

December 20, 2017

Mr. James J. Gilmore, Jr., Chair
Atlantic States Marine Fisheries Commission
1050 N. Highland Street, Suite 200 A-N
Arlington, Virginia 22201

Dear Mr. Gilmore:

Virginia hereby appeals the decision of the Atlantic Menhaden Management Board (the “Board”) to set the coast-wide total allowable catch (“TAC”) for menhaden at 216,000 metric tons for the 2018 and 2019 fishing seasons and to adopt certain portions of Amendment 3 to the Atlantic Menhaden Fishery Management Plan (“FMP”). Specifically, Virginia challenges the decision to allocate the TAC in a way that results in an unanticipated and unfair reduction in Virginia’s allowable menhaden landings and the decision to lower the Chesapeake Bay Reduction Fishery Cap (the “Bay Cap”) despite the lack of supporting scientific information. Taken together, these decisions, which are unnecessary for the conservation of the fishery, impose severe and unfair adverse economic impacts on Virginia and prevent it from sharing in the benefits of the increased TAC.

BACKGROUND

Atlantic menhaden have been subject to a coast-wide fishery management plan since 1981, but the first management measure, the Bay Cap, was not instituted until the passage of Addendum II in 2005. ASMFC, Amendment 3 to the Interstate Fishery Management Plan for Atlantic Menhaden, at pp. 26-27 (November 2017) [hereinafter “Amendment 3”]. At that time, the coast-wide status of the stock was healthy, but there was uncertainty about whether the reduction fishery in the Bay was causing localized depletion. Addendum II outlined research priorities to determine whether the depletion was occurring and imposed the Bay Cap as a precautionary measure to ensure that it did not occur while the research was being done. *Id.* at pp. 24, 27.

After passage of Addendum II, the company that is responsible for the reduction fishery on the East Coast, Omega Protein Corporation (“Omega”), entered into talks with recreational fishing and environmental groups to revise the cap.¹ Those discussions resulted in an agreement to set the cap at 109,020 metric tons. This agreement was implemented in Addendum III. (Amendment 3, at p. 27). The addendum permitted limited roll-over of unused quota from one year to another, meaning that the maximum that could be harvested in a given year from the Bay was 122,740 metric tons. *Id.*

The first coast-wide management measure, a TAC, was established in Amendment 2, which was approved in December of 2012. *Id.* The TAC was set at 170,800 metric tons, which represented

¹ See Scott Harper, “Kaine and Fishery Strike Deal to Limit Menhaden Harvesting in Bay,” *Virginian Pilot*, available at https://pilotonline.com/news/local/environment/kaine-and-fishery-strike-deal-to-limit-menhaden-harvesting-in/article_4300a886-9bb8-5e2e-b620-c416c7fd4fce.html

a 20% reduction from average landings from 2009 through 2011. *Id.* This TAC was allocated among jurisdictions using average annual landings of each jurisdiction during the same 2009 through 2011 period. *Id.* The amendment also provided for a 20% reduction in the Bay Cap, resulting in a cap of 87,216 metric tons. *Id.* at p. 28.

The TAC was increased by 10% to 187,880 metric tons in May of 2015. *Id.* The Bay Cap was not increased. In 2016, the TAC was increased again by 6.45%, resulting in a TAC of 200,000 metric tons. *Id.* Once again, the Bay Cap was not increased. At the same time that it voted to increase the TAC, the Board initiated the development of Amendment 3 to the FMP to explore the feasibility of implementing menhaden-specific biological and ecological reference points (“BERPs”) to replace the current single-species reference points that are used to manage the stock and to re-examine the method of allocating the TAC among the jurisdictions. *Id.* at pp. 1-3.

The Board considered whether to adopt Amendment 3 and adjust the TAC at its meeting on November 13 and 14, 2017. At the meeting, the Board was presented with evidence indicating that, under the current stock assessment, the menhaden stock is healthy and overfishing is not occurring. Furthermore, the Board was presented with information indicating that raising the TAC to 220,000 metric tons would result in absolutely no risk of the fishing mortality target being exceeded and raising the TAC even higher would result in only a small risk of exceeding the target. After substantial debate, the Board decided not to adopt the BERPs presented, perhaps because they were not menhaden-specific and may have caused the lowering of the TAC substantially to meet the target fishing mortality rate; instead, it chose to continue using single-species reference points until menhaden-specific BERPs are finalized. The Board raised the TAC by 8%, setting it at 216,000 metric tons. It also decided to reallocate the quota using an unorthodox fixed minimum allocation. Under that system, all states, regardless of their history of menhaden landings, are each provided 0.5% of the TAC. The remainder of the TAC is then divided among the states according to their proportion of the landings from 2009 through 2011. States that do not wish to retain their portion of the TAC are given the option of relinquishing all or some portion of their new quota, which will cause that portion of the TAC to be redistributed among the remaining states in proportion with their landings. The Board continued the 1% episodic events set aside for the New England states. Finally, the Board voted to lower the Bay Cap by more than 41%, setting it at 51,000 metric tons. Despite the increase in the TAC, Virginia’s permissible landings were actually decreased once the allocation method and episodic events set-aside are taken into account.

Virginia exhausted every possible avenue to avoid these results and secure relief from the Board. At the meeting, Virginia argued that the TAC that was chosen was likely too low to accomplish the goals expressed in the reallocation discussion, which were to increase allocations to additional East Coast states but not at the expense of existing menhaden fisheries. When the allocation method was discussed, Virginia argued and voted against each of the fixed minimum proposals. It also forcefully advocated against lowering the Bay Cap, pointing out that such an action was unsupported by any scientific evidence. Those efforts failed. Virginia is unaware of any remaining avenue of securing relief from the Board and believes that this appeal is its only recourse.

ARGUMENT

Despite the Board's decision to raise the TAC, which shows that it believes the menhaden stock is healthy, it adopted an allocation method that cut Virginia's permissible menhaden landings and reduced the Bay Cap. The decisions on the TAC and allocation prevented Virginia from benefiting from the increase in the permissible harvest level and provided jurisdictions with little or no history of landings with a substantial share of the TAC, relative to the practical needs of those jurisdictions. The reduction in Virginia's permissible landings was an unforeseen impact of the Board's decisions. In addition, the decisions unfairly penalized Virginia in contravention of the FMP and disregarded the historical landings period that the Board chose. Compounding the problem was the decision to lower the Bay Cap despite the lack of supporting technical information. These measures, which are unnecessarily restrictive in light of the health of the menhaden stock, should be altered to protect the interests of all jurisdictions participating in the fishery.

I. The Board unintentionally and unfairly penalized Virginia to benefit other states with no history of participating in the fishery when setting the TAC and allocating the TAC among the states.

Although the Board's decisions ultimately reduced Virginia's permissible landings, this was not the Board's stated intent. Throughout the Board's deliberations on Amendment 3, a theme emerged: many Board members wanted to provide additional jurisdictions with an opportunity to participate in the fishery, but they did not wish to do so at the expense of the other jurisdictions. For example, when the Board was considering whether to set the fixed minimum allocation at 0.75% or 1%, much of the discussion focused on how the former was preferable because it would not harm any state. After that method was chosen, however, a representative from Omega pointed out that the 0.75% fixed minimum would result in an 8% reduction in Virginia's landings. At that point, some Board members and staff worked to find an alternative allocation scheme that would not harm any state. The result of those efforts was a table distributed by staff showing that allocating the TAC based on a 0.5% fixed minimum would achieve that goal. At that point, a motion was made to reconsider the allocation, and the 0.5% fixed minimum was selected. Unfortunately, the staff analysis reflected in the table did not account for the episodic events set-aside, which has been 1% of the coast-wide TAC since 2013. Before the set-aside is factored in, Virginia's allowable landings increase by 0.58%. After the set-aside is removed, however, Virginia's allowable landings decrease by 0.43%, which amounts to more than 1.6 million pounds of menhaden.² If this had been pointed out to the Board, it undoubtedly would have taken steps to ensure that Virginia was not harmed.

In addition to being unforeseen, the impact on Virginia is fundamentally unfair. Amendment 3 takes pains to note that its allocation method is designed to provide a fair and equitable allocation of the resource among the jurisdictions and an allocation that is biologically, economically, and socially sound. (Amendment 3, at pp. 3, 24, 29). The allocation method that was ultimately chosen

² Several states have indicated that they will relinquish their share of the TAC for the 2018 fishing season. Once those shares of the TAC are redistributed, Virginia's permissible landings will rise modestly. Nevertheless, the allocation is still problematic because the benefit accruing to Virginia is unfairly small when compared to the disproportionate benefit enjoyed by the other jurisdictions. In addition, there is no guarantee that the states that relinquished their allocation this year will do so again next year, meaning that Virginia may face a reduction in its allowable landings during the 2019 fishing season.

fails that standard. First, the allocation results in a reduction in harvest opportunity for only one state, Virginia, while providing other jurisdictions with very substantial and unnecessary increases. For example, three states that had no allocation before were given the opportunity to land more than 2 million pounds of menhaden, while New Hampshire's allocation was increased by more than 1,000,000%. Moreover, it is not at all clear that many of the states which benefitted from this reallocation can actually use it. Virginia is the only state with a reduction fishery; the other states that have a menhaden fishery at all have a bait fishery. The recent socio-economic study of the menhaden fishery requested by the Board found that most states with minor shares of the TAC under the old allocation system are often not affected by their minor percentage of the TAC because of the bycatch provision that allows vessels to harvest up to 6,000 pounds of menhaden per day even after a state or jurisdiction's share of the TAC has been harvested. The bycatch amounts will continue to not be counted against the TAC under Amendment 3. This means these states could proceed harvesting menhaden for bait at a rate of 6,000 pounds of menhaden per vessel per day after their relatively small portion of the TAC realized under Amendment 2 has been landed. Thus, many states that benefitted from the reallocation could have had the same or a similar harvest level under the small-scale fishery and bycatch provisions without the reallocation of the TAC.

Indeed, many of the jurisdictions admitted that they do not need the additional allocation and do not have the desire or infrastructure to make use of it. Pennsylvania, for example, repeatedly stated during the deliberations that it had no desire to create a fishery for menhaden in the state, even going so far as suggesting that, if it were forced to demonstrate the intent and ability to make use of its allocation as a condition to receiving it, its fishermen would purposefully use faulty gear that would allow the vast majority of the fish in the nets to escape. New Hampshire stated that it may have the ability to make use of some of its allocation, depending on whether a large fishing vessel decided to target menhaden and dock in the state, but it admitted that it would likely make a good part of its allocation available to other states through transfers. South Carolina acknowledged that it did not have the infrastructure necessary to participate in the fishery and expressed a willingness to relinquish its allocation. Connecticut, on the other hand, stated that it would not participate in the relinquishment program, as it viewed the allocation as a kind of currency to be traded.

The latter position highlights the unfair position in which Virginia finds itself. It can either allow its permissible landings to decrease or negotiate for a transfer from a state that has no need for its allocation of the TAC because it either has no intention to participate in the fishery or its fishery is not bound by the TAC under the small-scale fishery and bycatch provisions. In other words, Virginia must either accept the lowered allowable landings of menhaden and the clear, demonstrable adverse economic impacts on the communities that depend on the fishery or provide a windfall to a state by exchanging something of value for a transfer of a portion of the TAC that the transferring jurisdiction does not need. It is fundamentally unfair, socially unjust, and economically unsound to place a state in such a position, especially when doing so is unnecessary for the preservation of the menhaden fishery because the stock is healthy enough to provide for an increased harvest level for all jurisdictions.

This fundamental unfairness stems from a key defect in the fixed minimum allocation method: namely, the scheme ignores historical landings in setting the minimum. Even states that had no landings whatsoever during the relevant landings period are given an allowable harvest of more than 2.3 million pounds of menhaden. This is a radical redistribution of the TAC. Indeed, if the Board had

instead chosen to double the average landings of the smaller jurisdictions, it would have ended up redistributing around 16 million fewer pounds of menhaden. It is troubling to Virginia that a historical basis of landings had persisted since 2013, whereby Virginia rightly enjoyed 84.96% of the TAC, yet the *de novo* allocation system adopted by the Board resulted in Virginia being downgraded to 79.66% of the coast-wide TAC.

A remedy to this unnecessary and unfair allocation exists. The most reasonable way to remove the unfairness is to increase the TAC to a level that allows all jurisdictions to be given a fair share and adopt an allocation method that is based on landings. While jurisdictions that have not traditionally participated in the fishery can be given shares of the TAC, they should be required to demonstrate some landings under the bycatch or small-scale fishery provisions before that occurs. Doing so will ensure that the decision will not provide significant shares of the TAC to states with no intention of using them as anything other than a bargaining chip while also ensuring that states with established fisheries will be provided with sufficient allowable landings to avoid harm to those fisheries.

II. The decision to lower the Bay Cap is unnecessary and unsupported by scientific evidence.

Compounding the harm to Virginia stemming from the setting of the TAC and the allocation method is the Board's decision to reduce the Bay Cap from 87,216 metric tons to 51,000 metric tons. If lowering the cap were necessary to preserve the health of the menhaden stock, that harm could be justified. Unfortunately, the technical information available to the Board does not demonstrate any such need for lowering the Bay Cap.

Before examining the technical information presented to the Board, it is first beneficial to examine the rationale for the Bay Cap. It was initially justified as a precautionary measure to ensure that localized depletion of menhaden would not occur while the issue was studied. (Amendment 3, at p. 24). Later, the Board theorized that it protected the Bay as "an important nursery ground for menhaden." *Id.* Finally, at the meeting, the maker of the motion to lower the Bay Cap asserted that it was necessary to protect the Bay as a nursery for both menhaden and other species. This justification was reflected in the press release that announced the reduction in the Bay Cap. *See* ASMFC, News Release, *ASMFC Approves Amendment 3 to the Interstate Fishery Management Plan for Atlantic Menhaden*, ("This recognizes the importance of the Chesapeake Bay as nursery grounds for many species by capping recent reduction landings from the Bay to current levels."), available at [http://www.asmfc.org/uploads/file//5a0c69b4pr57 MenhadenAmendment3_Approval.pdf](http://www.asmfc.org/uploads/file//5a0c69b4pr57%20MenhadenAmendment3_Approval.pdf).

The technical information presented to the Board does not support any of these rationales. First, as to localized depletion, the studies that were commissioned at the time the Bay Cap was first instituted failed to find that such depletion was occurring. (Amendment 3, at p. 24). In fact, those studies indicated that, if such depletion did occur, it would be relatively small in scale and short-lived given the migratory nature of menhaden. *Id.* An external peer review of those studies conducted by the Center for Independent Experts supported this view, concluding localized depletion was a possibility in theory but nothing demonstrated that it was occurring in the Bay.

There is similarly no evidence to support the view that lowering the Bay Cap was necessary to protect the Bay as a nursery area for menhaden. Amendment 3 does not explain how the Bay Cap

serves to protect the Bay as a nursery. Logically, it could only do so if the reduction fishery resulted in high mortality for juvenile menhaden or harmed menhaden habitat. Nothing indicates that it does either. The reduction fishery does not target juvenile menhaden,³ and the mortality rate among juvenile menhaden attributable to fishing activity is low. In addition, no evidence exists to show that the gear used in the reduction fishery harms the habitat of menhaden or any other species.⁴ In fact, the scientific information that is available tends to show that the reduction fishery does not harm the Bay's nursery function at all. If the fishery did harm the Bay, one would expect the research in the area to show the Bay to contributing fewer recruits than other estuaries or supplying less healthy recruits that fail to survive to reproduction age. That is not the case. Instead, the current research indicates that the Bay contributes roughly the same proportion of recruits to the population as estuaries in New England and the southeast. *Id.* at p. 21. These recruits tend to survive to reproduction age in roughly equal proportions. *Id.* It is thus apparent that the reduction fishery does not prevent the Bay from serving as a nursery for juvenile menhaden.

Finally, there is similarly no evidence to suggest the Bay Cap was necessary to protect the Bay as a nursery for other species. Again, Amendment 3 does not provide an explanation for how the Bay Cap serves this purported purpose. However, it could only do so if the reduction fishery deprived other species of a sufficient amount of menhaden to forage, harmed the habitat of those other species in some way, or harvested large numbers of those other species as bycatch. Of course, as discussed above, there is nothing to indicate that localized depletion of menhaden is occurring, so there is nothing to indicate that the harvest is depopulating the Bay to such an extent that other species do not have a sufficient forage base.⁵ In addition, no evidence has been tendered to show that the reduction fishery harms the habitat of any animal. Finally, nothing indicates that the reduction fishery harvests such large numbers of other species that their numbers are endangered, as the bycatch in the fishery is incredibly low. *See id.* at pp. 14-15 (noting that studies have found that there is little bycatch in the purse seine fishery and summarizing a study conducted by the Virginia Institute of Marine Science that found that the bycatch in the 1992 menhaden reduction fishery comprised only 0.04% by number).

There is thus no technical information to support the view that the Bay Cap needed to be lowered. Virginia does not object to the Bay Cap being in place, but it does object to arbitrarily lowering it when no science indicates that doing so is necessary or even beneficial for conserving the

³ One Board member speculated that this may change. During deliberations on the Bay Cap, that member asked the Virginia delegation whether Omega, which was recently acquired by a new company, would begin targeting smaller fish to fulfill some unnamed purpose of its new owner. Virginia indicated that it had no knowledge of such plans and that the smaller fish were not generally useful for Omega's purposes. As far as Virginia is aware, Omega has no plans to begin targeting juvenile menhaden.

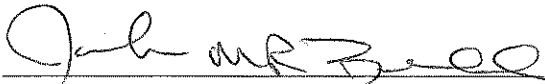
⁴ The purse seine has no impact on habitat if used correctly. Food and Agricultural Organization, United Nations, Purse Seines, <http://www.fao.org/fishery/geartype/249/en> ("Because of [the purse seine's] characteristics there is no impact on the bottom habitat (except when the water depth is less than the height of the seine during the fishing operations and . . . the lower edge of the gear wipes the sea bottom).").

⁵ A multi-year dietary analysis of the top five predators in the Chesapeake Bay found that menhaden comprised at least 5% of the diet of only one of those predators. T.F. Ihde, et al., *Assessing the Chesapeake Bay Forage Base: Existing Data and Research Priorities*, at pp. 20, 26 (STAC Publication 15-005, 2014), available at http://www.chesapeake.org/pubs/346_Ihde2015.pdf. Thus, the impact of any localized depletion that did occur on other species would be negligible.

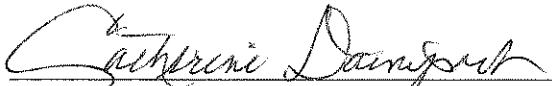
menhaden fishery. Accordingly, Virginia believes that the Bay Cap should be restored to at least 87,216 metric tons and that a limited amount of unused quota should be rolled over to future years.

CONCLUSION

In sum, the Board's decisions on the TAC, allocation of the TAC, and the Bay Cap, all of which are excessively restrictive and unnecessary for the conservation of the menhaden fishery, should not be allowed to persist. Virginia believes that the Interstate Fisheries Management Board ("ISFMP Board") should instead order that the TAC be set at 220,000 metric tons and that an allocation method be adopted that is based on historical landings without arbitrary adjustments. In addition, Virginia believes that the Bay Cap should be returned to 87,216 metric tons with a possibility for the rollover of a portion of any unused quota from year to year. As required by the ISFMP Board's Appeals Process pursuant to which this appeal is taken, Virginia commits to comply with the ISFMP Board's decision in this matter, subject to its right to take further action beyond the ASMFC process to seek relief.



John M.R. Bull, Administrative Appointee



Catherine Davenport, Governor Appointee



Senator Richard Stuart, Legislative Appointee