/sustainablefisheries/seis/final062004/Appen/App_F/app_f10.pdf), NMFS itself stated that:

“The direct business relationship between the observer’s employer and industry creates, at a minimum, the appearance of a conflict of interest. The OPO [Observer Program Office] has no documented cases of an observer being asked by their company to alter data to benefit a business partner. Nevertheless, this possibility exists and OPO staff have seen less egregious cases where the company’s need to provide the service to their customers outweighs the government’s need for quality data. These examples include behavior such as deploying an observer with no sampling gear, no personal gear, or while the observer was ill and unable to sample.”

Moreover, NMFS pointed to the pressure from not only the fishing industry but also from the observer contractors competing for industry funding:

“The NPGOP currently operates with five permitted observer companies. These companies compete for industry clients. The competition may also put observers under unnecessary pressure which can be detrimental to data quality and the observer’s work environment. For example, observers have reported not being allowed to board vessels because they had completed an affidavit against the vessel.” [Page F 10-10]

The industry funding aspect of this proposal would extend this direct economic disincentive for accurate reporting of information since accurate reports may evidence violations or otherwise work to the disadvantage of the industry funding observers throughout the Mid-Atlantic and New England regions.

Nothing in the proposal addresses this built-in conflict, or attempts to mitigate or control the potentially pernicious repercussions.

II. Plan Creates an Economic Incentive to Evade Observation

The SBRM would make the economic price tag of observers a cost of doing business for the fishing industry. The salaries, food and provisions for observer coverage will become a multi-thousand dollar cost for fishing fleets, which will inevitably try to minimize these costs.

As fishery observer coverage is required for only a portion of the time the vessel fishes, the vessel and crew are financially penalized every time they must carry an observer. This arrangement is not conducive to a good working relationship between observer and crew. Moreover, it fosters a dynamic in which vessels will actively seek to evade observer coverage.

III. Plan Discourages Marine Mammal and Other Monitoring to the Detriment of Marine Resources

The SBRM is geared toward monitoring of bycatch only. The plan may minimize other observation not strictly required for monitoring of bycatch.

The Environmental Assessment for the SBRM states—

“Regardless of the approach selected, the at-sea observer program implemented in this amendment is designed to optimize the accounting and estimation of discards occurring in fisheries managed under the Northeast Region FMPs [Fishery Management Plans]. If observers assigned to fishing vessels under the SBRM are utilized for other purposes, such as real-time quota monitoring, monitoring of marine mammal interactions, monitoring fishing gear operations, etc., these activities and competing priorities may degrade the sampling design developed and implemented through this amendment.” [Page 216]

The industry financed nature of the SBRM stresses that observer duties be structured “to ensure that the observer program can be applied to the subject fisheries in as cost effective manner as possible.” The concern, of course, is that all non-bycatch responsibilities of observers are sacrificed so as to limit any activities deemed extraneous by the subject fisheries. This reduction or de-emphasis of the full range of observer duties will come at the detriment of marine mammals and other marine life outside of the narrow parameters of bycatch rules.

IV. Industry Funding Cripples Controls on Harassment of and Interference with Observers

The economic pressures facing commercial fishing fleets are growing more intense as fishing stocks continue to decline and international competition becomes fiercer. So perhaps it is not surprising that reported cases of harassment of and interference with observers is on the rise. Many of the observers are female and face particular challenges from all-male fishing crews on long, arduous voyages.

According to figures obtained by PEER under the Freedom of Information Act –

- The number of observer harassment cases more than doubled from 2004 to 2005, capping a rising trend over the past decade. For the last year available, more than one in ten of the 500 observers in service are experiencing some form of intimidation or obstruction, according to agency records;
- Other violations reported by observers rose dramatically starting in 1999 and continued to rise through 2005; and
- Agency data also indicated that in the vast majority of cases, NMFS took no enforcement action, and when it did, a warning was the most frequent sanction. Many violations were dismissed on the basis that the agency lacked resources to investigate them.

Under an industry funded observer program, it will be more difficult to obtain reports of and take enforcement action in harassment and intimidation case. In fact, it is unclear whether NMFS has jurisdiction to protect industry-paid observers. As a consequence, industry funded observers will be left with little or no recourse against interference, retaliation or other improper conduct directed against them.

V. The SBRM Is Based on a Flawed Model

The SBRM Amendment would model the NEFOP after the NPGOP Service Delivery Model of industry funded observers, where industry pays observer providers directly for observer services. The NPGOP model, however, has been criticized in assessments conducted by NMFS itself, the Commerce Office of Inspector General and independent evaluators.

The shortcomings found by NMFS in its 2004 Paper on NPGOP Service Delivery Model, cited above, were echoed that same year by the Department of Commerce, Office of Inspector General in its audit report entitled “NMFS Observer Programs Should Improve Data Quality, Performance Monitoring, and Outreach Efforts.” Report No. IPE-15721/March 2004

Even more direct was critique contained within the “Independent Review of the North Pacific Groundfish Observer Program” prepared by MRAG Americas, Tampa, Florida for the NMFS, Alaska Fisheries Science Center in 2000. The MRAG report summarizes why there is such a high turnover of observers with this service delivery model and concludes –

“If the option of a government program is open to the OPO, then we recommend that it is implemented as soon as possible, to enable NMFS to effectively deliver on its responsibilities for monitoring North Pacific groundfish. In the event this is not an option, a viable alternative would be to establish direct contractual relationships between the government and the observer companies.” [Page 6]

Under the SBRM Amendment, NMFS appears to be on a course to greatly expand a failed model for no explicable reason. Yet, NMFS appears to be on the course to expand a service delivery model that is well documented to be detrimental to data quality, observer welfare and NMFS oversight.

VI. SBRM Amendment Diminishes Transparency of Observer Data

Under the predominant system currently in effect for observer services, NMFS contracts with individual observers whose work product is generally subject to the Freedom of Information Act (FOIA) because it is federally funded and a federal agency is the custodian of all of the data.

Under the plan proposed by the SBRM Amendment, the industry would contract with private companies who employ the observers. Presumably, the final bycatch reports will be delivered to NOAA and will be available under FOIA. It is not at all clear, however, what is the public availability status of all other observer data in an industry funded system.

As the SBRM Amendment EA notes—

“Observers are trained and expected to record information regarding 611 species...Because the explicit inclusion of additional, non-FMP managed species (other than those required under the law), is not necessary to ensure that data on the discards of those species is collected and available for use and/or use in stock assessments, and is beyond the scope required for the SBRM Amendment...”
[Page 208]

The question, then, is whether the public will have access to the data from other than the approximately 39 FMP species? The EA is silent on this point. Moreover, since the raw

data on the 572 non-FMP species will be in the hands of a private company with no direct contractual connection to a federal agency it may be beyond the reach of FOIA and the public.

To the extent that vast amounts of observer data remain in private hands in industry funded programs, the SBRM Amendment may substantially reduce information available to researchers, regulators and others about the status of marine stocks.

For these reasons, PEER strongly urges NMFS to reject this SBRM Amendment.

Sincerely,

Jeff Ruch
Executive Director