

OP. NO. 06-002

FISHERIES AND HABITAT OF THE TIDAL WATERS: COMPACTS AND JOINT LAWS WITH OTHER STATES – ATLANTIC STATES MARINE FISHERIES COMPACT.

Atlantic States Marine Fisheries Commission's Menhaden Management Board exceeded adaptive management authority when adopting menhaden cap in Addendum II because (1) cap is wholly new management measure, which cannot be implemented by addendum; (2) when Atlantic menhaden stocks have been declared "healthy," cap or quota cannot be imposed unless menhaden are found to be overfished; and (3) Atlantic Menhaden Fishery Management Plan does not include prerequisite management measure that can be varied by imposition of cap through addendum. Should General Assembly decline to adopt menhaden cap, Commonwealth would not be out of compliance with Plan because Commission failed to follow required procedures.

The Honorable John H. Chichester
Member, Senate of Virginia
January 31, 2006

Issues Presented

You ask several questions relating to Addendum II¹ ("Addendum II") to Amendment 1 of the Atlantic Menhaden Fishery Management Plan² ("Plan") adopted by the Atlantic States Marine Fisheries Commission ("Commission"). First, you ask whether, based on a review of the adaptive management provisions of the Plan and the measures Addendum II seeks to implement, the menhaden landings cap instituted by the Commission exceeded its regulatory authority. You next ask whether the Commonwealth of Virginia would not be out of compliance with the Plan should the General Assembly decline to adopt the management provisions contained in Addendum II. Finally, you ask whether the Commission has adopted the cap without following the required procedures.

Response

It is my opinion that the Commission's Menhaden Management Board ("Board") exceeded its adaptive management authority when it adopted the menhaden cap in Addendum II. Addendum II uses abbreviated rulemaking processes to initiate a new quota on the harvest of menhaden in the Chesapeake Bay. In my opinion, such an exercise of regulatory authority by the Board exceeds the lawful reach of its authority for three reasons: (a) the cap is a wholly new management measure, which cannot be implemented by an addendum; (b) when Atlantic menhaden stocks have been declared "healthy," a cap or quota cannot be imposed unless menhaden are found to be overfished; and (c) the Plan does not include a prerequisite management measure that can be varied by imposition of a cap through an addendum. It is further my opinion that because adoption of the cap exceeded the Board's authority, the Commonwealth would not be out of compliance with the Plan should the General Assembly decline to adopt the Plan. Finally, it is my opinion that the Commission failed to follow required procedures in adopting the cap as an addendum.

Background

In October 2005, the Commission, through the Board, issued a final version of a rulemaking titled Addendum II, which imposes the following regulatory requirement:

The annual total allowable landings by the reduction fishery in Chesapeake Bay shall be no more than the average landings from 1999-2004. Harvest for reduction purposes shall be prohibited when 100% of the cap is landed. This cap will be in place for the fishing seasons starting in 2006 and going through 2010 [hereinafter "menhaden cap"].^[3]

Addendum II provides that states with reduction processing capabilities must submit implementing programs for approval by the Board by January 11, 2006, and implement the cap by July 1, 2006.⁴ The primary impact of Addendum II is on the menhaden reduction fishery conducted in Virginia waters in the Chesapeake Bay.

In Virginia, the taking of menhaden by the use of purse nets or seine is regulated, as a matter of state law, primarily by statute.⁵

Applicable Law

The Commission, an interstate compact organization comprised of fifteen Atlantic Coast States formed to recommend joint management measures for shared marine fish stocks, was formed as a voluntary consortium via the Atlantic States Marine Fisheries Compact ("Compact").⁶ In 1942, Congress approved the Compact for a fifteen-year period.⁷ In 1950, Congress approved Amendment Number 1 to the Compact repealing the fifteen-year limitation.⁸ Amendment Number 1 authorized two or more signatory states to designate the Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the respective designating states. The Commonwealth has never designated the Commission as a regulatory agency.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act⁹ ("Act"). The stated purpose of the Act "is to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources."¹⁰ The Act provides for state implementation of coastal fishery management plans ("FMP") of the Commission.¹¹ Noncompliance with an FMP may result in the imposition of a federal sanction, a complete moratorium on the fishery in question within the waters of the noncomplying state, imposed by the United States Secretary of Commerce ("Secretary").¹²

In accordance with Article V of the Compact,¹³ the Commission has adopted Rules and Regulations for the conduct of its business.¹⁴ Article VI of the Rules and Regulations pertains to the Interstate Fishery Management Program and provides for a written Interstate Fishery Management Program ("ISFMP") Charter ("Charter").¹⁵ The Compact and the Rules and Regulations provide the Commission only the authority to make recommendations to member states.¹⁶ The Act provides the mandatory element to require compliance with FMPs.

The Charter addresses the Interstate Fishery Management roles and responsibilities of the Commission, the ISFMP Policy Board, fishery management boards, staff officials, and committees and subcommittees for management, technical, and advisory support.¹⁷ The Charter provides standards for interstate fishery management plans and compliance¹⁸ as well as specific requirements applicable to the adaptive management process.¹⁹

The current Plan was adopted by the full Commission in July 2001 and is referred to as "Amendment 1 to the Interstate Fishery Management Plan for Atlantic Menhaden."²⁰ Addendum II, the subject of your inquiry, was adopted in October 2005,²¹ by the Board pursuant to the "adaptive management"²² process, as opposed to being approved by the full Commission pursuant to the more comprehensive process applicable to adoption of FMPs and their Amendments.²³

Discussion

1. Board's Adoption of Menhaden Cap Through Adaptive Management

Process Exceeds Board's Authority.

There are two interrelated sources of authority governing the adoption of management requirements by an addendum through what is referred to as "adaptive management" processes.²⁴ The first is the Commission's general authority to adopt a plan-specific adaptive management process, described within the Charter. The second is the Plan itself, which details how and when the adaptive management process can be used to manage the menhaden fishery.

When the conditions for use of this adaptive management authority are met, a management board, such as the Board, may alter an existing management measure in a fishery management plan without a vote or action by the full Commission. Also, formal rulemaking processes that would otherwise be required for FMPs and amendments to FMPs are avoided. For these reasons, this regulatory tool is one of limited application.

The Charter states: "FMPs which provide for adaptive management *shall identify specifically the circumstances under which adaptive management changes may be made*, the types of measures that may *be changed*, the schedule for state implementation of *changes*, and the procedural steps necessary to effect a *change*."²⁵ The FMP must thus specify the "types of measures" that can be adopted or changed and the "circumstances" triggering use of the adaptive management process.²⁶ The Plan contains the specific circumstances, management measures, steps, and conditions required to be met or taken to use this abbreviated process.²⁷

I do not interpret the Charter to provide for use of the adaptive management process to implement *new* management measures. The repeated use of the word "change" in the Charter to describe management measures that may be adopted by the adaptive management process argues against authorization to implement *new* measures. This conclusion is supported by the fact that this abbreviated rulemaking power is exercised without full adherence to procedures applicable to FMPs or amendments to FMPs and without adoption by the full Commission. It is my opinion that adaptive management is restricted to policies which vary *existing* management measures.²⁸ The Menhaden FMP, however, contains no such management measures subject to variation by addendum,

other than a general requirement that states institute a system for reporting landings of menhaden that are not the subject of Addendum II.

The Plan contains specific language detailing when adaptive management can be employed to institute "catch controls" such as proposed by Addendum II. Although the Plan identifies "catch controls" as potentially subject to adaptive management,²⁹ it also requires a finding that menhaden are subject to "overfishing or an overfished/depleted condition" before a catch quota can be implemented under adaptive management.³⁰ Addendum II does not state that this finding has been made. Rather, Addendum II describes the "problem" as a "relative increase (11%) in the proportion of menhaden reduction removals from Chesapeake Bay over ... two time periods"³¹ and a "potential for localized depletion ... in Chesapeake Bay."³² With respect to the "potential" for localized depletion, Addendum II specifically acknowledges that "[s]ufficient scientific data are not available to satisfactorily address the potential for localized depletion in the Bay."³³

The Plan defines "overfishing" in § 2.5 as relating to fishing mortality rate and stock biomass.³⁴ Addendum II does not find that the menhaden stock in the Chesapeake Bay is "overfished" consistent with the Plan requirement. To the contrary, Addendum II specifically states that "the Atlantic menhaden stock is considered to be healthy coastwide, based on the recommended benchmarks developed during the latest peer-reviewed assessment."³⁵ Additionally, the Commission's agent charged with recommending initiation of adaptive management, the Plan Review Team³⁶ ("PRT"), has not recommended that adaptive management be initiated. In its latest report, the PRT made no recommendations for new or changed management measures for adoption, and confirmed the health of the resource.³⁷

The Act requires that FMPs must be "based on the best scientific information available."³⁸ This requirement is also contained in the Commission's Charter³⁹ and in its Rules and Regulations.⁴⁰ Although it is a matter ultimately for factual determination,⁴¹ it is not apparent that the menhaden cap is based on "the best scientific information available" when Addendum II does not address whether the fishery is "overfished." The phrase "best scientific information" presupposes the accumulation of "scientific" information.

The Board must follow the requirements of the Act, the Compact, the Charter, and the Plan. Failure to comply with its own rules, regulations, standards, and procedures renders its action invalid.⁴²

Ordinarily, courts afford considerable deference to decisions of agencies in administrative decisions.⁴³ In this case, however, it is reasonable to expect that the Board's compliance with its own rules would be subject to heightened scrutiny due to the existence of unsettled Constitutional questions underlying the coercive aspects of the Act. Questions under the Constitution of the United States to challenge Addendum II may include federalism issues, the Tenth Amendment; the Joinder Clause, Article IV, § 3, cl. 1; the Compact Clause, Article I, § 10, cl. 3; the Appointments Clause, Article II, § 2, cl. 2; and the doctrine limiting Congressional delegation of authority to nonfederal entities. When a case may be decided on other grounds, a court will avoid inquiring into the constitutionality of an action.⁴⁴ Accordingly, there may be less deference to the Board's action with respect to Addendum II.

2. Commonwealth Will Not Be Out of Compliance with Plan

if General Assembly Does Not Act.

It is my opinion that the Board exceeded its adaptive management authority by adopting the menhaden cap in Addendum II. Therefore, if the General Assembly declines to enact legislation ratifying the menhaden cap, the Commonwealth would not be out of compliance with the Plan.

The Plan provides that "[a] state will ... be out of compliance" when "it fails to meet ... any addendum prepared under adaptive management."⁴⁵ An addendum adopted beyond existing authority and without complying with required procedures, however, should be deemed void as a regulatory requirement.⁴⁶ Because it is my opinion that the Board exceeded its rulemaking authority and failed to follow required procedures in adopting Addendum II, it would more properly be viewed as a recommendation, as provided by the Compact and the Commission's Rules and Regulations,⁴⁷ rather than a regulatory requirement.⁴⁸

3. Menhaden Cap Adopted Without Following Required Procedures.

The discussion in response to your first question is equally applicable to this one. The menhaden cap that Addendum II seeks to implement is flawed because it was not adopted in accordance with the procedure required of an amendment to an interstate FMP, and it was not adopted by the full Commission. The touchstone of legally enforceable management measures under the Commission's governing authorities, including the Act, is that conservation recommendations to states must meet certain standards, must be subject to levels of analysis and public comment, and must be adopted and approved by the full Commission.⁴⁹ These processes were short-circuited by employment of the adaptive management process used to implement Addendum II.

Conclusion

Accordingly, it is my opinion that the Commission's Menhaden Management Board ("Board") exceeded its adaptive management authority when it adopted the menhaden cap in Addendum II. Addendum II uses abbreviated rulemaking processes to initiate a new quota on the harvest of menhaden in the Chesapeake Bay. In my opinion, such an exercise of regulatory authority by the Board exceeds the lawful reach of its authority for three reasons: (a) the cap is a wholly new management measure, which cannot be implemented by an addendum; (b) when Atlantic menhaden stocks have been declared "healthy," a cap or quota cannot be imposed unless menhaden are found to be overfished; and (c) the Plan does not include a prerequisite management measure that can be varied by imposition of a cap through an addendum. It is further my opinion that because adoption of the cap exceeded the Board's authority, the Commonwealth would not be out of compliance with the Plan should the General Assembly decline to adopt the Plan. Finally, it is my opinion that the Commission failed to follow required procedures in adopting the cap as an addendum.

¹See Atlantic States Marine Fisheries Commission, "Addendum II to Amendment 1 to the Interstate Fishery Management Plan for Atlantic Menhaden," *available at* <http://www.asmfmc.org/> [follow "Managed Species" hyperlink; then follow "Atlantic Menhaden" hyperlink; then follow "Addendum II (October 2005)" hyperlink] [hereinafter Addendum II].

²See Atlantic States Marine Fisheries Commission, "Amendment 1 to the Interstate Fishery Management Plan for Atlantic Menhaden," [follow "Managed Species" hyperlink; then follow "Atlantic Menhaden" hyperlink; then follow "Amendment 1 to the Interstate Fishery Management Plan for Atlantic Menhaden" hyperlink] [hereinafter Plan].

³Addendum II, *supra* note 1, § 5.1.1.1, at *12.

⁴*Id.* § 5.1.2 at *12-13.

⁵See Va. Code Ann. §§ 28.2-400 to 28.2-411 (2004).

⁶The Compact is codified at § 28.2-1000.

⁷See Pub. L. No. 77-539, 56 Stat. 267 (1942).

⁸See Pub. L. No. 81-721 (1950).

⁹See Pub. L. No. 103-206, 107 Stat. 2447 (1993) (codified at 16 U.S.C.S. §§ 5101 to 5108).

¹⁰16 U.S.C.S. § 5101(b) (LexisNexis 1999).

¹¹16 U.S.C.S. § 5104(b) (LexisNexis 1999).

¹²16 U.S.C.S. § 5106(a), (c)(1) (LexisNexis 1999).

¹³See § 28.2-1000 (art. V) (2004).

¹⁴See Atlantic States Marine Fisheries Commission, "Compact & Rules and Regulations," *available at* <http://www.asmfc.org/> [follow "About Us" hyperlink; then follow "ASMFC Compact: Rules & Regulations" hyperlink] [hereinafter Rules & Regulations]

¹⁵See *id.*, art VI, §§ 1-2, at *11.

¹⁶See § 28.2-1000 (arts. IV, VI); Rules & Regulations, *supra* note 14, art. 1, § 2, at *7.

¹⁷See Atlantic States Marine Fisheries Commission, "Interstate Fisheries Management Program Charter," *available at* <http://www.asmfc.org/> [follow "About Us" hyperlink; then follow "ISFMP Charter" hyperlink] [hereinafter Charter].

¹⁸See *id.*, § 6, at 14-21.

¹⁹See *id.*, § 6(b)(3) at *17.

²⁰See *supra* note 2.

²¹See *supra* note 1.

²²See *infra* note 28.

²³ See Atlantic States Marine Fisheries Commission, "Proceedings of the Atlantic States Marine Fisheries Commission, Atlantic Menhaden Management Board," *available at* <http://www.asmf.org/> [follow "Managed Species" hyperlink; then follow "Atlantic Menhaden" hyperlink; then follow "Meeting & Minutes Summaries" hyperlink; then follow "2005 Feb" hyperlink].

²⁴ See *infra* note 28.

²⁵ Charter, *supra* note 17, § 6(b)(3), at *17 (emphasis added).

²⁶ *Id.*

²⁷ See Plan, *supra* note 2, § 4.6, at *77-79.

²⁸ The Commission's charter defines adaptive management as "[a]n iterative process which includes evaluation of the response of the managed fishery and stock to *specific management measures* and adjusting *such measures* based on that evaluation." Charter, *supra* note 17, § 8(c), at *23 (emphasis added).

²⁹ Plan, *supra* note 2, § 4.6.2(6), at *78.

³⁰ *Id.*, § 4.2.7, at *74.

³¹ Addendum II, *supra* note 1, § 2.1, at *6.

³² *Id.*, § 2.2, at *6.

³³ Addendum II, *supra* note 1, § 2.2, at *7.

³⁴ Plan, *supra* note 2, at *60.

³⁵ Addendum II, *supra* note 1, § 1.2, at *5.

³⁶ See Plan, *supra* note 2, § 4.6.1, § 4.8.3, at *78, *79-80, respectively.

³⁷ See Atlantic States Marine Fisheries Commission, "2005 Review of the Fishery Management Plan for Atlantic Menhaden," *available at* <http://www.asmf.org/> [follow "Managed Species" hyperlink; then follow "Atlantic Menhaden" hyperlink; then follow "FMP Reviews 2005" hyperlink], at *3, *9 (Aug. 17, 2005).

³⁸ 16 U.S.C.S. § 5104(a)(2)(A) (LexisNexis 1999).

³⁹ Charter, *supra* note 17, § 6(a)(2), at *14.

⁴⁰ Rules & Regulations, *supra* note 14, art. VI, § 3, at *11.

⁴¹ The Office of the Attorney General historically has declined to render official opinions when the request involves a question of fact rather than one of law. See, e.g., Op. Va. Att'y Gen.: 2002 at 64, 66; 1997 at 1, 3; and opinions cited therein.

⁴²"[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated ... is required of those to whom Congress has entrusted the regulatory missions of modern life." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citation omitted).

⁴³Great deference should be given to the administrative interpretation of statutes by the agency charged with the responsibility for carrying out legislation. See, e.g., *County of Henrico v. Mgt. Rec., Inc.*, 221 Va. 1004, 1010, 227 S.E.2d 163, 166-67 (1981); 2002 Op. Va. Att'y Gen. 186, 187.

⁴⁴See, e.g., *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997).

⁴⁵Plan, *supra* note 1, § 5.1, at *81-82.

⁴⁶See *supra* note 42 and accompanying text.

⁴⁷See *supra* note 16 and accompanying text.

⁴⁸The only other compliance measure in the Plan requires a menhaden catch reporting system. I am unaware that there is any question concerning the Commonwealth's compliance with the menhaden catch reporting system.

⁴⁹See generally, Charter, *supra* note 17, § 6, at *14-21; see also 16 U.S.C.S. § 5102(1) (LexisNexis 1999); *id.* § 5104 (LexisNexis 1999).

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