



# Atlantic States Marine Fisheries Commission

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*James J. Gilmore, Jr. (NY), Chair*

*Patrick Keliher (ME), Vice-Chair*

*Robert E. Beal, Executive Director*

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*Vision: Sustainably Managing Atlantic Coastal Fisheries*

January 17, 2018

John M.R. Bull  
Commissioner  
Virginia Marine Resources Commission  
2600 Washington Avenue  
3rd Floor  
Newport News, Virginia 23607-4317

Dear Mr. Bull,

This letter responds to the Commonwealth of Virginia's December 20, 2017 appeal of the Atlantic States Marine Fisheries Commission's (Commission) approval of Amendment 3 (Amendment) to the Atlantic Menhaden Interstate Fishery Management Plan (FMP). On January 5 and 11, 2018, in accordance with the appeals process, a conference call of the Commission Chair Jim Gilmore, Vice-Chair Pat Keliher, past Chair Doug Grout (Leadership), and staff were convened to review the Virginia appeal. The purpose of the review was to assess the issues Virginia raises in its appeal and to determine whether those issues are of the type and substantiality that warrants review by the full Interstate Fisheries Management Program Policy Board (Policy Board). Given the appeal does not directly indicate the specific appeal criteria for which Virginia is making its claims, Leadership has made assumptions for which criterion an issue falls under.

During the call, it was determined the appeal did **not** meet the qualifying guidelines under appeal criterion one (decision not consistent with FMP), four (historical landings period not adequately addressed) and five (unforeseen circumstances/impacts) for both state allocations and the setting of the 2018 total allowable catch (TAC). However, it **could be forwarded** to the Policy Board for appeal consideration under criterion three (incorrect application of technical data) for the Chesapeake Bay Reduction Fishery Cap (Bay Cap). Appeal criterion two was not considered because it was not referenced in the appeal.

## **A. Claims Under Criterion One: Decision Not Consistent with FMP**

The appeal referenced criterion one, "Decision not consistent with the FMP." Under this criterion, the appeal argues the allocation method fails to meet the goal of the FMP specifically allocating the resource in a method that is biologically, economically, and socially sound. See letter from Virginia Commissioners to ASMFC Chair James J. Gilmore, pp. 3-5 (December 20, 2017). Leadership rejects this claim.

The goal of Amendment 3 is “to manage the Atlantic menhaden fishery in a manner which equitably allocates the resource’s ecological and economic benefits between all user groups. The primary user groups include those who extract and utilize menhaden for human use, those who extract and utilize predators which rely on menhaden as a source of prey, and those whose livelihood depends on the health of the marine ecosystem. Pursuit of this goal will require a holistic management approach which allocates the resource in a method that is biologically, economically, and socially sound in order to protect the resource and those who benefit from it.” While it is true the allocation method does result in a reduction of the percent share allocated to Virginia, the Commonwealth is allocated nearly 80% of the coastwide quota with the remainder to be shared by the other 14 member states. It is important to note the available quota for Virginia actually increases in 2018 relative to 2017. This increase is further described later in this letter.

Under the FMP, the primary user groups are defined as the directed fishery (bait and reduction), recreational fishermen, predators of menhaden, and those whose livelihoods depend on the health of the marine ecosystem. Given the FMP goal of equitable allocation, one could argue that allocating nearly 80% of TAC to one jurisdiction within a 15 jurisdiction management unit is not an equitable distribution to the primary user groups. Given the diverse objectives of the primary menhaden user groups, the Board must make allocation decisions that balance biological, economic, and social trade-offs. The Board had significant deliberations on the issue of what is equitable allocation. By choosing the fixed minimum allocation method, the Board was able to address the needs of the different stakeholders, taking into account the needs of the directed fishery, while having minimal negative impact relative to the 2017 quotas. Virginia’s 2018 quota still allows for growth, given it has not harvested its full allocation in the last two years. Leadership concludes substantial grounds for an appeal are not present on this issue.

**B. Claims Under Criterion Four: Historical Landings Period Not Adequately Addressed**

The appeal cited criterion four, “Historical landings period not adequately addressed.” Under this criterion, the appeal states the fixed minimum allocation method ignores historical landings in setting the minimum. See letter from Virginia Commissioners to ASMFC Chair James J. Gilmore, pp. 3-5 (December 20, 2017). Leadership rejects this claim. While Virginia is correct the fixed minimum does not use history-based landings, the vast majority (approximately 94%) of the TAC is allocated using average landings from 2009-2011. Leadership concludes historic landings are being considered for the allocation of the vast majority of the TAC. Commission guiding documents do not require Boards to allocate quota based solely on historical landings information.

Virginia states the fixed minimum allocation method was “radical” and “unorthodox.” Leadership argues the method is a reasonable allocation tool to accommodate changing conditions in a fishery that cannot be addressed through the use of historic landings. In fact, two other Commission plans use fixed minimums to allocate quota, northern shrimp and American eel. In addition, there are several other fisheries in the United States and the world

that are managed using fixed minimums, including Western Atlantic reefish and the Shetland shellfish fisheries (UK). The fixed minimum approach allowed the Board to allocate the majority of the TAC using historical landings, but provided opportunities for states that either did not have accurate historical catch information (due to the lack of reporting requirements) or have seen increases in menhaden abundance in state waters in recent years (2015-2017). Leadership concludes substantial grounds for an appeal are not present on this issue.

Virginia suggests a remedy to the “unnecessary and unfair” existing allocation is to increase the TAC to 220,000 MT. The Board did consider this TAC level at the November 13 and 14, 2017 Board meeting but the motion failed with 5 in favor and 13 in opposition (See November Meeting Summary page 3). The Board reviewed a wide range of TAC levels with varying levels of risk for exceeding the fishing mortality target. In setting the TAC, the Board considered both the menhaden resource and the ecosystem services the resource provides. It also took into consideration the overwhelming public support to conservatively manage the resource. In taking this holistic approach, as set by the goal and objectives of the FMP, the Board set a lower TAC than could have been afforded under tradition single species management. This was an intentional and conscious conservative management action to minimize risk to the resource while menhaden-specific ecological reference points are developed over the next two years.

In addition, the appeal suggests a state should demonstrate landings in either the bycatch or small scale fishery provision in order to receive allocation. A similar concept was considered by the Board but was not approved.

*...States have the option to opt out of the program and decline their fixed minimum allocation, or maintain 10,000 pounds for bycatch purposes and decline the remainder of their quota. States also have the right to opt in to the program and receive their full allocation... (See Meeting Summary page 5).*

This notion, that a state must demonstrate landings history to receive allocation, was argued against by states that support the FMP’s goal to include those primary user groups that extract and utilize predators which rely on menhaden as a source of prey, those whose livelihood depends on the health of the marine ecosystem and those non-consumptive users who place a high value on a healthy ecosystem. Some states see a different social and economic value for menhaden in their waters for both the recreational and ecotourism industries. These sorts of decisions highlight the nature of cooperative interstate fisheries management – to seek to balance the different needs and values of all involved states, not the one or the few. These difficult decisions are sometimes necessary in service of the management goals of the FMP.

**C. Claims Under Criterion Five: Unforeseen Circumstances/Impacts.**

The appeal letter cites criterion five, “Unforeseen circumstance/impacts.” The appeal recounts the Board wanted to provide additional jurisdictions with an opportunity to

participate in the fishery but not at the expense of other jurisdictions. The appeal states if the Board had known under the 0.5% fixed minimum and the 1% episodic event set aside Virginia's landings would be decreased, the Board would have taken steps to ensure Virginia would not be harmed. See letter from Virginia Commissioners to ASMFC Chair James J. Gilmore, pp. 3-5 (December 20, 2017). Leadership disagrees with Virginia's position that these issues were unforeseen. While the tables that were passed at out the meeting did not include the 1% episodic event set aside, it was made clear to the Board at the start of the meeting the Amendment would be taken up in the order presented in the document. This meant that episodic events set aside would be discussed after allocation, and would alter the distribution of the TAC (See Board minutes pages 2 and 50).

When considering action on the allocation method, scenarios were presented where Virginia would have less quota in 2018 than in 2017 despite the increase in the TAC. But the Board recognized Virginia's quota would have the opportunity to increase above 2017 levels if states relinquished quota. During the Board deliberations, a few states indicated it was their intent to relinquish quota. Since the November Board meeting 6,704,365 pounds of quota has been relinquished. Virginia's 2018 quota has increased by 5,696,800 pounds because relinquished quota is redistributed to states based on their average landings from 2009-2011 (84.97% for Virginia). Based on the additional quota received, Virginia's 2018 quota is 4,099,337 pounds higher than 2017. Allocation decisions are always difficult; but they are, as here, necessary in service of management goals of the plan. Since Commissioners recognized and weighed these potential impacts to the states and industry, Leadership does not find the allocation consequences of this Amendment as unforeseen.

**D. Claims Under Criterion Three: Incorrect Application of Technical Information.**

Virginia's appeal is partially based on appeal criterion three, "Incorrect application of technical information." Under this criterion, the appeal states the reduction in the Chesapeake Bay Reduction Fishery Cap (Bay Cap) from 87,216 MT to 51,000 MT and the removal of the rollover provision is not supported by the technical information that has been presented to the Board or described in the Amendment. See letter from Virginia Commissioners to ASMFC Chair James J. Gilmore, pp. 5-7 (December 20, 2017).

Leadership concluded the Policy Board should consider Virginia's claim that Chesapeake Bay localized depletion studies were inconclusive. The decision to set a reduced Bay Cap in Amendment 2 was a precautionary measure set as a placeholder until the commissioned studies on localized depletion were finalized and peer-reviewed (Amendment 2 reduced the Bay Cap from average landings from 1999-2004 to 87,216 MT). It was not based on a scientifically quantified harvest threshold, fishery health index, or fishery population level study. The Bay Cap limit was a compromise reached by managers, fishery stakeholders, and environmental NGOs.

In addition, the appeal states there is no evidence in Amendment 3 to support the view that lowering the Bay Cap was necessary to protect the Bay as a nursery area for menhaden and

there is no evidence to suggest the Bay Cap is necessary to protect the Bay as a nursery for other species. Leadership agrees the Amendment does not provide sufficient evidence to support such claims. In making this statement, it does not conclude that evidence does not exist, but that it is not contained in the Amendment.

Virginia claims the Bay Cap was arbitrarily lowered. In setting the 51,000 MT Cap, the Board considered recent harvest levels to minimize impacts on Virginia. The Bay Cap was set at the average landings in the Bay from 2012-2016 (rounded up); therefore, it was not arbitrarily lowered nor was it expected to significantly impact the prosecution of the fishery.

Leadership is recommending the formation of a Fact Finding Committee (Committee), as allowed under the appeal process, to investigate the science surrounding the Bay Cap. The Committee would conduct a literature review of the science in question. The Committee would look for peer-reviewed literature that could address the following questions:

1. What is the impact on menhaden reproduction or other species in the Bay with menhaden harvest set at 87,216 MT?
2. Does menhaden harvest in the Bay impact menhaden nursery grounds? Other species?
3. Does menhaden harvest in the Bay impact menhaden reproduction in the Bay?
4. What environmental factors impact menhaden reproduction in the Bay?
5. Is there current science that would guide the Board in setting the appropriate level of harvest in the Bay?

Leadership recommends to the Policy Board:

- Consider the appropriate level of the Bay Cap for 2018 while the Fact Finding Committee addresses the above questions.
- Charge the Menhaden Board with reconsideration of the Bay Cap to 87,216 MT for 2018 while the Committee drafts a report to the Board. After reviewing the Committee's report, the Menhaden Board could consider the Bay Cap for 2019 and beyond.

In recognition that Virginia sets its annual menhaden regulations through a legislative process, not controlled by Virginia Marine Resources Commission, Leadership strongly recommends pursuing/implementing this one year change in the Bay Cap as a way to help facilitate compliance with the FMP.

In light of these findings, Leadership finds there are grounds for the appeal to be heard by the Policy Board on one of the three claims under criterion three advanced in Virginia's letter – specifically, Virginia's claim regarding the Bay Cap. Leadership concludes it is appropriate to provide Virginia an opportunity to present its appeal on this issue to the Policy Board. During the ISFMP Policy Board meeting on February 8, 2018, the ISFMP Director will present background on the Amendment and the Board's justification for changing the Bay Cap. Following this presentation, the Commissioners from Virginia will be provided 15 minutes to present their rationale for the appeal and their suggested resolution of the issue. The Policy Board will then be provided an opportunity to discuss the issue, consider the recommendation from Leadership, and then decide what issues, if any,

Mr. John M.R. Bull

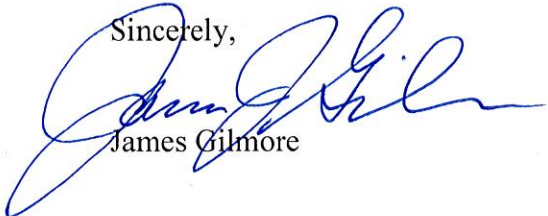
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should be remanded back to the Menhaden Board for corrective action. No additional public comment will be taken in connection with the appeal.

Thank you for the continued partnership and commitment to the Commission process and actions.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Gilmore", is written over the typed name.

James Gilmore

cc: Catherine Davenport  
Senator Richard Stuart  
Interstate Fisheries Management Program Policy Board

L18-08