

PROCEEDINGS OF THE
ATLANTIC STATES MARINE FISHERIES COMMISSION
ATLANTIC MENHADEN MANAGEMENT BOARD

The Westin Crystal City
Arlington, Virginia
August 7, 2018

Approved February 7, 2019

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2. **Approval of Proceedings of May 2018** by Consent (Page 1).
3. **Postponed Motion from May 2, 2018**
Move the Atlantic Menhaden Board recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan if the State does not implement the following measure from section 4.3.7 (Chesapeake Bay Reduction Fishery Cap) of Amendment 3: The annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more than 51,000 mt. Motion by Chris Batsavage; second by Jim Estes. Motion to substitute.
4. **Move to substitute:**
Move to substitute that if harvest from the Chesapeake Bay by the reduction fishery exceeds 51,000 metric tons, then the Atlantic Menhaden Board will recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan since the state has not implemented the following measures from Section 4.3.7 (Chesapeake Bay Reduction Fishery Cap) of Amendment 3: •
 - **The annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more than 51,000 metric tons.**
 - **Harvest above the Cap in any given year will be deducted from the next year's allowable harvest.**
 - **Any amount of un-landed fish under the Cap cannot be rolled over into the subsequent year.**

The implementation of these regulations is necessary to achieve the conservation goals and objectives of the FMP. In order to come back into compliance, the Commonwealth of Virginia must implement the above measure as contained in Amendment 3 to the Atlantic Menhaden FMP. Staff will notify the Board if reduction harvest from the Bay reaches 90% of the Cap, and if the Cap is exceeded (Page 2). Motion by David Blazer; second by Steve Bowman. Motion failed (Roll Call: In Favor – ME, DE, MD, PRFC, VA, SC; Opposed – NH, MA, RI, CT, NY, NJ, PA, NC, GA, FL; Abstain – USFWS, NMFS). (Page 18).
5. **Postponed Motion from May 2, 2018:**
Move the Atlantic Menhaden Board recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan if the State does not implement the following measure from section 4.3.7 (Chesapeake Bay Reduction Fishery Cap) of Amendment 3: The annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more than 51,000 mt. Motion by Chris Batsavage; second by Jim Estes.
6. **Move to postpone to the February 2019 Commission meeting** (Page 19). Motion by Martin Gary; second by Dennis Abbott. Motion carried (Page 19).
7. **Move to elect Spud Woodward as Vice-Chair of the Atlantic Menhaden Management Board** (Page 20). Motion by Bob Ballou; second by Malcolm Rhodes. Motion carried (Page 20).
8. **Motion to adjourn** by Consent (Page 21).

ATTENDANCE

Board Members

| | |
|---|---|
| Pat Keliher, ME (AA) | Craig Pugh, DE, proxy for Rep. Carson (LA) |
| Cheri Patterson, NH, proxy for D. Grout (AA) | Dave Blazer, MD (AA) |
| Ritchie White, NH | Russell Dize, MD (GA) |
| Dennis Abbott, NH, proxy for Sen. Watters (LA) | Allison Colden, MD, proxy for Del. Stein (LA) |
| Nichola Meserve, MA, Administrative proxy (Chair) | Steve Bowman, VA (AA) |
| Raymond Kane, MA (GA) | Bryan Plumlee, VA (GA) |
| Sarah Ferrara, MA, proxy for Rep. Peake (LA) | Sen. Monty Mason, VA (LA) |
| Bob Ballou, RI, proxy for J. McNamee (AA) | Rob O'Reilly, VA, Administrative proxy |
| David Borden, RI (GA) | Steve Murphey, NC (AA) |
| Eric Reid, RI, proxy for Rep. Sosnowski (LA) | Chris Batsavage, NC, Administrative Proxy |
| Justin Davis, CT, proxy for P. Aarrestad (AA) | Doug Brady, NC (GA) |
| Sen. Craig Miner, CT (LA) | Mike Blanton, NC, proxy for Rep. Steinburg (LA) |
| Jim Gilmore, NY (AA) | Malcolm Rhodes, SC (GA) |
| Maureen Davidson, NY, Administrative proxy | Robert Boyles, SC (AA) |
| Emerson Hasbrouck, NY (GA) | Mel Bell, SC, proxy for Sen. Cromer (LA) |
| John McMurray, NY, proxy for Sen. Boyle (LA) | Spud Woodward, GA (GA) |
| Joe Cimino, NJ, proxy for L. Herrighty (AA) | Doug Haymans, GA (AA) |
| Tom Fote, NJ (GA) | Krista Shipley, FL, proxy for J. McCawley (AA) |
| Andy Shiels, PA, proxy for J. Arway (AA) | Martin Gary, PRFC |
| Loren Lustig, PA (GA) | Derek Orner, NMFS |
| Roy Miller, DE (GA) | Sherry White, USFWS |
| John Clark, DE, proxy for D. Saveikis (AA) | |

(AA = Administrative Appointee; GA = Governor Appointee; LA = Legislative Appointee)

Ex-Officio Members

Staff

| | |
|------------|----------------|
| Bob Beal | Jessica Kuesel |
| Toni Kerns | Max Appelman |

Guests

| | | |
|----------------------------|------------------------------------|------------------------------------|
| Charles Beale, MD | Sarah Heil, NMFS | Jeffrey Pierce, Alewife Harvesters |
| Ellen Bolen, VMRC | Pete Himchak, Omega Protein | Nick Popoff, ME DMR |
| Heather Corbett, NJ DFW | Aaron Kornbluth, PEW Trusts | Sam Rauch, NOAA |
| Pat Geer, VMRC | Ben Landry, Omega Protein | Alan Risenhoover, NMFS |
| Matt Cieri, ME DMR | Arnold Leo, E. Hampton, NY | Dave Sikorski, CCA MD |
| Jeff Deem, VMRC | Thomas Lilly, Salisbury, MD | Melissa Smith, ME DMR |
| Maya Drzewicki, CBF | Chip Lynch, NOAA | Stan Sutliff, VSSA |
| David Frulla, KDW | Chris Moore, CBF | Jack Travelstead, CCA |
| Shaun Gehan, Omega Protein | Mike Millard, USFWS | Bob Vanasse, Saving Seafood |
| Joseph Gordon, PEW | Patrick Paquette, MSBA | Kate Wilke, TNC |
| Zach Greenberg, PEW | Mike Pentony, NMFS | |
| Marin Hawk, MSC | Jeffrey Pierce, Alewife Harvesters | |

The Atlantic Menhaden Management Board of the Atlantic States Marine Fisheries Commission convened in the Jefferson Ballroom of the Westin Crystal City Hotel, Arlington, Virginia; Tuesday, August 7, 2018, and was called to order at 3:30 o'clock p.m. by Chairman Nichola Meserve.

CALL TO ORDER

CHAIRMAN NICOLA MESERVE: Good afternoon ladies and gentlemen. My name is Nichola Meserve; I'm from Massachusetts, and I have the honor of serving as your Chair for the Menhaden Management Board. I'm going to start the meeting by actually looking to Bob Beal to make a couple of introductions.

EXECUTIVE DIRECTOR ROBERT E. BEAL: Thank you Madam Chair. Yes, I would like to just introduce two new Commissioners from Virginia. This will be their first meeting, Senator Monty Mason is the new Legislative Commissioner from Virginia, and Bryan Plumlee is the new Governor's Appointee from Virginia.

This will be their first meeting; and that means be nice to them for this meeting, please. I would also like to introduce Krista Shipley; she is Jim Estes' proxy for this meeting. Jim is at home trying to allocate some disaster relief funds that were dumped in Florida's lap; so he's got his hands full down there. Those are my introductions Madam Chair; thank you.

CHAIRMAN MESERVE: Thank you and welcome to the Commission family and the Menhaden Board in particular. Is that a question from Robert Boyles?

MR. ROBERT H. BOYLES, JR. No Ma'am, Madam Chair, but a point of clarification. I do need all the help I can get. Mel Bell, my associate here, the name tag suggests he is sitting here for me; but Captain Bell is actually here for Senator Cromer as his meeting specific proxy.

APPROVAL OF AGENDA

CHAIRMAN MESERVE: Thank you for that clarification. If there is nothing else we will move on to Agenda Item 2, which is the Approval of the Agenda. Are there any additions or modifications to the agenda? Seeing none; we'll consider that approved.

APPROVAL OF PROCEEDINGS

CHAIRMAN MESERVE: We also have the proceedings from the May, 2018 Board meetings. Are there any corrections, modifications to the minutes? Seeing none; we'll also consider those approved.

PUBLIC COMMENT

CHAIRMAN MESERVE: Up next is public comment; and this is an opportunity for members of the public to comment on items that are not on the agenda. Are there any members of the public that would like to comment? There are no names on the Public Comment Sign-In Sheet, Max? Okay.

CONSIDER POSTPONED MOTION FROM THE MAY, 2018 MEETING

CHAIRMAN MESERVE: Then we can move on to Item 4; and that is Consider the Postponed Motion from the May, 2018 meeting. That motion is automatically back on the floor, and I think we'll start by getting it up onto the screen and read into the record again which is: **Move the Atlantic Menhaden Board recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan if the State does not implement the following measures from Section 4.3.7 (Chesapeake Bay Reduction Fishery Cap) of Amendment 3: The annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more than 51,000 metric tons.**

Motion by Mr. Batsavage and seconded by Mr. Estes. Before beginning debate, allow me to remind the Board of just a few items that were related to this motion. The Board will recall that in postponing this motion it also approved sending a letter to Virginia; detailing the contents of the postponed motion.

Chairman Gilmore's letter reflects the thorough and thoughtful debate that we had in May. That letter as well as the response from Governor Northam is in the Board's briefing materials. The Board also heard at the May meeting of the Bay Reduction Fishery Landings for 2017 were roughly 20,000 metric tons; well below Amendment 3s 51,000 metric ton cap. That also figured into the Board's decision to postpone the motion.

I hope everyone received the letter that just came from the Commonwealth of Virginia that identifies the partial season 2018 landings; which provides that 43.8 percent or roughly 22,000 metric tons of the Amendment 3 Cap has been harvested, with landings data through July 27, 2018. With that said; I would open up the motion to the Board for discussion. Dave Blazer.

MR. DAVID BLAZER: I would like to offer a substitute motion if I could; so that we can debate that. All ready, excellent. **I would like to move to substitute that if harvest from the Chesapeake Bay by the reduction fishery exceeds 51,000 metric tons, the Atlantic Menhaden Board recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan if the state does not implement the following measures from Section 4.3.7(Chesapeake Bay Reduction Fishery Cap) of Amendment 3.**

The three components are [1] the annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more

than 51,000 metric tons. [2] Harvest above the Cap in any given year will be deducted from the next year's allowable harvest. [3] Any amount of un-landed fish under the Cap cannot be rolled over into the subsequent year.

The implementation of these regulations is necessary to achieve the conservation goals and objectives of the FMP. In order to come back into compliance the Commonwealth of Virginia must implement the above measure as contained in Amendment 3 to the Atlantic Menhaden FMP. Staff will notify the Board if reduction harvest from the Bay reaches 90 percent of the Cap, and if the Cap is exceeded.

CHAIRMAN MESERVE: Is there a second to the motion; Steve Bowman; thank you?

MR. STEVEN G. BOWMAN: Second to the motion, and I would like to speak to the motion.

CHAIRMAN MESERVE: Please go ahead; unless David would like to go first.

MR. BLAZER: I'll let him go first and then I'll add on.

CHAIRMAN MESERVE: Go ahead, Steve.

MR. BOWMAN: Ladies and Gentlemen, members of the Commission, good afternoon. First I would like to take this opportunity to thank you for the opportunity that brings us here today. I realize that great understanding was afforded to the Commonwealth of Virginia by postponing this matter until today.

I also would like to take this opportunity to somewhat apologize, but definitely explain to the members of the Board that at this juncture, by virtue of this motion, we have not been able to adopt the Cap that we were hoping that we would be able to adopt the cap through the mechanism that was proffered. That would have been that the General Assembly would take up this matter during the course of the

interim period. Because of that the Commonwealth of Virginia immediately undertook monitoring efforts with the cooperation of the National Marine Fisheries Service and Omega to ensure that from the onset of the fishing season the amount of catch was being tracked. That is what you have in front of you today, as what Nichola had indicated, as far as the percentage is concerned.

We continue to monitor the catch as often as provided to us; which is on a ten day basis. The next report we should receive around Friday. I don't like being here today to ask for the support of this. I would certainly have liked the Commonwealth of Virginia to have adopted the Cap that would have prevented these proceedings from occurring. However, just as a refresher in the Commonwealth of Virginia, the way that the setup is the General Assembly is the body that adopts this specific – not a regulation but a law – in fact in Virginia it is a law.

What we do now is the best that the Marine Resources Commission can do; and that is to continuously monitor it. For the fact that I do not have the capability as Commissioner of Marine Resources of the Commonwealth of Virginia, from a logistical perspective, to basically place my will or the will of the Governor, or the Secretary of Natural Resources on the 140 members of the Virginia General Assembly.

Until the time comes, if the time comes that the General Assembly does something different, as far as the management of the menhaden is concerned, I am here to do the very best that I possibly can; and that is what I'm here to do today in providing you these numbers, with the promise that should in keeping with the motion.

Should the Commonwealth of Virginia determine that the Bay Cap is in proximity of being exceeded the first person that I will be contacting would be Bob Beal. Then of course the measures that are contained therein that

pertain to the immediate trigger by the Policy Board, and a finding of noncompliance would be in order. Again, I hope that you would support this. It does not appear that the Bay Cap is going to be exceeded; if you look at the numbers that were provided through July, from 2013 to 2018. The heaviest fishery months for the Chesapeake Bay are May, June, and then up until July; but primarily May and June as you note. Those numbers indicate what has normally been caught; as far as the percentage of the Bay Cap in those months, and again, the August through the end of the season. Then if you look through 2013 through 2018, you'll note that the 51,000 metric tons has never been exceeded. For these reasons I hope you will support this motion; and I thank you for your time, your indulgence, and your patience.

CHAIRMAN MESERVE: David Blazer.

MR. BLAZER: You know we deal with compliance and noncompliance issues; and I think this is a reasonable solution to try and address the menhaden fishery. We've debated this pretty extensively. We spent two days together in November talking through this; and what was good and what we thought was positive.

You know with the Commonwealth of Virginia having new leadership, you know with a new Governor, new VMRC folks, new Commissioners today at the Menhaden Board. I feel like we could give them a little bit more time on the administrative side of things; so that their Legislature hopefully can act to come into compliance.

I think this motion keeps the intent of what we're trying to do with the management plan with the 51,000 metric tons. Again, as the first couple statements there, if they exceed the amount of the harvest then they are out of compliance. I think this gives us a little bit of time. It meets the spirit of Amendment 3, with the Bay Reduction Cap. Again, I just think it's a pretty good solution that I would appreciate

everybody's support on. With that I'll call it a day.

CHAIRMAN MESERVE: Marty Gary.

MR. MARTIN GARY: I'll just reiterate I guess, or recognize what Commissioner Bowman and Blazer just said, as being another one of the adjacent jurisdictions in the Chesapeake Bay in support of this motion. I hope the rest of the Board members around the table will recognize that the concerns that led to the support for the Cap to begin with, are supported by the three contiguous jurisdictions in the Chesapeake Bay for the reasons that Commissioner Blazer and Bowman just mentioned. PRFC supports this motion.

MR. JOHN G. McMURRAY: I'm not clear if the intent is for this just to be for 2018 or if it is to extend this at least until we have the BRPs.

CHAIRMAN MESERVE: Would you like to clarify that David?

MR. BLAZER: Well, I think I don't know how long it's going to be before; you're talking about the ecological reference points? I don't know the timing of that. But I want to give the Legislature a chance next winter; when they come back in session. That is because there is more that they have to do; as well as maintain the Cap. I think the Cap for this summer, for this year, is what I'm referencing here. If the ERPs are going to be three or four years, then maybe there is another solution; a longer term solution.

CHAIRMAN MESERVE: Pat Keliher.

MR. PATRICK C. KELIHER: I really struggled with this one. I thought after making the last motion to postpone we were going to be done with this. We would give the Commonwealth an opportunity to come back into compliance. But obviously that didn't happen; and that did not happen not because of the state agency that is represented here at the table today.

It happened because of the Legislative Branch of government, not the Executive Branch of government. I think, in talking with Steve and others, there is certainly the part on the Agency charged with the implementation of rule, or law in this case, to be compliant. But they are not able to do so; and because of that I'm willing to support the motion that is on the board.

CHAIRMAN MESERVE: Bob Ballou.

MR. ROBERT BALLOU: I too am struggling with this issue; and very much appreciate the spirit in which this motion to substitute is offered. But I'm very concerned about the precedent that this might set. In essence, when you think about how many, I mean Dave Blazer mentioned that we deal with noncompliance, we deal with compliance; you're right, and we deal with noncompliance by holding states accountable.

We enact state specific quotas, for example for a number of species. It's incumbent upon each state upon adoption of an FMP or an amendment that sets forth state-specific quotas, to implement those quotas by putting them on the books. I find myself thinking, if this approach were to move forward, what would prevent any state under any new quota regime from saying well, we're not really.

By the way; I certainly understand the challenge regarding the Legislature, so I'm really directing my comments broadly, and I don't mean specifically to those sitting at the table here today. But I just find myself wondering what would prevent a state from saying, for whatever reason, that they're not comfortable putting the regulation on the book, say the state-specific quota. But trust us; we're not going to go over. We really want to be held accountable to our performance, not necessarily what we have on the books. It's an interesting approach; but I worry that it tears at the fabric of what this Commission has always been about, and that is we take for better or for worse what this Board, well in this case this Board, the species

boards broadly speaking adopt, and we implement them.

If we don't or we can't, there needs to be some level of accountability. Now I realize that this does speak to an accountability approach. But it's a very different one than I've been familiar with. Again, I really worry about the precedent, in terms of how this could play out with all of these gray areas now, as I see it manifesting themselves over the years, remembering back to how we handled the Chesapeake Bay Cap with regard to menhaden. With that I'm very reluctant on this issue. I'm, very reluctant to support this motion to substitute; based on the precedent.

CHAIRMAN MESERVE: Robert Boyles.

MR. BOYLES: If I may, if you all would indulge me, I would like to channel one of my favorite Virginians of history; the third president. Mr. Jefferson suggests that "Honesty is the first chapter in the book of wisdom." He also says, "In matters of style swim with the current, in matters of principal, stand like a rock." I take comfort in his last quote that I will give you. "Only aim to do your duty, and mankind will give you credit where you fail." To pick up on Board Chairman Emeritus Ballou's comments about precedence, I would like to go back and look for guidance with The Act. I'm going to give you a couple of definitions that I pull straight from the Atlantic Coastal Act.

"Conservation means restoring, rebuilding, and maintaining of any coastal fishery resource in the marine environment, in order to assure the availability of coastal fishery resources on a long term basis." We began this road down Amendment 3 to provide for long term conservation management allocation; and sustainability of the menhaden fishery for all Atlantic coast states.

Compliance is a condition, this is from the charter. "Compliance is the condition in which a state has implemented and is enforcing all

measures required by a fishery management plan." I go back to The Act, where it says, "Implement and enforce means to enact and implement laws or regulations as required; to conform with the provisions of a coastal fishery management plan, and assure compliance with such laws or requirements by persons participating in a fishery that is subject to such a plan."

My concern here is that this is a conditional compliance. To pick up on Bob Ballou's comments, I think it's a mighty slippery slope; it's a mighty slippery slope. President Eisenhower said, "Though force can protect in emergencies only justice, fairness, consideration, and cooperation can finally lead men to the dawn of eternal peace." I sure would like for us to move towards peace in this menhaden fishery. I'm not sure where this leaves us; but I have concerns with the substitute motion.

CHAIRMAN MESERVE: Emerson Hasbrouck.

MR. EMERSON C. HASBROUCK: It's going to be a hard act to follow after that excellent commentary. I'm wondering, I don't see where the accountability is here, right. The substitute motion says that we can find Virginia out of compliance if they do not implement the following measures; the first of which is the annual total allowable harvest from the Chesapeake Bay by the reduction fisheries, limited to no more than 51,000 metric tons.

They've already told us they can't do that. We're just hoping that maybe they can between now and sometime in the future; maybe this winter when the Legislature resumes. But I don't see those three items up there really any different from where we are right now; with just a hope that maybe Virginia will constrain its harvest. The second bullet is in place anyhow. If it goes over the Cap it's going to be deducted from the following year. If there is any underage it is not going to be added. I don't think I can support the substitute motion.

CHAIRMAN MESERVE: Ritchie White.

MR. G. RITCHIE WHITE: I'll pass.

CHAIRMAN MESERVE: Jim Gilmore.

MR. JAMES J. GILMORE: I too always hate to follow Robert; because he really has such an elegant way of speaking. It seems we're faced with a similar thing that has become modern. In modern times we've got two choices; neither one is very good. I'm not in favor of delaying; and I've discussed this with a lot of the Commissioners about upholding our process and our procedures.

But we're all in a very difficult position with this. I think what is swaying me now is the uniqueness of the whole situation; and the circumstances surrounding this. Steve brought up some of them, and Marty other ones about there is a new Virginia administration. Remember in February, when we were coming up with the implementing the amendment, it was different people around and it was a very big transition that was going on.

We're transitioning between ecosystem management and single-species management, which is another difficult thing. If this was a few years ago this would be black and white, and I think we would all know where we were going with this. The growing pains of that going into this new world of ecosystem management are complicating this tremendously.

Again, more unique things that the species is managed by the General Assembly, and I think there is maybe some effort to try to maybe fix that. That we won't exceed the Cap in 2018, and then again Virginia's entire quota won't be exceeded. However, there is a technical noncompliance. It's a technicality right now. I know it's not following our process. But when you start looking at all those other factors, forwarding a noncompliance at this point in

time may do more damage than it's going to do good.

I've fallen back to, let me try to do not as elegant as Robert, but when I go back to the beginning of my career in management I had a very good mentor; whose name was Herb Doig, and he was our Cornell graduate a great wildlife manager. He told me back then that what your job is, is to serve the resource. I think that is what all our jobs are around the table. To serve, we have rules, we have regulations, and we have process. Those are tools to get us there; and the great majority of the time we have to stick to those. But every now and then a unique thing comes up in terms of management; and I think we're at that point with this situation right now.

Based upon that my opinion is really to serve that resource right now; and I think the substitute motion gives us a little bit of breathing room. Still, it's built in that we're not going to exceed the limits that we agreed to; and again, it's not clean. I don't like it. But unfortunately we're in a rather difficult position at this point. At this point in time I'm reluctantly in favor of the motion.

CHAIRMAN MESERVE: Dennis Abbott.

MR. DENNIS ABBOTT: It's amazing how pliable we can become at certain times; as we analyze a problem. A second comment is that I know that I don't read the same books as the gentleman from South Carolina does, obviously. He's always imparting a lot of words of wisdom to us. But I do have two questions; one probably for the maker of the motion, and one for the seconder. The first one regarding the motion itself, at the very end it says that the staff will notify the Board if the reduction harvest from the Bay reaches 90 percent of the Cap, and if the Cap is exceeded. I question what the point of that would be. Does that mean we're going to take some action that we're not willing to take today? I don't think

that needs to be part of the motion; but I'll leave that to Mr. Blazer.

The second question is I would be interested to hear from the Commonwealth of Virginia what the argument really is within the Legislature. What is their position regarding the non-implementation of the Chesapeake Bay Cap? You know we've established what we think is the correct number. But I don't know if there is a counter argument, what would change their position. If you could offer me any guidance or help on that I would appreciate it.

CHAIRMAN MESERVE: Dennis, I have three more names, and then perhaps if Virginia is interested to respond to your question, I'll see if they raise their hand. No?

MR. BOWMAN: I would be glad to; I was waiting for Dave's first.

MR. BLAZER: He had two questions. Do you want us to answer?

CHAIRMAN MESERVE: Yes, please, first question Dave, thank you.

MR. BLAZER: Yes, real quick. The purpose of the 90 percent was to give us kind of an advanced notice of if we had to take the action; just kind of put us on notice that they may exceed the Cap at some point, and then follow up with the exceedance. Then that would go back to the beginning part that they would be found out of compliance. It was really just kind of giving us a heads up that that process is taking place and that it's being monitored.

CHAIRMAN MESERVE: Steve, if you would like to address the second part of the question.

MR. BOWMAN: I would, Ma'am. To the second part, while I cannot speak for the members of the Legislature, I can only advise that what I believe this would do is give me the opportunity to convey to the Legislature, through the appropriate committees, the difficulties that we

have, the difficulties that this type of arrangement provides to members of this body, and enable us to come to a cleaner solution in an effort to achieve the common goal of managing this stock in a manner that is consistent with the democratic process of this Commission.

CHAIRMAN MESERVE: Andy Shiels.

MR. ANDY SHIELS: I'm going to poke the elephant in the room; and why I think this is a bigger issue than simply the text that is on the screen. I think if all of us believed that our action here would be supported by the Secretary of Commerce, there would not be a discussion around the table right now.

That clearly comes from the fact that the summer flounder decision and New Jersey's desire to go out of compliance was dealt with in a way where the Secretary of Commerce did not support ASMFC. We all know that to be true. We are 0 and 1, and now we're concerned that we're going to be 0 and 2, and what does 0 and 2 mean for this body? Wise people say things like well, what good is a rule or a regulation or a law if you don't test it? Some of us believe that we should test this law, and see what the authority and the clout of ASMFC and the strength of 15 states carries; and others feel like we should not poke the bear, because we're likely to go 0 and 2. Maybe we'll go 0 and 3, and maybe we'll go 0 and 4; and at some point there is not going to be an Atlantic States Marine Fisheries Commission, with the ability to make decisions on how fisheries are managed up and down the east coast.

We all know what is in the background. We heard some comments the last couple days from folks from other levels of government; from federal government what their concerns are. I believe people were telegraphing to us where they think that federal government decision is going to go. But that for me is not enough to give up the authority that this Commission and Board has.

If you think about how we do rule making and regulations, or set caps and things in this group. We start out with a discussion item; and we go to APs, and then we go from APs to the Boards, and we have technical committees and we have meetings, and then the Board makes a vote. Then we come from the Board to this venue, and then eventually we're going to have the whole Commission vote later this week.

When we're done with that it goes on to yet another body, and that would be the Secretary of Commerce. My opinion and my recommendation is that I cannot support this motion; because I think that the decision that is very difficult needs to be made at the next level, because that is their opportunity to show whether they support this body or not.

If we go 0 and 2, or go 0 and 3, or go 0 and 4, at least at the end of the day this particular Commission can say it did what was right. It followed its charter. It followed its rules; and another body took that out of our hands, because that is the process that we work within.

CHAIRMAN MESERVE: Steve Murphy, did you have your hand up earlier? Go ahead.

MR. STEVEN W. MURPHY: I have struggled with this over the past couple days; trying to determine what's right. I think the precedent is what worries me the most. We brought the original motion to find Virginia out of compliance based on our experience with this body; and struggling to bring our own state into compliance with issues such as cobia, where they did not want to be in compliance.

I can't see us coming back and saying, you know we're going to not accept a quota for a certain fishery, but we'll let you know when we get there. I understand that this is an unusual circumstance with the Legislature. I think South Carolina; their Legislature actually has to adopt these things as well. There may be other states,

I don't know. But I would lean towards not supporting this substitute motion at this time.

CHAIRMAN MESERVE: Ritchie White.

MR. WHITE: I've been struggling listening to the two sides of this issue. They are both compelling. A short time ago New Jersey had a unique situation; and they decided to not come under compliance. We have a new unique situation; and Commonwealth of Virginia has decided, or the Legislature has decided to not be in compliance. My concern is that this will continue. I think we have to go back to our foundation; and we have to do what's right; wherever the chips fall.

Without doing that without operating on our foundation, this organization is going to fall apart. I think going forward, regardless of the outcome from the Secretary of Commerce that everyone sitting around this table is going to be deciding whether this organization continues. It's going to be up to us to not bring unique situations, to keep unique situations in compliance. I think that is important for our future. I will not be supporting this motion.

CHAIRMAN MESERVE: Cheri Patterson.

MS. CHERI PATTERSON: I have a couple questions to get some clarity on this. I have a tendency to be leaning towards my counterpart and what he just indicated; but I would like to get a couple questions out there answered. To the Commonwealth of Virginia, does the General Assembly have the ability to render this motion impotent? They don't want to see this occur with their vote. Can they actually move to do something against this?

MR. BOWMAN: I would answer the question that the General Assembly is subject to recall at any given time by the Governor of the Commonwealth of Virginia. The General Assembly in the Commonwealth of Virginia, as far as I know at this present time, has no indication that they will be coming back into

session until sometime in the middle of January. To be quite honest, the answer would be yes. The likelihood of them, as far as this is concerned, prior to the expiration of the fishing season in November, is not likely to occur.

CHAIRMAN MESERVE: Cheri, go ahead.

MS. PATTERSON: My next question is probably towards the process, the next step of the process that goes through if the Commonwealth is found out of compliance. It moves forward to the Secretary of Commerce; I understand that. But can the Secretary of Commerce rule on each one of these issues that is being defined by the Commonwealth? Can I get some clarity either with Bob or Chip on this?

CHAIRMAN MESERVE: Bob, do you want to take that?

EXECUTIVE DIRECTOR BEAL: I'll take a stab at it with the understanding that Chip may have to bail me out if I go awry here. If this motion were to pass or another motion were to pass, and the Policy Board and the Full Commission acted, and decided to send letters off to the Secretary of Commerce.

The process is within ten days I have to send a letter to the Secretary, notifying of what the Commission's action is, and in that letter I have to describe how the state is out of compliance and what they have to do to come back into compliance. In that letter also it has to make the case of why this is a conservation issue. Then once the Secretary receives that letter the Secretary has 30 days to make a determination on a two-prong question. The first question is does the state have the correct regulations in place, yes or no? I think that is a relatively easy question. The second question is the Commonwealth did not implement these regulations; does that fact present a risk or jeopardy to the conservation of that species? If the answer to both of those questions is yes, then the Secretary makes a decision, should a moratorium be implemented or not.

That is the only tool the Secretary has is a full moratorium or not a full moratorium. The one bit of flexibility the Secretary has is when that moratorium is initiated. Assuming after the 30 day period the Secretary says yes, a moratorium is appropriate and should be implemented. The Secretary has a six month window of when that moratorium date or the initiation of that moratorium can occur.

The Secretary really, this will be ultimately really a one-dimensional question. Does the 51,000 metric ton Bay Cap, or does the lack of implementation of the 51,000 metric ton Bay Cap pose a conservation issue for Atlantic menhaden? That will ultimately be the question, and that is a yes or no answer. Then the Secretary will have to determine when a moratorium would be implemented, if he feels it is appropriate. Does that answer your question, Cheri?

CHAIRMAN MESERVE: Did you have one more, or done? Next was Tom Fote.

MR. THOMAS P. FOTE: I think New Jersey has more votes on noncompliance over the years than any other state. That was one of the reasons, because we had the Legislature taking care of striped bass; so we would not get a bill through on time and wind up being closed. We were shut down a number of times because we weren't in compliance.

As a matter of fact, there was a special session one time they were going to vote on it, and the State House actually got flooded, so they canceled the meeting and they had a special session of the Senate just to vote on a striped bass bill to get us in compliance. One of the chief lobbyist said, "How the hell did you do that Tom?" I said because it's striped bass, so we did have a special session to vote on one bill.

The other thing I'm thinking about here is when we had only one Legislative Appointee and one Governor's Appointee on the Boards; we would

select a representative to represent all the Legislative and the Governor's Appointees to do that.

Back then I was a Legislative Proxy for Senator Lou Bassano, and I was sitting on the Tautog Board. New Jersey was out of compliance. Doug Gunther came to me; he said "Tom, how do you feel about voting your state out of compliance?" I say that's my job. He said, "You're going to catch flack." I said that's my job, I'm here to represent all the Legislative Appointees, I will get there. I did vote us out of compliance in New Jersey. Did I catch some heat; yes. I wrote to them, I said that was my job and I would do it again, because that's what it was. I also heard the New Jersey Board out about being out of compliance last year.

Remember, we were not asking to catch any more fish. We were not asking to do any less reduction than anybody else. What we wanted to do in New Jersey is control the size and the season; which was best for our fishermen, to stay within the rules of the quota. That's what we were not allowed to do. We basically appealed the process to basically answer those questions. They refused to basically answer it. That's one of the reasons we went out of compliance; because we weren't felt we were given a fair shake of the appeal process. We didn't ask for any extra fish; as a matter of fact, we accomplished a bigger reduction than was necessary, and some of the other states didn't.

There is a little different thing going on here. With that said, I am not as eloquent as Bob; but I do have a little bit of history here doing these things. I find it very difficult to vote for this, because I believe in the Commission. I wouldn't have volunteered my time for the last 28 years, since 1990, commented before that actually going to meetings. I'm going to have to support the process; and leave it at that.

CHAIRMAN MESERVE: I have a couple people on the list who have already spoken once. But I

did see Joe Cimino's hand, who hasn't had a bite yet, and then Ray Kane. Go ahead, Joe.

MR. CIMINO: In giving this a lot of thought, I was originally considering speaking to the motion that was tabled. I find myself more or less in the same situation that Mr. Gilmore is in. I know Mr. Ballou talked to tearing of the fabric. I think that may just be in front of us, either way that we step; and I find that a problem.

One other difference between the New Jersey appeal that's interesting is Virginia's appeal was pulled, New Jersey's appeal was denied. But there is a document from ASMFC leadership stating that if Virginia left their appeal in place, perhaps it should go forward to the Policy Board regarding the Cap.

That was all I was really thinking about talking about today. The one thing I feel comfortable with is that we need more science on this. My hope moving forward is that there will be a priority put in place at ASMFC level for more menhaden funding; specifically for research on the Bay Cap. I think that is important in our decision making process. I'll defer as to whether or not I think this motion gets us where we need to go for now.

CHAIRMAN MESERVE: Ray Kane.

MR. RAYMOND W. KANE: I've listened to the pros and the cons. My concern once again, I heard mention a number of times at the table is the shredding of the fabric of ASMFC. I have a question to the new Commissioner of Virginia. Under 2, Harvest above the Cap in any given year will be deducted from next year's allowable harvest.

Not being able to get your General Assembly to vote this up as was written in Amendment 3, what happens for instance, if they go over by 4,000 metric ton this year and next year you get a Bay Cap of 47,000 metric ton. Where does compliance fall in line there?

MR. BOWMAN: I would presume the compliance would follow the same place that we're asking for this motion to take it, and that is if we haven't done as indicated by the motion that it is immediately forwarded to the Secretary of Commerce as a finding of noncompliance.

CHAIRMAN MESERVE: Doug Brady.

MR. DOUG BRADY: I'm still trying to wrestle with the timeframe that is as far as this motion. I think we are here today because we're trying to work with Virginia on this motion is because their Legislature did not vote on it this year; and they are not going to be back in session or be called back into session to deal with this, most likely.

But in reading this motion, it doesn't have a time period, and so is the maker or the motion or the underlying premise of the motion that this would just go on continuously, and the Legislature would not have to vote on anything until we move to the next, I guess the biological reference points menhaden management? I am trying to get my head around this. I mean if we adopt this motion, it appears that we just kick the can down the road indefinitely, and the Legislature is not forced to do much of anything.

CHAIRMAN MESERVE: David Blazer.

MR. BLAZER: Yes I think this is trying to get us through this year, and to when the Virginia Legislature reconvenes. You know obviously the ecological reference point's kind of come into play. But I don't think that's going to happen in the next nine months before the next fishing season for them. I think this gets us through this fishing season and then Virginia's Legislative Session, and then we can take this back up this winter; sometime before the next fishing season.

CHAIRMAN MESERVE: Robert Boyles.

MR. BOYLES: I appreciate the opportunity to speak again. I want to go back to Mr. Shiels question; the real issue here. In the early 1940s when the country was engaged with a few distractions around the globe, the Congress in its wisdom decided that it was best to manage interstate fisheries cooperatively.

In 1993, as I understand it, when we were dealing with a lot of issues with ending overfishing and rebuilding overfished stocks, Congress in its wisdom passed the Atlantic Coastal Act. I'm about to the position now that I think we've outkicked our coverage with respect to the Atlantic Coastal Act.

I appreciate the Commissioner sharing with us the data on the landings to date. I look at performance of the fishery and the table that Steve has shared that the Commonwealth has shared, and it doesn't appear based on past trends that Virginia is going to blow that Cap. It doesn't appear to me.

But I think when you look at the difficult issues that are before the Commission today, and the difficult issues that are sure to come. I'm not convinced they're going to be related to ending overfishing and rebuilding overfished stocks or depleted stocks, so much as they're going to be about allocation issues.

As the Executive Director has pointed out, there is one remedy available to the Secretary of Commerce to sustain a noncompliance finding; and that is found in The Act; the '93 Act, The Atlantic Coastal Act. I think there is good argument to be made on all sides with respect to would this meet that standard for the Secretary to implement a moratorium? I think all of us desperately want to avoid that outcome. I think the real question here; this isn't about menhaden so much as it is are we committed to one another. Are we committed to joint problem solving; as we move beyond ending overfishing, as we move beyond rebuilding overfished stocks?

The future before us I think is bright; but it's difficult. From everyone to whom much has been given, much will be required. I think we need to recognize that as we move forward. Do we jeopardize the fabric of the Commission? I appreciate the Chairman's comments particularly. I think they are very telling.

Do we jeopardize the future of the Commission to make a point here; and I struggle with it. I really struggle with it; but again, I appreciate the Commonwealth sharing with us the Bay landings to date. I think the real question that we as a group have to remember is the legacy we inherited when we were distracted by a great World War, and the country decided we needed to cooperate.

From my perspective, to the degree that I have anything to say or do about it, I pledge to you all. I am very interested. I think there are greater gains to be had by cooperation. Coach Lombardi said, "Individual commitment to a group effort that is what makes a team work, a company work, a society work, and a civilization work." I hope we can work to take fisheries management into the future where it needs to be with a reasonable outcome today.

CHAIRMAN MESERVE: I'm going to turn to Craig Miner and then Emerson and Steve.

SENATOR CRAIG A. MINER: I just wanted to be clear in my mind. No matter what happens, does the Commissioner have the authority to suspend this fishery if the fishery is going to exceed some number below what is in statute; or are you bound by the current statute, which I gather is a higher number.

MR. BOWMAN: At the present time I by law am bound by the current statute.

SENATOR MINER: In Connecticut it is an election year. I have no idea what it is in Virginia.

MR. BOWMAN: I can assure you we're far from an election year at this juncture.

SENATOR MINER: Just from a distance it seems to me that the value of this fishery is such that somebody ought to be able to find a pathway; at least for an immediate solution to this issue. I'm pretty sure that I don't want to complicate this by supporting a motion that is much more complicated than a motion to table this until November; because I think this just further complicates it.

Although I do kind of get Robert's Boyles position that trying to work some of these things out has value. I just don't think that it helps me by doing this. I don't know that there is any other way; other than continuing down the path of noncompliance, I guess, in terms of our decisions that would prompt the Legislature to do something other than what they've done. I'm not even sure that they would do something next spring. But I guess I don't have the luxury of knowing the Legislature. I would say that in most states I think you would probably find that you would do something to come in compliance; rather than jeopardize this fishery. I guess that's my point.

CHAIRMAN MESERVE: Emerson.

MR. HASBROUCK: Having listened to what Mr. Shiels said about poking the bear and some of Mr. Boyles' comments as well. Then our Executive Director's comments that this noncompliance determination by the Department of Commerce is likely to come down to the question of does the lack of a Bay Cap pose a conservation issue for menhaden, and the answer to that is likely no.

I think the conundrum that we find ourselves in today has to do with the fact that we did not base all of our decisions for the Bay quota solely on the science that was presented to us. Instead, we also considered non-science based information in setting that quota. However, as

managers we have the flexibility and the ability to do that and we can do that.

But I guess going forward we have to keep in mind that if there is a noncompliance finding by us that is not based solely on science, relative to posing a conservation issue for the resource, the Department of Commerce is going to use a science-based approach to answer that question. I think we need to keep that in mind with this menhaden issue; as well as other species as we go forward, relative to states deciding that they may want to go out of compliance.

CHAIRMAN MESERVE: Steve Bowman, I think you may have the last crack, oh Pat will be next. Maybe then we'll be able to caucus on the substitute motion.

MR. BOWMAN: Okay, I was just going to follow up on Emerson's comments. Correct, as managers we do have the right to use science and other methodology; but when making a decision of this magnitude, I think one should give strong deference to the science that is at hand. In this situation, the response that the Commonwealth of Virginia had to its appeals, his appeal to the matter specifically states.

In addition the appeal states there is no evidence to 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 that 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.

I was not going to go into the weeds with that; however, at this juncture, based on what's been proffered by members that indicate there are unique circumstances, I think that term was used, and let's go ahead and poke the bear and let it go. If I were, and I would just ask if you were in the same decision, would you be making the decision when that is on the record

that the decision for the Bay Cap was not made from a scientific perspective. I'm just asking for fairness at this juncture.

There is an old saying. The first Police Academy class I went to, a very learned lawyer was there; and he talked to us about the letter of the law and the spirit of the law. The letter of the law, any individual can go forward and just read and say that's the way it's going to be and that's the way we should move. The spirit of the law takes the consideration what the overall intent to achieve the goal is; and also takes in consideration other extraneous situations that may be present.

I ask you to consider during your deliberations the spirit of the law, taking into consideration what is before you today as you consider enacting a moratorium on a very important fishery to the Commonwealth of Virginia; one that supports around 300 jobs and also has the potential to shut down the bait fishery as well, because as we learned the other day this is not just an elimination or a moratorium on the reduction fishery, it is on the entire menhaden fishery.

I thank you for your time today. Again, I wish we were not in this situation. I would rather not have been before you today. However, I have been and I have provided you the best information that I have had at my avail; and I would ask you to please support the substitute motion. Thank you.

CHAIRMAN MESERVE: Pat Keliher.

MR. KELIHER: I think Mr. Bowman's words on intent and spirit is really appropriate here. Both sides of this issue are concerned about the fabric of the Commission; to use a term that was used earlier. Everybody is trying to get to the same point in protecting this organization. I think there are two ways to do it. In a meeting a week or two ago in Maine; with both current and past leaders of this Commission, I made a

speech almost word for word to what Ritchie White said.

But after reflecting on that and thinking about how a negative finding from the Secretary of Commerce would impact the fabric of the Commission, it has led me to this point. I would urge everybody to continue to work in cooperation and in cooperation with the Commonwealth and pass this motion.

CHAIRMAN MESERVE: Doug Haymans.

MR. DOUG HAYMANS: This is really a point of clarification, so that I know what I'm about to vote on. Although I appreciate the motion as it's been brought forward, it is rather lengthy. I wonder whether everybody reads it carefully, especially the first paragraph. It seems as though it's an if/then statement without a then but two ifs.

It looks like to me it says that if it is exceeded by 51,000 pounds and if the state doesn't do something to reduce it, then and only then is it out of compliance. I just want to make sure that I understand that statement before I vote on it. Perhaps as we caucus, staff can clarify the reading of that first paragraph.

CHAIRMAN MESERVE: I read it Doug as a, if the harvest exceeds 51,000 metric tons then the Board will automatically make a recommendation to the Policy Board, which will have to be reconvened to make a similar determination.

MR. HAYMANS: Madam Chair, what does the second if, following the Atlantic menhaden fishery management plan, if the state does not implement the following. It's a single sentence with two ifs, and that just doesn't compute to me.

CHAIRMAN MESERVE: Bob Beal.

EXECUTIVE DIRECTOR BEAL: Doug, would it be more clear to you if we said after Amendment 3

to the Atlantic Fishery Management Plan, since the state has not implemented the following measures? At this point right now that's a given. The state has not implemented the following provisions that are in those three bullets.

Ultimately it comes down to if the Commonwealth were to exceed 51,000 metric tons then this recommendation automatically goes to the Policy Board. It does not come back before the Menhaden Board, it goes straight to them and we convene the Policy Board at some intercessional meeting of some sort. If we change that last sentence to read, since the state has not implemented the following measures, would that help you out or does that muddy the waters?

MR. HAYMANS: Basically you would be splitting the first sentence into two; making the second sentence "since the state has not implemented." That's fine to me. I think I would also add the then statement above so that it is clear. If the state, then the Atlantic Board, and just make it clear what that sentence says.

CHAIRMAN MESERVE: Is that an acceptable change with the, oh staff is still working on it, good? Is that an acceptable change with the maker and seconder of the motion? Is that the intent of your motion?

MR. HAYMANS: I would add a will in front of the recommend; will recommend to the ISFMP.

CHAIRMAN MESERVE: Bob Beal.

EXECUTIVE DIRECTOR BEAL: With the change that says the Atlantic Menhaden Board will recommend to the ISFMP Policy Board. I think that's okay if everyone has the understanding that this Board will not take further action. It's an automatic transfer. The recommendation automatically moves to the Policy Board that the Menhaden Board recommends they be found out of compliance. If everyone is

operating on that understanding, I think we're okay with that wording.

CHAIRMAN MESERVE: Thank you for the clarification, Bob. That is my understanding now that it's on the record that is the intent of the motion. I see a nodding of head from David Blazer and Steve Bowman. Is there anything further, Dave?

MR. BLAZER: No, Madam Chair, I'm fine with those changes.

CHAIRMAN MESERVE: Malcolm Rhodes.

DR. MALCOLM RHODES: I just had one quick clarification, just for my head. The current Chesapeake Bay reduction fishery by the state is still 87,000 metric tons, is that correct? What's on your books now?

MR. BOWMAN: On the books as far as the law is concerned?

DR. RHODES: Correct.

MR. BOWMAN: It's 87,000; I believe is what's on there.

CHAIRMAN MESERVE: Okay, one last turn. Derek Orner, please.

MR. DEREK ORNER: I know there have been questions. I think Bob did a great job describing the Atlantic Coastal Act and the process. There have been a couple questions come up on kind of the conservation need and what needs to be discussed. What I would like to do is kind of ask Chip if he can come up; give a little bit from his perspective. We've been back and forth a little bit, and just to get the last word in from him, if that's acceptable to the Board.

CHAIRMAN MESERVE: I believe time permits; so if there is no objection to that suggestion, I'll ask Chip Lynch to come to the public microphone.

MR. CHIP LYNCH: Hi everybody; Chip Lynch with NOAA's Office of General Counsel. This is perhaps a better response to Cheri's question. I think Bob; you did a great job outlining it. There is more to it, more to this question however. I can't speak to the propriety of this particular motion. I won't; this is up to you.

If you vote it down or vote for a noncompliance, the Federal Government will take it and we will analyze it according to our process set forth in the Atlantic Coastal Act. But I want to underscore the issue that we will need to look at it through the lens of conservation. That's what Congress has dictated.

Fortunately we'll be able to look at the record that you all develop; because you have the same standard. The Section 7C, which I'll throw all the lawyerly stuff at you, but under your own Commission ISFMP Charter says that you need to find that before sending any noncompliance over you need to discuss and make a finding that the measure in question that is not being followed, jeopardizes the conservation of the fishery in question.

It is not my place to interpret your internal guidelines and your internal regulations. It would seem to me, I hear you struggling, and I have tremendous respect for grappling with this difficult issue. But I know from General Counsel's point of view, I am interested in hearing you develop the record as to how this particular – the Bay Cap – failure to implement the Bay Cap will jeopardize the conservation of the resource.

That will help NOAA Fisheries when we get the referral; if we get the referral, to be able to rely on that record to move forward. I will, just as a bit of a historian on noncompliance's. There has been discussion that this particular situation is unique. The idea that a noncompliance situation would occur, or has occurred because of an inability of a Legislature to implement a regulation is absolutely not unique. What is unique in the approximately 20 to 24

noncompliance referrals we've had, it depends on how you group them, sometimes two states do it together. What is unique is that this would be the first time ever in the history of the Atlantic Coastal Act and the Striped Bass Act, which is really the genesis of this noncompliance provision in the Atlantic Coastal Act. It would be the first time ever that the Federal Government would receive a noncompliance referral for a fishery that is not overfished, overfishing is not occurring and there is record evidence from the leadership of the Commission that the measure is not related to conservation. That is unique.

We would look at all of these on a case-by-case basis; but that would be unique. Just in short, and in sum, we the Federal Government have to find a conservation basis. We are interested in hearing from all of you as to what the conservation basis is; because indeed that is also your own internal regulation.

The Commission process is important. The fabric of the Commission is important; and that cuts both ways. You want to follow your own internal rules, I would think, but it's not my position necessarily to give you advice. When you go through that process, NOAA Fisheries will then accept whatever recommendation that you give; and again, we're looking for a fully developed record not a one sentence summation or opinion.

But give us your opinion as to why in fact you have to do that before you send it to the Policy Board. Under your regulations you have to give an explanation as to why it jeopardizes conservation of the fishery or the resource; which I am not saying you can or you can't. I'm just saying we will be looking for that. That is a condition precedent for you all. That's all I have.

CHAIRMAN MESERVE: Thank you, Chip. David Borden.

MR. DAVID V. BORDEN: Like almost everyone else around the table, I'm very uncomfortable with the position I think we all find ourselves in. I just cannot see, given the legal guidance we just got from Chip, who I have great admiration for. I just can't see us sustaining a noncompliance finding.

Having said that; I think that I would align myself with Robert Boyles' comments that cooperation is the key here, and we have to figure out a way to do that. What that means is we have to compromise in order to get the job done. I'm opposed to the motion. I don't think it gets us anywhere.

I would be more comfortable if we table the motion, ask the staff to spend the next couple of months, go back through the record and pull out the pieces that they think are pertinent to a noncompliance finding, and bring those back. I just point out that what this does, at least in my view, and I think the motion is very well intended, and I complement those that have drafted it.

The essence of the motion is that if they go over, so we're drawing a line. They're saying if they go over the 51,000, then we're going to recommend that some action be taken at the Policy Board, which means that there will be another discussion on this. What do we gain by passing this motion?

We may as well table the motion; ask the staff to review the record. Bring back the pieces of the record that they think that are pertinent to a noncompliance finding, and then at that point we can have an informed judgment. Is this going to meet the standard that Chip is talking about or not? That's my two cents on the issue. I'm opposed to the motion.

CHAIRMAN MESERVE: Dennis Abbott.

MR. ABBOTT: I think we've had a robust discussion; and we probably all could go around the room once or twice more, and I don't know

if it would change anybody's position. But I would like to limit debate on this and hopefully if we agree on limiting debate we can vote on this motion, or to Dave Borden's suggest to table the motion, whatever. But I think it's time to move on.

CHAIRMAN MESERVE: I couldn't have said it better, Dennis. Let's take three minutes to caucus on the substitute motion, please.

We're going to extend the caucus for one more minute.

Can the Board members please return to their seats? I'm going to give everyone another minute to get to their seat as I read the motion.

Before reading this motion into the record again, there have been a couple changes, so unfortunately I'll have to read this lengthy motion again, I believe. But given the opportunity to caucus, some legal advice, is there anyone that has a compelling need to say anything further about this motion? Eric Reed.

MR. ERIC REED: I really don't know what to say. I would like to quote Vince Lombardi, but I don't think it could be in public, and that would probably be fine with everybody. I am concerned that this decision should not be made by this Board. That is my concern. Virginia is out of compliance, you're out of compliance.

Your Legislature has forced you into being noncompliant. This morning we had a little discussion about whether or not the Commission and the New England Council should cooperate better. I think we all decided that we should. My question becomes, should the Commission be willing to cooperate with the Commonwealth of Virginia, the Legislature there; which has nothing to do with menhaden, it has everything to do with policy, which gets me to whether or not this Board should make this decision.

There are only a few more players on the Policy Board; but it is the Policy Board. That is what concerns me. The way I understand it is if we pass this motion, then if conditions are met, and then the decision to find out whether or not we call Virginia out of compliance is going to be a Policy Board decision. That is my understanding at this point.

If it fails and we decide that the Board will find Virginia out of compliance that is another thing. Me personally, I would support this motion, because I think this decision needs to be in the hands of the Policy Board. I mean you guys have been around a long time; the Commission has been around a long time.

A lot of you members have been around a long time. I have not. But in my mind this is a decision on the policy of the Full Commission; not just for us. I would support this. I might get outvoted by my fellow Rhode Islanders, but that is my position. We should pass this; because this decision is too momentous to not be made by the Policy Board.

CHAIRMAN MESERVE: Loren Lustig.

MR. LOREN LUSTIG: Pennsylvania requests, perhaps you've already thought to do this, but Pennsylvania requests a roll call vote please.

CHAIRMAN MESERVE: That can be done, and with that we will call the question. I'll read it into the record. **Move to Substitute: that if harvest from the Chesapeake Bay by the reduction fishery exceeds 51,000 metric tons, then the Atlantic Menhaden Board will recommend to the ISFMP Policy Board that the Commonwealth of Virginia be found out of compliance for not fully and effectively implementing and enforcing Amendment 3 to the Atlantic Menhaden Fishery Management Plan.**

Since the state has not implemented the following measures from Section 4.3.7(Chesapeake Bay Reduction Fishery Cap)

of Amendment 3. PART ONE: The annual total allowable harvest from the Chesapeake Bay by the reduction fishery is limited to no more than 51,000 metric tons. PART TWO: Harvest above the Cap in any given year will be deducted from the next year's allowable harvest. PART THREE: Any amount of unlanded fish under the Cap cannot be rolled over into the subsequent year.

The implementation of these regulations is necessary to achieve the conservation goals and objectives of the FMP. In order to come back into compliance the Commonwealth of Virginia must implement the above measures as contained in Amendment 3 to the Atlantic Menhaden FMP. Staff will notify the Board if reduction harvest from the Bay reaches 90 percent of the Cap, and if the Cap is exceeded. I'll turn to Max to conduct the roll call vote.

MR. MAX APPELMAN: Maine.

MR. KELIHER: Yes.

MR. APPELMAN: New Hampshire.

MR. ABBOTT: No.

MR. APPELMAN: Massachusetts.

MASSACHUSETTS: No.

MR. APPELMAN: Rhode Island.

MR. BALLOU: No.

MR. APPELMAN: Connecticut.

MR. DAVIS: No.

MR. APPELMAN: New York.

MR. HASBROUCK: No.

MR. APPELMAN: New Jersey.

MR. CIMINO: No.

MR. APPELMAN: Pennsylvania.

MR. SHIELS: No.

MR. APPELMAN: Delaware.

MR. CLARK: Yes.

MR. APPELMAN: Maryland.

MR. BLAZER: Yes.

MR. APPELMAN: Potomac River Fisheries Commission.

MR. GARY: Yes.

MR. APPELMAN: Virginia.

MR. BOWMAN: Yes.

MR. APPELMAN: North Carolina.

MR. MURPHY: No.

MR. APPELMAN: South Carolina.

MR. BOYLES: Yes.

MR. APPELMAN: Georgia.

MR. HAYMANS: No.

MR. APPELMAN: Florida.

MS. KRISTA SHIPLEY: No.

MR. APPELMAN: U.S. Fish and Wildlife Service.

MS. SHERRY WHITE: Abstain.

MR. APPELMAN: National Marine Fisheries Service.

MR. ORNER: Abstain.

CHAIRMAN MESERVE: **The motion fails 6-10 with two abstentions. That brings us back to the main motion.** When staff is ready they will get the main motion back on the screen for us; Marty Gary.

MR. GARY: **Madam Chair, if it's appropriate I would move to substitute, to table the motion until the winter meeting, February, 2019.** If I get a second I'll explain.

CHAIRMAN MESERVE: That would be a motion to postpone until the February meeting then?

MR. GARY: Yes, Madam Chair.

CHAIRMAN MESERVE: Seconded by Dennis Abbott. Go ahead, Marty.

MR. GARY: Just briefly, Madam Chair. We offered the Commonwealth of Virginia once before an opportunity, a bridge, to allow them and their Governor, their newly elected Governor, who has clearly sent a message to the Bay community, who is primarily concerned about this Bay Cap issue, to have a chance to work with its Legislature.

Under duress and a short window of time, he did his very best. I think this gives them another opportunity. It allows them to finish this fishing season, it allows us to get the Legislature back in a position where they can address this particular issue, and allow us to move forward. I would also like to say I've agreed with a number of the comments around the table.

I just don't think our body is served well, given the current ecosystem, given the concerns that NOAA General Counsel has provided regarding the criteria. I really think it would be in the best interest of us to have another chance at this at the February meeting. I think that time table will allow us to move forward in an effective manner.

CHAIRMAN MESERVE: Is there discussion on this motion from the Board?

MR. REED: Point of order, there is no discussion on a motion to table; it's non-debatable.

CHAIRMAN MESERVE: It's a motion to postpone; but thank you for watching out for me there. David Borden.

MR. BORDEN: One of the advantages I see in doing this is that there is a lot that is going to change. It does, as the author characterized, it's going to allow the Legislature another opportunity to consider the issue. I just point out to everybody that we're going to have a major big crisis up and down the coast. It's almost guaranteed to play out; because of the cuts in the sea herring fishery.

I think that's going to have major impacts in terms of how menhaden are harvested, where they're harvested, and I think there is going to be a lot of discussion about all of the rules that we just put in place on menhaden. Allowing some of that to play out I think is advantageous for the Commission.

CHAIRMAN MESERVE: I'm seeing no other hands raised; so we will call the question. The motion is to postpone to the February, 2019 Commission meeting. All those in favor please raise your right hand. All those in favor keep them up, please. We have a disagreement on the count, so please put them up high, thank you; 13 in favor. All those opposed please raise your right hand. Five opposed any abstentions or null votes? **The motion carries 13-5.** We will postpone the noncompliance motion until the February, 2019 meeting.

ELECT A VICE-CHAIR

CHAIRMAN MESERVE: I thank the Board for the exhaustive and comprehensive discussion of this issue, and move on to Agenda Item 5; which is to thankfully elect a Vice-Chair of this Board. Bob Ballou.

MR. BALLOU: I would like to make a motion if I could; and that would be to move to elect the distinguished gentleman from Georgia, Spud Woodward as Vice-Chair of the Atlantic Menhaden Management Board.

CHAIRMAN MESERVE: A second from Malcolm Rhodes. **Is there any opposition to the motion? Congratulations Spud.**

OTHER BUSINESS

CHAIRMAN MESERVE: Is there any other business to come before the Board? David Blazer.

MR. BLAZER: Given the timing and where we are today, I just wanted to bring up one question or concern; especially given the debate that we've just had about the Chesapeake Bay Reduction Cap. You know we've talked about the lack of technical information on the Bay Reduction Cap, and there has been a move recently with some of our stakeholders to try and get an aerial survey, or some other science and technical information available to help us with that.

Especially given the debate from the last two hours, I would like to I guess ask the Committee that is doing the stock assessment and the Technical Committee, just to give us some ideas maybe eventually about aerial surveys, and is it going to help us give some information that might be relevant to this debate when we take it back up in February, or at least if we get a path forward with these types of aerial surveys and so forth. I also just one other comment, we realize that ASMFC has gotten a plus up with their budget, and there may be an opportunity for funding something along these lines. I just wanted to throw my hat in the ring for something along those lines. Sorry, Bob.

CHAIRMAN MESERVE: Katie Drew, please go ahead.

DR. KATIE DREW: The Technical Committee absolutely supports the concept of an aerial survey. It is one of our research priorities for menhaden. Whether that's focused on the Chesapeake Bay or on a larger coastwide scale, obviously we would prefer a larger scale. But for sure that kind of information would be helpful.

I would just like to temper expectations though as to point out that this would be an index of relative abundance. I think that can give us a lot of information on movement patterns and on the numbers of schools of menhaden that we're seeing in the Bay, seeing on the coast. But until we kind of have a longer time series, it will be harder to say, you know if we go out and see a hundred schools today is that good or bad?

We won't know until longer down the line. But for sure an aerial survey would have a lot of value; and the Technical Committee would obviously want to have opinions on how it should be designed to make sure that it is the most scientifically rigorous, and can give us the kind of information that we would need. But it's definitely one of our research priorities.

CHAIRMAN MESERVE: Is there any other business before the Board? Cheri.

MS. PATTERSON: I just have a question in regards to an aerial survey. How much of the Bay is actually accessible for an aerial survey; and can it be expanded logically if it's just a small portion of the Bay that is actually available for an aerial survey?

DR. DREW: Also a good question. Obviously doing an aerial survey of the Bay is much more complicated; due to air space restrictions because of where we're located, then if you were trying to do this in say Rhode Island. I can't give you sort of off the top of my head what the percentages would be.

But it's certainly a concern, and I think that's part of where the TC would like to have some input in terms of how do you design something that is going to be limited by factors outside of our control? I think there is definitely value in it. I think there is also value in extending that out beyond the Bay and covering some of the local ocean as well; to get a handle on that relationship. But it is not as simple as just, oh let's send a bunch of planes out in a grid pattern.

ADJOURNMENT

CHAIRMAN MESERVE: Anything further to come before the Board? Seeing none; we stand adjourned, thank you.

(Whereupon the meeting adjourned at 5:00 o'clock p.m. on August 7, 2018)