P R O C E E D I N G S

of the

ATLANTIC STATES MARINE FISHERIES COMMISSION

BUSINESS SESSION

June 8, 2000
Holiday Inn By the Bay
Portland, Maine

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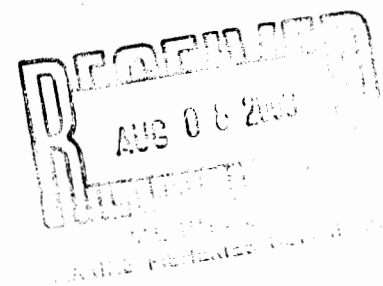

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The Business Session of the Atlantic States Marine Fisheries Commission convened in the Casco Bay Hall of the Holiday Inn By the Bay, Portland, Maine, June 8, 2000, and was called to order at 9:00 o'clock a.m. by Chairman David V.D. Borden.

CHAIRMAN DAVID V.D. BORDEN: All right, welcome to the Business Session of the Commission meeting. We have two items on the agenda. One deals with shad; the other deals with horseshoe crabs.

I would note for the record that we have a quorum, and I would ask the staff to take attendance and list that attendance with the minutes. Are there any other items that individuals would like to schedule for this session?

All right, if not, then lets take up the two items. We'll take up shad first. There's a motion. Upon the recommendation of the Shad and River Herring Management Board and the ISFMP Policy Board, move that the Commission determine that the state of South Carolina is not in compliance with Amendment I to the Interstate Fishery Management Plan for Shad and River Herring in that it has not implemented and enforced the recreational creel limit; that this measure is necessary to control fishing mortality, and that in order to come back into compliance, the state must implement and enforce the required creel limit. I move that on behalf of the Policy Board.

It does not require a second, so I open the discussion. David Cupka, do you want to comment?

MR. DAVID CUPKA: Thank you, Mr. Chairman. I had hoped to come to this meeting with a clear answer as to whether or not we would be in compliance with this requirement. We did have legislation introduced in the General Assembly this year.

It did pass the House and got over in the Senate. It was up for a second reading, and we had one senator object to it. We worked with him, and he finally removed his objection. Unfortunately, it was the last day of the

regular session, and it did not come up for a vote.

The reason I say I'm not clear is because they are coming back on the 20th of this month for a 3-day special session, and all efforts are being made to get the bill up before the legislature then.

If we can get it before them, I'm sure it's going to pass. Everybody is on board. Like I say, we ran out of time. But I will not know for sure until after the special session beginning on the 20th whether or not we will get that bill that we need to come into compliance.

CHAIRMAN BORDEN: All right, questions or comments? Further questions or comments? Anyone in the audience care to comment on this? Are you ready for the question? I'm going to ask for a roll call vote on this motion.

Do we need time for caucus on behalf of any of the delegations? One minute caucus. Ready to vote? Please call the roll.

EXECUTIVE DIRECTOR JOHN H. DUNNIGAN: State of Maine.

MAINE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New Hampshire.

NEW HAMPSHIRE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Massachusetts.

MASSACHUSETTS: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Rhode Island.

RHODE ISLAND: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Connecticut.

CONNECTICUT: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New York.

NEW YORK: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New Jersey.

NEW JERSEY: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Pennsylvania.

PENNSYLVANIA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Delaware.

DELAWARE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Maryland.

MARYLAND: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Virginia.

VIRGINIA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: North Carolina.

NORTH CAROLINA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: South Carolina.

SOUTH CAROLINA: Abstain.

EXECUTIVE DIRECTOR DUNNIGAN: Georgia.

GEORGIA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Florida.

FLORIDA: (No response)

EXECUTIVE DIRECTOR DUNNIGAN: Mr. Chairman, the votes are 13 in favor, 1 state not voting, and 1 state abstaining.

CHAIRMAN BORDEN: Thank you, Jack. The motion carries unanimously. I would note that, as David Cupka indicated, the Legislature is in the process and has the opportunity to meet here later this month, and hopefully we'll resolve this.

In the past, I think we have added some language in the formal letter of transmission that indicates that the Department of Commerce should use their discretion if, in fact, they think that the situation will be remedied.

Any objection to including that language in the formal letter on this issue? No objection? Then that will be done. Anything further on shad?

All right, the next item is horseshoe crab, and the same thing. As a formal motion, on behalf of Policy Board, upon the recommendation of the Horseshoe Crab Management Board and the ISFMP Policy Board, moves that the

Commission determine that the Commonwealth of Virginia is not in compliance effective May 1, 2000, with the provisions of the Horseshoe Crab FMP in that it has failed to implement and enforce a required provision in the Fishery Management Plan for Horseshoe Crabs; the specific requirement to establish a cap on commercial landings in the amount of 152,495 horseshoe crabs, as specified in Addendum I; that the cap on landings is necessary to control fishing mortality; and to come back into compliance, Virginia should implement the said cap on the commercial landing. So I move that on behalf of the Policy Board. The floor is open. Jack Travelstead.

MR. JACK TRAVELSTEAD: Thank you, Mr. Chairman. I guess back a couple of months ago, when this was before the Policy Board, Virginia indicated that it was unable to comply with the provision for the capping of landings on horseshoe crabs because of certain standards within our law.

At that point, the Management Board and the Policy Board asked for a written legal opinion describing the reasoning behind that opinion. Yesterday we provided copies of an opinion from our Attorney General's Office, confirming the previous oral advice that the Virginia Marine Resources Commission had received that we do not possess the statutory authority to implement Addendum I.

As a result, the matter to be implemented would have to be brought to the Virginia General Assembly, which will not be in session until January of next year. Yesterday I passed out a copy of that opinion.

I hope everyone has had a chance to review it. It is rather descriptive. We hope that it will convince you that the standards that the Commonwealth of Virginia must follow to implement regulations are substantially different than the standards that this Commission must follow in the adoption of a Fishery Management Plan.

Of course, there's nothing in the Compact of ASMFC, or nothing in the Coastal Act that can force a state to ignore its laws, and adopt regulations to comply with the Management Plan.

We are forced to go to our General Assembly to see that this is done. Virginia law contains a set of standards that we must follow in the adoption of Fishery Management Plans, and you will see those standards listed in the enclosure that was included with the legal opinion.

Like you and the various regional councils, the Commission

-- and when I say Commission I mean the Virginia Marine Resources Commission -- must look at all of the scientific, economical, biological and sociological information available.

They must adopt measures that prevent overfishing and achieve an optimum yield within each fishery. When our Commission sat down to do this a couple of years ago when we adopted a 710,000 crab quota, we did just that.

We reviewed the information that was available in the management plan, that was available in the stock assessment, that was available in the peer review of the stock assessment.

Both of those documents are very descriptive about the lack of a lot of very basic information that is normally available to this Commission when it adopts management plans, and in particular when it adopts quota-based management.

The ASMFC has some 22 different fishery management plans that we have adopted, and I believe six of those have a preferred option that involves some type of quota-based management.

And in every one of those cases, with the exception of the horseshoe crab, the quota system is backed up by a stock assessment that provides evidence of overfishing. It defines clearly what overfishing is.

It provides estimates of fishing mortality rates and describes those that constitute overfishing. It describes stock size, and it provides rebuilding schedules for the designated stock.

This is not the case with the horseshoe crab. If one examines the Stock Assessment Report that was provided to the Management Board, you will see in there that the Technical Committee reports in that document that much of the information available on horseshoe crab abundance and stock dynamics is of limited use.

Many of the surveys that collected information on horseshoe crabs, the Technical Committee indicated have significant survey design inadequacies. The state and federal survey data that were available, that were appropriate for review, suggested that the horseshoe crab population in the Mid-Atlantic Region has been stable or declining.

Lack of data from outside of the Mid-Atlantic that was

contained in that stock assessment prohibited analysis of stock abundance trends outside of the Mid-Atlantic region. The report goes on to state that recent data from four state and two federal surveys show no increasing or decreasing trend in horseshoe crab abundance.

The Delaware Trawl Survey was the only trawl survey to show a significant decreasing abundance trend, and a high correlation was found between that survey and Delaware Beach count surveys.

But the beach survey was not included in the Stock Assessment Report because of survey-designed inadequacies. The Stock Assessment Report further documents substantial increases in harvest during the 1990s and attributes those increases to increases in effort and better reporting requirements.

That same report cautions that available landings data are incomplete, and based on the deficiencies the magnitude of the increase and reported harvest may be greater or less than that reflected in the data.

Most importantly, the Stock Assessment Report states, and I'm quoting here, "Regardless of the magnitude, the increase in reported landings seems not to have had a demonstrable impact on the horseshoe crab population based on available troll survey data". End of quote.

Now, all of that information went forward for peer review. A Peer Review Panel was formed and commented substantially and descriptively on the assessment. The Peer Review Panel found that there was no single dataset deemed reliable enough to provide any coastwide information for use in the Horseshoe Crab Stock Assessment.

The panel, therefore, reviewed datasets for portions of the coast, but admitted that it is not appropriate to extrapolate those results to the entire coast. The panel also found that effort data are not available on a coastwide basis, and went further to recommend that effort data be collected through a mandatory reporting program.

The panel reviewed the same trawl surveys that the Technical Committee looked at and found that they were of little, to no value in assessing the status of the horseshoe crab.

They went further to recommend initiating a coastwide trawl survey specifically designed for horseshoe crabs. The panel noted that the spawning surveys in Delaware Bay suffered from a lack of standardized methodology

sufficient to produce an indicator of population size.

In that case, the survey periodicity did not match the periodicity of the horseshoe crab concentrations on the spawning grounds. The number of beaches sampled was limited, and the sampling techniques varied over time.

Now the panel did disagree with the stock assessment report on two particular counts. The first count was that the data available do not provide for any conclusions regarding the trend of the horseshoe crab population.

The second point was that the increase in reported landings seemed not to have had a demonstrable impact on the horseshoe crab population.

To the first point, the Peer Review Panel noted that no trend could be identified, not because there is no trend, but due to the uninformative nature of the data. The data tell us nothing about the status of the horseshoe crab population.

To the latter point, the Peer Review Panel found that due to the uninformed nature of the data, it is not possible to identify whether increases in landings have had an impact on the horseshoe crab population or not.

The Peer Review Panel then followed in their report with a series of enumerated management advice that consisted of the following:

1. There is a lack of informative baseline stock abundance data on horseshoe crab.

2. The catch in the fishery has increased sharply in recent years, corresponding to sharp increases in effort in some areas.

3. There is no informative stock abundance data available on the response of the coastwide population to recent increased catch and effort.

They admitted there is some evidence of localized population declines in recent years. They also noted that there is a high likelihood of the existence of several genetically separate populations; and as a result you cannot apply the localized data to the entire coast.

There were two areas of concern that the panel raised. One was that as a species, horseshoe crabs are extremely vulnerable to overexploitation because spawning adults are easily harvested by anyone on the beach.

The second point was that horseshoe crabs take many years to mature. The panel seemed to latch on to those two items, and as a result recommend a conservative risk-averse management strategy.

I would note for the record that Virginia finds it interesting that the panel did not offer recommendations concerning the harvest of horseshoe crabs from spawning beaches, where they noted that crabs are particularly vulnerable to overexploitation.

Nor did they recommend things like size limits that are designed to protect crabs until they reach sexual maturity. It is this type of information that prevents Virginia from proceeding with the adoption of regulations.

The Peer Review Panel also noted that there are no biological reference points on horseshoe crabs. There are no estimates of fishing mortality. There are no estimates of recruitment. There are no estimates of stock size.

When the Virginia Marine Resources Commission compared the sum total of science that is available on this species and looked at the impacts that the 152,000 crab quota would have on the industry, they had no choice but to maintain the existing quota of 710,000 crabs, which they had previously set.

Industry has provided the VMRC with estimates that we have verified that show that our conch industry alone in Virginia has a need for approximately 1.4 million horseshoe crabs.

The Commission recognized, when it set the 710,000 crab quota, that some action was necessary. And it was our belief that industry could make up the difference by receiving crabs from fishermen in other states.

So, that's the record that the Commission had before it, and that prevents it from adopting the measures by regulation. The question is what happens between now and January? The Commission is concerned about horseshoe crabs.

We have taken an interest in that species for several years. Two years ago we adopted regulations that prohibit the harvest of horseshoe crabs from their spawning beaches.

Two years ago a dredge fishery was initiated in Virginia's territorial waters, not far from the beach, during a period of time when the crabs are migrating to their

spawning beaches.

We have eliminated that fishery. Two years ago we established the 710,000 crab quota. At the Management Board, when the quotas were adopted, Virginia supported the 152,000 crab quota if two conditions could be met.

We know that that 152,000 crab quota will have an enormous impact on our conch fishery. But we supported that quota at the Management Board, provided two conditions could be met.

Those conditions were:

1. That the plan allow for transfers of quotas from one state to another.

2. That at some point in time, late in the year, after those states who traditionally harvest horseshoe crabs from the beach have done so, have taken all that they deem necessary and appropriate, that at some point late in the year, say November, that those crabs that are not harvested and apparently will not be utilized by other states, be lumped into a coastwide quota that would be made available to fishermen in any state.

By adding those two provisions to the management plan, we believe that the needs of Virginia's conch fishermen could be met through interstate transfers and lumping of quota, and that we could comply with the management plan by regulation if those two things were added to the management plan.

The nice thing about those two provisions are that they still maintain the 2.2 million crab quota that the Management Board established for horseshoe crabs.

If the Management Board was convinced that there was a problem on horseshoe crabs, then they must believe that the 2.2 million crab quota was established to correct that problem.

As long as that quota is not exceeded, then we're okay. We're in a good situation. If further evidence comes along down the road that shows the quota should be smaller, then decrease it.

If it can be raised, then we increase it. But nothing that Virginia proposed would allow for that quota to be exceeded. It would allow for our state to adopt the management plan.

It would allow an opportunity for our fishermen to have access to the number of horseshoe crabs that it needs. We allow for transfers of quotas in several of our other management plans.

It is done routinely without impact to the states involved. We trade a lot of things up and down the Atlantic Coast. There's no reason to believe that it could not or should not be done for horseshoe crabs.

Lastly, because Virginia is concerned about this resource, and particularly about wastage of a valuable resource, my Commission in June will consider a regulation that will mandate the use of bait bags in our conch fishery.

We will propose regulations at our June meeting. The Virginia Institute of Marine Science has been looking at bait bags in Virginia waters. They have had the full cooperation of industry to experiment with those.

In fact, there are other experiments going on this week, as I speak, that will look at the usefulness of those bait bags this time of year. But, we believe we have sufficient evidence now to mandate the use of those bait bags by all of our permitted conch fishermen, as well as individuals who are licensed to land in Virginia, who fish conch pots.

So the regulation would extend to those as well. The evidence is pretty substantial that the use of bait bags can greatly reduce your dependence on horseshoe crabs by as much as 50 percent.

If that can drop Virginia's conch fishermen's dependence from 1.4 million horseshoe crabs to 700,000 horseshoe crabs, then that's something that we're certainly in favor of.

If you take that measure and combine it with the ability to transfer quotas and lump quotas, Virginia goes away from here very happy. The overall quota is not exceeded.

Horseshoe crabs are protected until additional science is available, and the shorebirds are happy. I didn't mention much of the information that the Technical Committee looked at on shorebirds.

But, if you take a close look at that information, you will find that the stock assessments that have been done on those species are about equivalent to, in terms of data richness, that we have on horseshoe crabs.

Many of the techniques that have been used to assess the shorebirds are outdated, and there's, quite frankly, a need to peer review those assessments. We have not had a peer review on the shorebird information.

And it seems to me, because this management plan ties management of the horseshoe crab so closely to the shorebirds, that that information should undergo a very rigorous peer review.

We do know within the last five years that the egg densities on many of the spawning beaches have been the highest recorded during those surveys. We also know that the departure weights of the shorebirds have been rather high in recent years.

So, that's, again, some conflicted information that we would hope you would take into account. So, with that, Mr. Chairman, again summarizing, Virginia does not have the authority to adopt the plan by regulation.

We would ask that you give us additional time, until January, to get to our Legislature with the management plan. We would further ask that the full Commission ask the Management Board to once again reconsider the issues of transfer and lumping of quota at a Management Board meeting sometime between now and January and allow us to move forward.

With that, Mr. Chairman, I would move to table this motion until January, 2001.

CHAIRMAN BORDEN: All right, we have a motion to table. Is there a second? Second on the motion? Any second on the motion? The motion fails due to a lack of a second. Have you concluded your statement, Jack? Comments or additional statements? George.

MR. GEORGE LAPOINTE: A couple questions. First, either the Chair of the Horseshoe Crab Board or staff, can you give us a chronology on the Commission's actions in regard to compliance, how this process started?

I believe it started -- and I just want to be sure -- with the Commission taking action at the February meeting week and then following through. But if I could just have that confirmed that, in fact, the Commission has been following its process, I would appreciate that.

Then, from Jack Travelstead, I guess, how that sets in with regard to your Commission taking action on this process as well. First, from either Bruce -- Bruce, are

you Chair of the Horseshoe Crab Board?

MR. BRUCE FREEMAN: Yes.

MR. LAPOINTE: Or from Jack Dunnigan.

EXECUTIVE DIRECTOR DUNNIGAN: The Addendum was approved by the Horseshoe Crab Management Board at the February ASMFC meeting week. At that point, states were instructed to go home and prepare state implementation plans.

Those came back to the Management Board at the April meeting week, and at that point the Commonwealth of Virginia indicated that it would not be implementing the cap that it had under the addendum.

When they were told of that by the Commonwealth, the Management Board recommended that the non-compliance motion move forward. The ISFMP Policy Board was meeting during the April meeting week, and at that point the Policy Board received the recommendation of the Horseshoe Crab Management Board, concurred in it and recommended to the Commission that Virginia be found out of compliance.

MR. LAPOINTE: Thank you. And, Jack Travelstead, how did the VMRC interact with this schedule as well, and your legislature? I'm just trying to get this straight.

MR. TRAVELSTEAD: The Legislature is in session for six or eight weeks in Virginia. But there are deadlines, very early deadlines in January when legislation can be introduced.

So by the time we knew what the quota was and began to have discussions with the Commission, it was beyond the deadlines for submission of legislation.

There's a rather lengthy process that state agencies must go through to see that legislation is introduced, and we were past all of those deadlines. The General Assembly in Virginia will meet again -- I think they go into session around the 11th or 12th of January of next year. It is a short session next year, so the deadlines are backed up even further.

CHAIRMAN BORDEN: All right, other questions? Bruce, you had your hand up.

MR. FREEMAN: Yes, I have a number of comments I'd like to make relative to some of the statements that Jack Travelstead had made, and this is done on behalf of the Horseshoe Crab Committee.

I didn't answer or can't respond to all of them; I simply haven't had time to write them down. But, I think, in my opinion, the objections and issues raised by Jack can be adequately answered through the process that we've gone through. And we can do that, but I can't do it at this time. Let me just make several comments.

Relative to the sequence of events, Virginia did raise a number of issues at the October meeting when this was originally scheduled for approval by the Commission. If you recall, the Commission agreed to go out to public hearing with several alternatives that Virginia had suggested to get public comment, some of which had to deal with transfer, as some of the conditions which they had indicated were important to them.

We delayed the process and went to public hearing, put out a Public Information Document and spent several months with meetings, getting comments from the public and fishermen and harvesters of horseshoe crabs and conch harvesters and eel harvesters and so forth, conservation organizations.

Because of that, we came back to the Commission with the results of what we essentially heard from the comments and went forth with the plan. So, one could argue that if indeed the Commission wanted to move quickly and meet the January time line that Virginia had set, we should have moved on the plan in October.

But at the request of Virginia, we extended that to allow for public comment. There were comments made relative to the Peer Review Panel, and what Jack had indicated, indeed, were some of the comments made by that group.

There were concerns over some of the methods that were used, and there were recommendations to correct those methods so that we would have much better data collection. There was a comment, nevertheless, made by the Peer Review Panel that the Commission should take a proactive action to conserve the horseshoe crab resource -- it was extremely important -- and that there was a very important biological link between horseshoe crabs and hemispheric shorebirds.

That link was strong enough such that action should be taken by the Commission in order to not only conserve the horseshoe crab resource nut in every way possible protect the hemispheric shorebird migration.

It was indicated that this link with the shorebirds is somewhat unique in the way the Council acts, or the

Commission acts because it deals specifically with the conservation of a species for its own sake, but in this instance, that particular resource has very important biological consequences to another very important group of animals that aren't fish, but, indeed, are birds.

And that if, indeed, this link is broken, that it could be the disastrous results of perhaps the extinction of some of these hemispheric shorebirds. That certainly is a worse case scenario, but possible.

So there was a strong recommendation by the Peer Review Panel to take additional action. So far as the two conditions that Virginia raised, again, one dealing with the transfer of quotas from one state to another, this was an issue raised by the board and voted not to occur.

We do have this in other plans, but in this instance it was a conscious decision made by the board. The other concern or condition was that crabs not harvested by a state be placed into a pool, so to speak, and to be used by anyone.

This is not something that's in any present plan. And there are conditions under all our plans that any state has the ability to put in place conservation measures that are more stringent than required by a plan.

Quite frankly, my personal opinion, to have a pool could very well undermine states who feel more stringent actions are necessary. We have this in every state. All of us at one time or another have regulations in place that go far beyond what the plan calls for, and we believe are necessary.

To have someone else or some other jurisdiction take advantage of that is totally contrary to the philosophy of which we now have in our plans. I think that would be extremely difficult to overcome.

The question I would have, also, is if the Virginia Marine Resource Commission had authority to place a maximum catch level of, I believe it's 710,000 on horseshoe crabs, and this is done recently, with the base of knowledge we have at hand, how is it that the Commission does not still have that authority?

Is there something changed between what was done recently, and what we're asking the Commission to do today? It seems like there's an inconsistency here. If Jack could answer the last, or at least give some indication. Is there some legal reason why --

MR. TRAVELSTEAD: Well, you have the legal opinion in front of you, and I just spent 15 or 20 minutes describing why we can't do it. The standards require the Commission to establish an optimum yield.

This is a 9-member board that meets monthly to prepare regulations. They have to weigh the available science against the economic and social impacts of the regulation. They did that two years ago when they established the 710,000 crab quota.

They looked at the industry needs, they looked at what evidence there was of overfishing, and they came to that conclusion. There have been no new data submitted to describe overfishing that would change the balance of everything that they have to weigh to force them to think that a lower quota is necessary.

I don't know what else I can say. It's just simply that the balancing act doesn't work. If there had been overwhelming, compelling evidence that overfishing was concerned, or even a slim amount of evidence that overfishing is there, I think we could have changed the balance.

But the Management Plan doesn't even define what overfishing is. There's no definition. The Peer Review said, "We don't have enough data to tell you one way or the other what's going on". So, you know, my Commission had that information.

They also had the needs of the industry to look at, the 1.4 million crab needs, and that weighs rather heavily. You're talking about an extreme economic impact by going from 1.4 million crabs to 152,000 crabs.

(Whereupon, Ms. Susan Shipman assumed the Chair.)

VICE-CHAIRMAN SHIPMAN: Bruce, did you have further comment?

MR. FREEMAN: Not at the present, thank you.

VICE-CHAIRMAN SHIPMAN: Okay, I had Mr. Beckwith and then Mr. Adler.

MR. ERNEST E. BECKWITH, JR.: Thank you, Madam Chairman. I've got a couple of questions for Jack. Jack, what are the seasonality of landings of horseshoe crabs in Virginia?

MR. TRAVELSTEAD: Well, we have some crabs, you know,

landed I guess in any month of the year. Through April, we've landed about 35,000 crabs. The May data are not in, but I would suspect the fishery would pick up a little bit.

But, we have virtually eliminated all of the in-state fisheries for horseshoe crabs. We don't allow them to be picked up from the beach when they're there. We eliminated the dredge fishery that I spoke of.

The 1,000 foot prohibition harvest from the beach has eliminated some of the pound net harvest. So most of it is coming in by way of trawl; and typically, the biggest part of that fishery is near the end of the year.

MR. BECKWITH: One more question and then -- actually, two more questions. I forgot who I was talking to about horseshoe crabs this week, but someone said to me that there should not be a large need for landings this year because there were so many horseshoe crabs in storage. Have you heard that, Jack?

MR. TRAVELSTEAD: I think a lot of the freezers are full. We landed last year less than our 710,000 crab quota, 650, between 650 and 700, I can't remember the exact. Yes, I think a lot of those are still in freezers.

MR. BECKWITH: Okay, I've got one final question. You had mentioned that because of the certain standards that you have that apply to all of your Fishery Management Plans, that you could not implement these regulations, and that you would consider going back to your Legislature next year and ask for some type of a change.

I was just curious what type of a change could you ask for that would allow you to meet the requirements of the plan when you have these overarching guidelines for standards for all of your other Fishery Management Plans?

MR. TRAVELSTEAD: Well, I think the General Assembly will have two options. They can, by legislation, adopt the 152,000 crab quota outright themselves, which supersedes any regulation of the Commission; or, they could empower the Commission to adopt the quota specified in the ASMFC Management Plan, irrespective of the standards that we have to meet for the others. So they merely take horseshoe crabs away from those standards.

MR. BECKWITH: One final question. What is the probability of getting that change made?

MR. TRAVELSTEAD: Getting the General Assembly to adopt

something? I couldn't begin to tell you. I can't speak for the General Assembly. I work for the Executive Branch.

MR. BECKWITH: The question is I'm just asking for your best opinion, because we're looking at a situation where we're about to perhaps pass a motion which will find you out of compliance, and that could either assist you or hinder you in your efforts to get those changes made.

MR. TRAVELSTEAD: Well, I think that the probabilities would be substantially increased if there was further discussion by the Management Board about the transfers of quotas, things that I talked about earlier, those possibilities.

That's not to say that nothing would be adopted without those provisions being looked at. And if I could, just one comment about Bruce's comment, that we don't allow lumping of quota in any other management plan.

Well, look at that a little bit differently. We do have coastwide quotas on a number of species; and while I have used the word lumping, that's really no different than all of the states harvesting off of a coastwide quota.

It's no different than what we have for scup, for instance. During part of the year, we have a coastwide quota; everyone works against it. And during the summer we have state-by-state quotas.

There's no reason why the same type of thing couldn't be done with horseshoe crabs. You could have state-by-state quotas during the spring and summer periods when the crabs are in shore and on the beaches, and we could have a coastwide quota the rest of the year. And that is no different than we have in other plans.

VICE-CHAIRMAN SHIPMAN: Okay, we have Mr. Adler and then Mr. Manus.

MR. WILLIAM ADLER: Thank you. Jack, I want to return to one thing that was said earlier. If the plan had gone with the 152, plus the two provisions, that you said Virginia said they could live with the 152; under your existing rules, could Virginia have then passed the 152 thing, because you've still got that part about are you overfishing, et cetera, and I don't see how allowing the transfer of quota takes away from that. That's my first question.

MR. TRAVELSTEAD: We don't have any legal advice on that;

that if you added those two provisions, would we be able to do it by regulation. It does raise a good argument though, that -- I could argue to my Commission that given the addition of those two provisions that industry would have available to it, more horseshoe crabs than the 152,000 crab quota because at some point in the year, we would be off operating off of a coastwide quota.

And, now whether or not that's sufficient to overcome the standards, I don't know. We've not asked that question. It certainly is in the right direction.

MR. ADLER: I know, but that still -- while you had handled the industry problem, that still would leave you open to arguments that, well, that still doesn't get to the part that we can't do a regulation unless it's proved that the scientific, et cetera, and all that stuff, and so the transfer of quota still might not be good enough.

My second question is, actually, probably to the Chair, and that is wouldn't any consideration of a transfer, now that the addendum has gone through without one, wouldn't that require another addendum just to change that?

VICE-CHAIRMAN SHIPMAN: Well, I'd defer to the Management Board Chair, but I would assume that it would. But I would defer to Mr. Freeman.

MR. FREEMAN: Yes, I would concur, Bill, that it would require at least an addendum.

MR. ADLER: Yes, okay, I thought so. It's not just, well, a Management Board can meet and say, "Oh, well, we'll do a transfer thing for Virginia". And the last thing was you have a lot of crabs in the freezer.

MR. TRAVELSTEAD: I wish I did.

MR. ADLER: But, well, you know, somebody has got a lot in the freezer. And the thing is that you need 1.4 million, you caught less than 700,000, but you used 1.4 million, and you have a lot left over.

How come you've got a lot left over if you only brought in seven? You need 1.4, so you, obviously, brought some in from other states

MR. TRAVELSTEAD: Absolutely, yes.

MR. ADLER: And you brought in, or somehow you ended up with -- what's this, the miracle of loaves and fishes; 14 baskets left over. How did that happen?

MR. TRAVELSTEAD: Well, the needs of the industry are 1.4 million. We harvested almost 700,000 last year. And there were, I'm sure, a number of crabs purchased from other states, both south and north of Virginia.

MR. ADLER: Obviously, more than 700.

MR. TRAVELSTEAD: I can't tell you how many are in freezers, but I have heard that there are crabs in the freezers. The Conch Fishery is not year around. So, they're not being used every month of the year, so there is stockpiling that does occur, you know, of those crabs.

Now, the good thing is that if we can implement this bait bag provision, overnight the needs of the industry are cut in half. That's a heck of a lot of horseshoe crabs that are saved.

MR. ADLER: All right, thank you. That's my question for now.

VICE-CHAIRMAN SHIPMAN: Mr. Manus.

MR. ANDREW MANUS: Madam Chairwomen, I respectfully call the question.

VICE-CHAIRMAN SHIPMAN: We did have one other individual who had asked to speak.

MR. ERIC SCHWAAB: Thanks. Actually, Mr. Adler asked both my questions, so I can withdraw mine.

VICE-CHAIRMAN SHIPMAN: Mr. Manus, with your indulgence, if Jack Dunnigan can make a comment.

EXECUTIVE DIRECTOR DUNNIGAN: Thank you, Madam Chair. Just a couple of issues for the record, as much as anything else. Remember that there is a substantial record to support the action of the management board that the board has developed over a long period of time.

Most of the members who are around this table are also members of that management board, and are very familiar with that record. That record has substantial advice in it about the biology of this animal, and the need to provide for a risk-averse precautionary approach towards management.

I think it's not fair to characterize that record as being totally void of any support on a biological basis for taking the action, the prudent action that the Board has taken to try to provide some protection to this fishery in

recognition not only of the needs of this resource, but of other resources that are dependent upon it.

The second point that I would like to make is just to comment briefly, if I might, on the memorandum that was distributed yesterday by the Commonwealth, the legal memorandum, which summarized the oral advice that had been given to the Virginia Marine Resources Commission.

I am not a Virginia lawyer, so I can't really comment on all of the provisions that might be available in Virginia law. It is certainly the responsibility of the Attorney General of Virginia to give advice to the agencies of that Commonwealth, including VMRC.

But in looking at this, I must tell you that I was not really very convinced. The memorandum is general in the way that it approaches the issue. It doesn't review, specifically, what the regulatory authority of VMRC is, and denote what case history or other limitations there may be in there that have put some bounds on what their authority is.

As I think the Chairman of the Horseshoe Crab Board was getting to a couple of minutes ago, nowhere in here can we tell why 150,000 crabs is within their legal authority -- excuse me, why 700,000 crabs is within their legal authority, but 150,000 isn't.

Where is that line drawn? Except for the statement that risk-averse concept has its limits, I don't know what that means. And the subsequent statement that says given the lack of important scientific and biological information, the addendum, in their opinion, appears to have crossed a threshold.

If this is a matter of opinion about whether this was a good idea, that's one thing. The memorandum doesn't very clearly detail why it would be illegal under the Commonwealth law.

The memorandum also contains a number of other issues that are not new to us; questioning, for example, the constitutionality of the Atlantic Coastal Fisheries Cooperative Management Act, and others that we have talked about before, but none of that has ever led us to conclude that we have less authority than is clearly specified in both the Compact -- excuse me, the Commission's authority that's in the Compact, and then there are the implications of the Federal Statute.

So, I thought it would be important just to make sure that

the record indicated that we had had the opportunity to review this memorandum.

I want to thank the staff of the VMRC for following through on our request and making it available, but I wanted to share those thoughts with the Commissioners.

VICE-CHAIRMAN SHIPMAN: Thank you, Mr. Dunnigan. The question has been called. Seeing no objection to calling the question, we'll need to caucus. I'm going to give you 30 seconds to caucus.

We're going to go ahead and call the question. This will be a roll call vote, if everyone is ready. I'm not going to read the motion again. I think you can see it, and it is not changed from when it was originally read by the Chairman earlier. Okay, Mr. Dunnigan.

EXECUTIVE DIRECTOR DUNNIGAN: Maine.

MAINE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New Hampshire.

NEW HAMPSHIRE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Massachusetts.

MASSACHUSETTS: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Rhode Island.

RHODE ISLAND: (No response)

EXECUTIVE DIRECTOR DUNNIGAN: Connecticut.

CONNECTICUT: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New York.

NEW YORK: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: New Jersey.

NEW JERSEY: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Pennsylvania.

PENNSYLVANIA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Delaware.

DELAWARE: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Maryland.

MARYLAND: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Virginia.

VIRGINIA: No.

EXECUTIVE DIRECTOR DUNNIGAN: North Carolina.

NORTH CAROLINA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: South Carolina.

SOUTH CAROLINA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Georgia.

GEORGIA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Florida.

FLORIDA: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Rhode Island.

RHODE ISLAND: Yes.

EXECUTIVE DIRECTOR DUNNIGAN: Madam Chair, there are 14 votes in favor and one vote opposed.

VICE-CHAIRMAN SHIPMAN: Okay, the motion carries, and the Commission has voted to find the state of Virginia out of compliance with the Horseshoe Crab Fishery Management Plan.

The next item we need to take up is whether to request the Secretary, as we communicate this finding, to request the Secretary exercise discretion in implementing the procedures for non-compliance by the Secretary. Discussion? I have Mr. Nelson.

MR. JOHN I. NELSON: Well, I guess the question is that after this finding, will the Commonwealth of Virginia want to reconsider and see if they can reconsider there position and see if they can do something internally.

Therefore, we could get that feedback, and if it's positive, then we could request to have that type of discretion shown by the Secretary.

VICE-CHAIRMAN SHIPMAN: Jack, would you like to respond to that?

MR. TRAVELSTEAD: Well, the Virginia Marine Resources Commission can't do something that it has been told is illegal. Certainly, the action and discussion that occurred here at this board will be relayed back to the appropriate authorities in the state much higher than my level, and I can't predict at this point what might or might not be done.

Certainly, all of the comments will be sent back; and if there are changes in opinions, then we will certainly inform the Commission as soon as possible.

VICE-CHAIRMAN SHIPMAN: What I'd like to do before I call on Mr. Freeman is ask Mr. Dunnigan if he would review for us the Secretary's obligations under the statute and the procedures that the Department of Commerce has implemented.

EXECUTIVE DIRECTOR DUNNIGAN: Thank you. Under the statute, I have ten working days to inform the Secretary of the Commission's finding. After that, the Secretary has 30 days in which to make a decision of whether to impose a moratorium on fishing for horseshoe crabs in the Commonwealth.

The Secretary is required during that period to consult with the affected state and to give the affected state an opportunity to present a full case in defense of its position.

And it is also required to consult, once again, with us and with any relevant regional fishery management council. The statute also says that the Secretary, in his discretion, if he decides to impose a moratorium, may delay the effective date of that moratorium by up to six months, if he believes that the affected state is making a good faith effort to try to come back into compliance.

We are not required to make a recommendation to the Secretary in this regard, but in virtually every instance where we've discussed non-compliance and passed motions, we have decided one way or the other whether to do that.

In some instances, for example, in the vote earlier this morning, the Commission decided to actually make a recommendation to the Secretary that he use his discretion.

And if the Commissioners don't want to make a

recommendation, that's your choice. But if you do, I need to know that, so that I can include that in the letter.

VICE-CHAIRMAN SHIPMAN: Mr. Freeman.

MR. FREEMAN: The question I was going to ask, do we need a motion or would the letter simply occur? I would be of the opinion simply to ask the Secretary to move on this issue.

We've been discussing this issue. We are in the harvesting season at the present time. It seems that it's very important to move as quickly as possible on this particular issue.

If not, we will essentially lose a harvesting season. I also couch this in respect to Virginia, knowing this is a difficult issue. Obviously, New Jersey takes a different slant on this issue, a different opinion, but I do this with the knowledge that there is an abundance of crabs that are being held in reserve.

This is not a situation where there's essentially no bait available. And the reserve seems to be high enough that it's affecting the price. Where there's harvesting that's not occurring because the reserve is so high, there's no additional place to store these.

So it doesn't seem to be that Virginia is not going to be able to get crabs for the conch season. But I would submit that we move as quickly as possible and have the Secretary move as quickly as possible.

VICE-CHAIRMAN SHIPMAN: Yes, Senator Goldthwait.

SENATOR JILL GOLDTHWAIT: Thank you. I have no objection to proceeding with notifying the Secretary. My comment is as far as the Attorney General's opinion in the state of Virginia, I think that is the internal business of the state.

I don't think it's appropriate for us to be challenging that opinion, suggesting that it should be reviewed or anything else. That has to do with how the state of Virginia does its business, and that's up to them.

I think the broader issue is we've certainly recognized previously that the process of implementation of these plans vary from state to state, and generally, when we select compliance dates, we look at the state routes and accommodate those things that have to be done legislatively, and I don't know how or why that didn't

happen, unless it was the state not being aware of the fact that it was only the legislature that could act in this case.

But the fact remains that however it got there, the state now appears to be out compliance. I think that our effort should be focused on that, rather than certainly on the Attorney General's opinion in that state.

VICE-CHAIRMAN SHIPMAN: Thank you, other comments. Seeing no sentiments to make a recommendation to the Secretary to exercise his discretion, unless there is a motion or a strong sentiment otherwise, we will just submit out letter forward with a finding of non-compliance, and the Secretary has within his authority to either exercise or not exercise his discretion. And we will remain silent on that. Yes, Mr. Cupka.

MR. CUPKA: Thank you, Madam Chairman. In view of the action that was taken previously relative to shad, I would just ask staff that they try and expedite that letter and to make sure that they also copy the individuals who were copied originally; not only the Commissioners but the appropriate members of our General Assembly so that they will try and have that letter in hand before they come back for that special session.

VICE-CHAIRMAN SHIPMAN: Thank you, we will note that. Is there other business to come before the Commission? Yes, Mr. Schwaab.

MR. SCHWAAB: Madam Chairman, I was just curious as to disposition of the Policy Board's recommendation relating to Delaware's compliance on American Eel.

VICE-CHAIRMAN SHIPMAN: I think we've got to hold the Eel Board in a moment and find out what's going to happen with that. What our plans are, if no one objects, we will adjourn subject to being recalled immediately after the Eel Board meeting, and we will take up the Delaware issue first on the Eel Agenda. Is that suitable to everyone?

Okay, thank you for bringing that to our attention. Is there other business? Okay. We will stand adjourned, unless there's a need to be recalled.

(Whereupon, the meeting was adjourned at 10:10 o'clock a.m., June 8, 2000.)

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