



Atlantic States Marine Fisheries Commission

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MEMORANDUM

TO: Executive Committee

FROM: Robert Beal, Executive Director

DATE: October 27, 2015

SUBJECT: Review of Executive Committee Recommended Changes to the Commission Guidance Documents

The Executive Committee (EC) met on August 5, 2015 to review potential changes to the Commission guidance documents and developed nine recommended changes. Below is a summary of those nine actions.

The Commission's guidance documents detail the operating policies, procedures, roles, and responsibilities of the Commission and its committees. These documents include the ISFMP Charter, Compact and the Rules and Regulations, the Appeal Process, Conservation Equivalency: Policy and Technical Guidance Document, Technical Support Group Guidance and Benchmark Stock Assessment Process, and the Advisory Committee Charter. Over time the way the Commission conducts its business has evolved and, in some cases, is not consistent with its guiding documents. Also, there are examples where the documents do not provide clear guidance.

Issue 1: Appealing Non-Compliance Findings **Guiding Documents: ISFMP Charter and Appeals Process**

The Appeals Process provides a mechanism for a state/jurisdiction to petition for a management decision to be reconsidered, repealed, or altered. The process is intended to only be used in extraordinary circumstances where all other options have been exhausted. While the Appeals Process states out-of-compliance findings can be appealed, it fails to outline the specifics of how such an appeal should be addressed.

Policy Questions: Should the process for appealing a non-compliance finding be the same as appealing other Commission decisions? If the Commission allows non-compliance findings to be appealed under the existing appeals process, the timing requirements of a non-compliance decision and an appeal would be problematic. When a non-compliance finding has been made the Commission is required to notify the state and the Secretaries of Commerce and the Interior of the Commission's determination within ten business days. However, the Appeal Process provides that an appeal will be addressed at the next scheduled Commission Meeting. Given the timing of our meetings this could be well after the non-compliance finding has been sent to the Secretaries of Commerce and the Interior.

Because a non-compliance finding goes through several bodies of review, it may already have an appeal process “built-in.” Non-compliance recommendations start with the species management board, are reviewed by the Policy Board, and then forwarded to the full Commission. A further review is completed by the Secretaries of Commerce and the Interior, where states have the opportunity to justify their actions prior to a final compliance determination by the Secretaries. Does the Non-Compliance Process need to be amended to include an appeal process?

AOC Recommendation: The AOC recommends removing a state’s ability to appeal a non-compliance finding from the Commission guidance documents. Since a non-compliance finding must be made at multiple levels within the Commission, the AOC felt the states had adequate opportunity to receive all of the relevant information and debate the issue prior to making a decision. Also, a state found out of Compliance by the Commission has the opportunity to present their case to the Secretaries of Commerce and the Interior prior to a final compliance decision.

Executive Committee Action: The EC recommends to the Policy Board to remove a state’s ability to appeal a non-compliance finding from the Commission guidance documents.

Issue 2: Definition of a Final Action

Guiding Document: ISFMP Charter and Rules and Regulations

Both the ISFMP Charter and the Rules and Regulations define what constitutes a final action. The Charter definition includes the establishment of quotas, allocations, approval of FMPs/amendments/addenda, emergency actions, and non-compliance recommendations. The Rules and Regulations include all of these except for emergency actions; therefore, there is an inconsistency between the two documents. Since the last modification of the Charter, the Commission has begun to conduct roll call votes for all final actions to increase transparency. The Rules and Regulations also reference the definition when describing the 2/3 majority requirement to amend or rescind a final action.

Policy Question: Should the definition of final action be expanded to be consistent with Commission goals to be transparent in its actions?

Possible language changes to the Charter and Rules and Regulations:

1. Final actions would be defined as: setting fishery specifications (including but not limited to, quotas, trip limits, possession limits, size limits, seasons, area closures, gear requirements), allocation, final approval of FMPs/amendments/addenda, emergency actions, conservation equivalency plans, and non-compliance recommendations.

AOC Recommendation: The AOC recommends modifying the definition of a final action consistent with the proposed definition above.

Executive Committee Action: The EC recommends to the Policy Board the definition of final action is: setting fishery specifications (including but not limited to, quotas, trip limits, possession limits, size limits, seasons, area closures, gear requirements), allocation, final approval of FMPs/amendments/addenda, emergency actions, conservation equivalency plans, and non-compliance recommendations.

Issue 3: Amendment and Addendum Process, including timing of Advisory Input
Guiding Document: ISFMP Charter

Public Comment on Public Information Documents

The Commission’s Charter outlines the process to draft and approve amendments and addenda. While most of the guidance is clear there are a few areas where additional specificity would improve the process.

The Charter outlines the timing for which the draft FMP or amendment is available for public comment but is silent on the public comment timing for public information documents (PID). Draft amendments must have four public hearings, the hearing schedule must be published within 60 days following approval of the draft amendment/FMP, the hearing document must be published for 30 days before the first hearing, and public comment will be accepted for 14 days following the date of the last hearing.

Policy Question: Does the Commission want to require the same timing provisions for PIDs? The Commission currently tries to follow this process for PIDs.

AOC Recommendation: The AOC recommends applying the same timeline to public information documents and draft FMPs/amendments as described above with the modification of only requiring three public hearings for both PIDs and draft FMPs/amendments.

Executive Committee Action: The EC recommends to the Policy Board the same timeline outline for draft FMPS/amendments apply to PIDs and modifying the number of required public hearings to three for both PIDs and draft FMPs/amendments.

Public Comment on Draft Addenda

The Charter is also silent on how long draft addenda are out for public comment. Currently, many of the FMPs require a minimum of 30 days public comment for draft addenda. This language is included in the adaptive management section.

Policy Question: Does the Commission want to require draft addenda to be available for public comment for a minimum of 30 days across all FMPs?

AOC Recommendation: The AOC recommends requiring a minimum of 30 days public comment on all draft addenda.

Executive Committee Action: The EC recommends to the Policy Board a minimum of 30 days public comment on all draft addenda.

Advisory Panel Involvement in FMP/Amendment Development

The Charter and Advisory Committee Charter provide mixed guidance on when advisory panels (AP) should provide input to the FMP process. In order to have clear guidance, staff suggests AP input should be provided at the following stages of the FMP/amendment development.

1. **During the development of the PID.** APs provide guidance to the PDT before the Board reviews the document for public comment.
2. **During the development of the Draft FMP.** After the Board gives the PDT guidance on issues to include in the draft, APs provide feedback to the PDT on those issues.
3. **During the public comment of the Draft FMP.** APs meet to give recommendations on the public comment draft of the FMP. This meeting should try to be scheduled after the public hearings so the AP can be presented with an overview of the comments received at the hearings.

Policy Question: Is this the correct timing for AP input into the FMP/amendment process?

AOC Recommendation: The AOC recommends using the three opportunities listed above to solicit Advisory Panel input during FMP/amendment development.

Executive Committee Action: The EC recommends to the Policy Board using the three opportunities described above to solicit Advisory Panel input during FMP/amendment development.

Issue 4: Technical Committee Decision Making and Staff Participation on Committees’ Guiding Documents: ISFMP Charter and ASMFC Technical Support Group Guidance and Benchmark Stock Assessment Process

Voting and Decision-making

Previously, the Policy Board had discussed how technical committees (TC) make decisions when the committee cannot come to consensus. The Board stated the overall goal is for committees to develop recommendations through consensus. The problem arises when a group cannot come to consensus. Some Board members are concerned the committee guidance is not as constructive when consensus is not reached since the Board is provided with differing scientific recommendations and is left with making a policy decision on technical input. There is also concern when majority and minority options are presented, it is not clear how strongly the committee supports or does not support each of the options. To address this problem, the Policy Board decided the TCs would vote on issues when consensus could not be reached. The number of votes in favor and against each recommendation would be presented to the Board. Members of the Board expressed concerns voting may make some TC members uncomfortable and take away from science and add politics to the discussion.

AOC Recommendation: The AOC recommends that TCs continue to strive to find consensus whenever possible, however a vote should be taken if a consensus can’t be reached. The same standard for voting would apply to stock assessment subcommittees (SASC).

Executive Committee Action: The EC recommends to the Policy Board that TCs continue to strive to find consensus whenever possible, however a vote should be taken if a consensus can’t be reached. The same standard for voting would apply to stock assessment subcommittees (SASC).

Staff Involvement

The guidance document states Commission staff members are not members of TCs but they are members of stock assessment committees. Commission science staff often take part in TC deliberations and do work to support those discussions. Questions were raised if staff should be members of TCs if they are doing the work to support Committee work. If TCs were required to vote when consensus could not be reached then staff members would also vote on issues. The downside of allowing staff to vote is it may compromise the ability of staff to remain neutral on issues being presented to the Board if that is a Board priority.

Policy Questions: Should the TCs vote when they are not able to achieve consensus?
Should the Commission staff be designated as members of TCs?

Possible options for Commission staff participation on TCs:

1. Commission science staff are not TC members and could not participate in or run analyses for TC discussion. State staff would support all TC work.
2. Commission science staff are not TCs members but perform analyses to support TC discussions and recommendations. They can take part in the deliberations of the TC for recommendations to the Board.
3. Commission science staff are members of TCs and perform analyses to support TC discussions and recommendations. They do not take part in the deliberations of the TC for recommendations to the Board.
4. Commission science staff are TC members and perform analyses to support TC discussions and recommendations, as well as take part in the deliberations of the TC for recommendations to the Board. Staff would also vote if the TC could not come to consensus.

AOC Recommendation: The AOC recommends staff is fully involved with conduct of analyses and deliberations of TCs and SASCs. If consensus can't be reached within a TC, then staff will not participate in a vote, however staff will participate in SASC votes when necessary.

Executive Committee Action: The EC recommends to the Policy Board science staff is fully involved with conduct of analyses and deliberations of TCs and SASCs. If consensus can't be reached within a TC, then science staff will not participate in a vote, however science staff will participate in SASC votes when necessary.

Issue 5: Commissioner Attendance

Guiding Documents: The Compact and the Rules and Regulations

The Commission's Compact states the continued absence of representation or any representative on the Commission from any state should be brought to the attention of the state's governor. This directive from the Compact led to language in the Rules and Regulations stating a state official will be notified of unexplained absence of any Commissioner from two consecutive meetings.

Policy Questions: Should a state official be notified if a commissioner is absent for more than two meetings but has given an explanation for why he/she could not attend? Are two consecutive absences considered a continued absence? What state official should be notified?

Possible language changes to the Rules and Regulations:

1. The state official will be notified of the absence of any Commissioner or their proxy from two consecutive meetings.
2. The state official will be notified of the absence of any Commissioner or their proxy from three consecutive meetings.
3. After two consecutive absences of a Commissioner or their proxy, the Commissioner will be contacted in writing by the Executive Director to request a reason for the absences. The Executive Director will work with the Chair to determine if a state official should be notified of the absences.

AOC Recommendation: The AOC agreed Commissioner attendance is important for the Commission's success. The AOC felt that multiple letters going to Governors or other state officials may not be appropriate or constructive. The AOC recommends that a state's Executive Committee member be notified in the event there are repeated absences of a Commissioner. The Executive Committee member could then work with their state officials to determine what action, if any, should be taken.

Executive Committee Action: The EC recommends to the Policy Board that a state's Executive Committee member be notified in the event there are repeated absences of a Commissioner. The Executive Committee member could then work with their state officials to determine what action, if any, should be taken.

Issue 6: Appeal Criteria

Guiding Documents: ISFMP Charter and Appeals Process

The Appeals Process provides a mechanism for a state to petition for a management decision to be reconsidered, repealed or altered. The appeals process is intended to only be used in extraordinary circumstances where all other options have been exhausted. Management measures established through the FMP/amendment/addendum process can be appealed. However, the appellant must use one of the following criteria to justify an appeal: decision not consistent with FMP goals and objectives, failure to follow process, insufficient/inaccurate/incorrect application of technical information, historical landings period not adequately addressed, or management actions resulting in unforeseen circumstances/impacts. The following issues currently cannot be appealed: management measures established via emergency action, out-of-compliance findings (this can be appealed but, through a separate, established process, see Issue 1 above), and changes to the ISFMP Charter.

Policy Questions: Should the following appeal criteria be modified or clarified?

1. Decision not consistent with the FMP
2. Failure to follow process
3. Insufficient/inaccurate/incorrect application of technical information

4. Historical landings period not adequately addressed
5. Management actions resulting in unforeseen circumstances/impacts

AOC Recommendation: The AOC recommends the current appeal criteria be retained. The wording of the criteria is somewhat vague, but this is intentional to allow for states to bring forward their concerns. The AOC felt it would be difficult to provide a highly detailed list of actions that can and can't be appealed. The discretion of the Chair, Vice-Chair, and immediate past Chair is a key component in interpreting the current appeal criteria. The AOC has confidence the elected leaders will provide a fair review of any appeals brought forward by the states.

Executive Committee Action: The EC recommends the Policy Board take no action to change the current appeal criteria.



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MEMORANDUM

TO: Executive Committee
FROM: Robert Beal, Executive Director
DATE: October 27, 2015

SUBJECT: Review of Commission Guidance Documents

The Executive Committee (EC) met on August 5, 2015 to review potential changes to the Commission guidance documents. The Executive Committee took action on nine issues, however due to time constraints were unable to come to a final decision on two issues. The following memorandum summarizes the two remaining issues from the August meeting and introduces two new issues for consideration by the Executive Committee.

The Commission's guidance documents detail the operating policies, procedures, roles, and responsibilities of the Commission and its committees. These documents include the ISFMP Charter, Compact and the Rules and Regulations, the Appeal Process, Conservation Equivalency: Policy and Technical Guidance Document, Technical Support Group Guidance and Benchmark Stock Assessment Process, and the Advisory Committee Charter. Over time the way the Commission conducts its business has evolved and, in some cases, is not consistent with its guiding documents. Also, there are examples where the documents do not provide clear guidance.

Issue 1: Definition of a 2/3 Majority
Guiding Documents: ISFMP Charter and Rules and Regulations

Commission guidance documents state a 2/3 majority is required to establish and terminate an emergency action, as well as amend or rescind a previous final action. Currently, 2/3 majority is defined as the entire voting membership of a Board regardless of whether voting members are present. For the vote to carry, 2/3's of the entire voting membership of the Board must vote in the affirmative. This can be problematic when voting entities are not present or abstain from a vote. An absence, abstention, or a null vote is the equivalent of a negative vote. The current definition intentionally set a high standard (overwhelming support) for a Board take emergency action or to overturn previous actions to protect the integrity of our decision-making process.

Policy Question: Should the definition of a 2/3 majority be altered?

Possible options for the 2/3 majority definition:

1. Status quo
2. A 2/3 majority will be defined by the members present at the meeting (a quorum is necessary) rather than the entire voting membership.

3. A 2/3 majority will be defined by the entire voting membership, however any abstentions will not be considered when determining the total number of votes.

Note: When determining the number of votes necessary to achieve a 2/3 vote, there will often not be a whole number of votes needed. For example: If a management board has 11 voting members, it will require 7 1/3 votes for a 2/3 majority. In the event there is not a whole number of votes, the votes required will be rounded up to the next whole number.

AOC Recommendation: The AOC did not develop a final recommendation on this issue, but agreed the Executive Committee should continue the discussion. Members of the AOC noted the outcome of votes had been impacted by abstentions and absences and the process should be modified. Other members commented that they support status quo and feel there should be overwhelming support to change previous actions or declare an emergency.

August 2015 Executive Committee Action:

The EC made the following motion regarding the 2/3 majority voting. *Move to approve option 3 from the staff document with the modification that only abstentions from the federal services would not count. Motion made by Mr. Daniel; seconded by Mr. Abbott.*

After a lengthy discussion a motion was made by Mr. Abbott to table. Mr. Clark seconded and the motion to table passed unanimously.

Issue 2: Advisory Panel, Law Enforcement Committee and Technical Committee Participation at Board Meetings

Guiding Documents: ISFMP Charter and ASMFC Technical Support Group Guidance and Benchmark Stock Assessment Process

Advisory bodies such as advisory panels, the Law Enforcement Committee and TCs provide advice to the species management boards. It is the responsibility of the Chair of each group to represent the viewpoints of all committee members, including opposing opinions when presenting to the management boards. There have been instances where chairs, in particular advisory panel Chairs, have expressed their own opinions and not those of the panel or have spoken on subjects the panel has not discussed as a group. This has raised concerns with both Board members and the advisory panel members.

Policy question: How does the Board ensure advisory body chairs follow the guidance outlined in the Charter and the Technical Support Group Guidance document?

Possible language changes for participation of advisory body chairs at board meetings:

1. Board Chairs should enforce the guidelines specified in the committee guidance documents where advisory bodies only represent the viewpoints of the committee in their presentation to the Board. Failure of chairs to follow the Board Chair's guidance may result in his/her replacement as advisory body chair.

2. Chairs should present their report and answer any specific questions relevant to their report. Chairs may not ask the Board questions or present their own viewpoints during Board deliberations.
3. Chairs should present their report and answer any specific questions relevant to their report. Once the report and Board questions are done, the Chair would move to the public seating.

AOC Recommendation: The AOC did not develop a final recommendation on this issue, however there were a number of consensus ideas. The AOC agreed the TC Chair (or other representative) should be at the table for the entire meeting. This person is often asked questions by Board members. The AOC also agreed there is a perception the Chair of the Advisory Panel has unfair access to the Board if they are allowed to fully interact with the Board during their deliberations. While the AOC did not reach a consensus, many of the members felt that option 3 above is most appropriate, but should only be applied to the Advisory Panel Chair.

August 2015 Executive Committee Action:

The EC did not have adequate time to fully address this issue.

Issue 3: Council Participation on Management Boards

Guiding Documents: ISFMP Charter

The charter states the Executive Directors/Chairs of the Regional Fishery Management Councils may be invited to be a voting member of an ISFMP species management board when the board determines that such membership would advance the inter-jurisdictional management of the specific species. When the management area includes more than one Council, the applicable Councils will need to identify one Executive Director/Chair to receive the invitation to participate on that board as a voting member.

The Charter does not specify how the Council should participate on boards that manage more than one species (e.g. The Lobster Board takes action on both lobster and Jonah crab issues)

Policy question: Should the Council representative on a multi-species management board be able to participate on all actions being considered by the management Board or just species specific actions for which the Council was invited to participate on the management board?

Possible language changes for Council participation at board meetings:

1. If a Council(s) has been invited as voting member of a board that manages multiple species, the board will designate which species can be discussed and voted on by the Council representative.

2. If a Council(s) has been invited as voting member of a board that manages multiple species, the Council representative is being invited to participate on all actions of the board, regardless of species interest.

Issue 4: Web Based Public Hearings and On-line Public Comment Surveys

Guiding Documents: ISFMP Charter

The ISFMP Charter requires the Commission to conduct a minimum number of public hearing for public information documents (PIDs), new FMPs, and draft amendments. Those public hearings are held in the states requesting hearings. Public hearings can also be held at the request of a state for draft addenda. With new technology and changing social behaviors, how the Commission conducts public hearings and collects public comments is evolving.

Some Councils have begun to hold webinar based public hearings. The structure is similar to an in-person public hearing where staff presents the document to the public and then the public is allowed to ask questions. Once questions are completed, the public has the opportunity to comment on the draft document. For larger states where it could take several hours for a member of the public to travel to the hearing location a webinar based hearing provides an opportunity to be involved in the Commission process.

In addition, the Commission tested an on-line survey as an additional tool to collect public comments. New York decided to not hold an in-person public hearing on the Jonah crab FMP due to the low number of permit holders and landings. But staff developed an on-line survey in which New York sent out to their limited number of permit holders to fill out. These surveys would not be used in lieu of public hearings, but will be another tool to help solicit public comment and increase public participation.

Policy question: Should the Commission hold webinar based public hearings?

Possible language changes for webinar based public hearings:

1. PIDs and draft amendments must have three public hearings, one of which could be a webinar based public hearing.

Policy question: Should the Commission develop on-line surveys to collect public comments for public hearing documents?

No language change would be necessary to conduct on line public comment surveys.