



## 2018 Planned Council Meeting Topics

*as of 3/30/2018*

### **April 10-12, 2018 – Montauk, NY**

- Golden Tilefish 2019 Specifications – *Review*
- Golden Tilefish Permit Issue
- Blueline Tilefish Specifications (2019-2021) - *Develop and approve*
- Atlantic Mackerel Rebuilding Framework With 2019-2021 Specifications and RH/S Cap – *Framework meeting 1*
- Mid-Atlantic State of the Ecosystem report

### **April 30, 2018 – Atlantic States Marine Fisheries Commission Spring Meeting, Arlington, VA**

*Joint meeting of the Council and the Commission's Bluefish Management Board*

- Bluefish Allocation Amendment – *Review scoping plan and approve document*

*Joint meeting of the Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board*

- Summer Flounder Amendment: Commercial Issues/Goals and Objectives – *Approve public hearing document ~~and Draft Environmental Impact Statement~~*
- Summer Flounder, Scup, and Black Sea Bass Recreational Management Framework – *Review and approve draft alternatives*
- Approve Black Sea Bass LOA Draft Addendum for Public Comment (ASMFC action)

### **June 5-7, 2018 – Philadelphia, PA**

- Atlantic Surfclam and Ocean Quahog 2019 Specifications – *Review*
- Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment – *Review and approve refined range of alternatives*
- Recommend regulatory streamlining options
- ~~Risk Policy Framework – Final action (moved to October)~~
- Strategic Planning – *Update and discussion*
- Collaborative research program review
- **NMFS Climate Science Strategy – Update and overview of recent research**

### **August 14-16, 2018 – Virginia Beach, VA**

- Swearing-in of new and reappointed Council members
- Election of officers
- Bluefish 2019 Specifications – *Develop and approve*
- Bluefish Allocation Amendment – *Review scoping comments and present potential range of alternatives*
- Atlantic Mackerel Rebuilding Framework With 2019-2021 Specifications and RH/S Cap and Progress Update – *Framework meeting 2 (final action)*

- Summer Flounder 2019 Specifications – *Develop and approve*
- Scup 2019 Specifications – *Review*
- Black Sea Bass 2019 Specifications – *Develop and approve*
- Summer Flounder, Scup, and Black Sea Bass Recreational Management Framework – *Review alternatives and impact analysis; approve ASMFC public hearing document*
- Black Sea Bass 2019 Wave 1 fishery – *Review and approve Letter of Authorization (LOA) Framework – Framework meeting 2 (final action)*
- Draft 2019-2023 Strategic Plan – *Review*

#### **October 2-4, 2018 – Cape May, NJ**

- 2019-2021 Spiny Dogfish Specifications – *Develop and approve*
- 2019 Specifications for Squids and Butterfish - *Review*
- Commercial Fisheries eVTR Framework – *Framework meeting 1*
- 2019-2023 Strategic Plan – *Approve*
- Chub Mackerel Amendment – *Approve public hearing document*
- Industry-Funded Monitoring Amendment update – *Decide whether to proceed*
- Revised MSB goals and objectives – *Adopt*
- [Risk Policy Framework \(moved from June\)](#)

#### **December 11-13, 2018 – Annapolis, MD**

- Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment – *Approve public hearing document*
- Bluefish Allocation Amendment – *Approve range of alternatives for public hearings*
- Commercial Fisheries eVTR Framework – *Framework meeting 2 (final action)*
- Summer Flounder, Scup, and Black Sea Bass 2019 Recreational Management Measures - *Adopt*
- Summer Flounder Amendment: Commercial Issues/Goals and Objectives – *Final action*
- Summer Flounder, Scup, and Black Sea Bass Recreational Management Framework – *Final action*
- Black Sea Bass Amendment – *Review initiation and identify issues for consideration*
- Chub Mackerel Amendment – *Final action*
- 2019 Implementation Plan - *Approve*



**NORTH CAROLINA MARINE FISHERIES COMMISSION**  
**DEPARTMENT OF ENVIRONMENTAL QUALITY**

COMMISSIONERS

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**JANET ROSE**  
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**RICK SMITH**  
Greenville  
**ALISON WILLIS**  
Harkers Island

March 28, 2018

Dr. Christopher M. Moore, Executive Director  
Mid-Atlantic Fishery Management Council  
800 North State St., Suite 201  
Dover, DE 19901

Dear Dr. Moore:

I am writing on behalf of the N.C. Marine Fisheries Commission regarding the amendment to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan that primarily addresses the commercial summer flounder fishery. The summer flounder fishery has been a very important component of the state's commercial fishing industry for the last several decades. In 2016, North Carolina's commercial fishery landed 2,071,089 pounds of summer flounder with a dockside value of \$8,238,703. The summer flounder trawl fishery accounts for nearly all of the commercial summer flounder landings in North Carolina, and a total of 266 flounder trawl trips from 97 vessels landed summer flounder in our state in 2016.

The commercial allocations issue in this amendment is of utmost concern to the commission. North Carolina has the largest allocation of the commercial summer flounder quota based on its historic landings, and shore-based infrastructure and businesses were developed to support the state's commercial summer flounder fishery. We understand that the amendment is still under development, so we ask that proposed management measures concerning allocation include a broad range of options that considers the historic fisheries of the affected states.

Thank you for keeping this request in mind as the amendment to this plan is being developed and please know how much we appreciate the work you do on behalf of our Atlantic Coast fisheries.

Sincerely,

A handwritten signature in cursive script that reads "Sammy Corbett".

Sammy Corbett, Chairman  
N.C. Marine Fisheries Commission

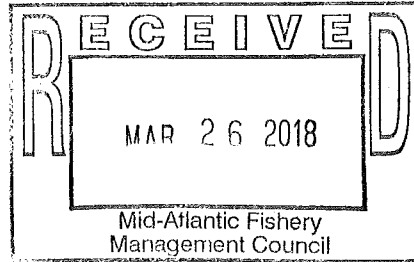
cc: Steve Murphey, Director, N.C. Division of Marine Fisheries  
N.C. Marine Fisheries Commission



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU



March 23, 2018

Secretary of Commerce Wilbur Ross  
Office of the Secretary  
U.S. Department of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230

Chairman Mike Luisi  
c/o Christopher Moore, Executive Director  
Mid-Atlantic Fishery Management Council  
800 North State Street, Suite 201  
Dover, DE 19901

Re: Petition for rulemaking

Dear Secretary Ross and Chairman Luisi:

Enclosed is a rulemaking petition submitted by the State of New York and the New York State Department of Environmental Conservation ("New York") to the U.S. Department of Commerce, through its sub-agencies the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service, and to the Mid-Atlantic Fishery Management Council (the "Agencies"). With this petition, New York requests the Agencies to amend the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan and its implementing regulations to comply with the Magnuson-Stevens Fishery Conservation and Management Act. Specifically, the Agencies' fixed, decades-old state-by-state allocations of the annual commercial quota for the summer flounder fishery violate the Act as outdated, discriminatory, inefficient, costly, and unsafe, and they must be replaced. New York also proposes that the Agencies revise the allocations in a two-phase process, by first dispensing with state-by-state allocations and implementing coastwide management of the commercial quota for an interim period while the Agencies collect information that allows them to revise the allocations so that they are fair to New York and otherwise consistent with the Magnuson-Stevens Act, and then issuing new state-by-state allocations.

Please do not hesitate to contact this office with any questions.

Respectfully submitted,

Channing Jones  
Assistant Attorney General

## NOTICE OF PETITION

U.S. Department of Commerce  
Wilbur Ross, Secretary  
1401 Constitution Avenue NW  
Washington, DC 20230

National Marine Fisheries Service  
Chris Oliver, Assistant Administrator  
1315 East-West Highway  
Silver Spring, MD 20910

National Oceanic and Atmospheric  
Administration  
Timothy Gallaudet, Acting Under Secretary  
1401 Constitution Avenue NW, Room 5128  
Washington, DC 20230

Mid-Atlantic Fishery Management Council  
Mike Luisi, Chairman  
Christopher Moore, Executive Director  
800 North State Street, Suite 201  
Dover, DE 19901

## COURTESY COPIES

New England Fishery Management Council  
John Quinn, Chairman  
Thomas Nies, Executive Director  
50 Water Street, Mill 2  
Newburyport, MA 01950

Atlantic States Marine Fisheries  
Commission  
James Gilmore, Chair  
Robert Beal, Executive Director  
1050 North Highland Street, Suite 200 A-N  
Arlington, VA 22201

South Atlantic Fishery Management Council  
Charles Phillips, Chair  
Gregg Waugh, Executive Director  
4055 Faber Place Drive, Suite 201  
North Charleston, SC 29405

## PETITIONERS

State of New York  
Eric Schneiderman, Attorney General  
The Capitol  
Albany, NY 12224

New York State Department of  
Environmental Conservation  
Basil Seggos, Commissioner  
625 Broadway  
Albany, NY 12233

**BEFORE THE**  
**U.S. DEPARTMENT OF COMMERCE,**  
**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,**  
**NATIONAL MARINE FISHERIES SERVICE,**  
**and MID-ATLANTIC FISHERY MANAGEMENT COUNCIL**

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**In re:**

**Petition for Rulemaking to Repeal and Replace  
the 1993 Commercial Quota Allocations Under  
the Fishery Management Plan and Implementing  
Regulations for Summer Flounder**

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**STATE OF NEW YORK**  
**and the**  
**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**  
  
**PETITION FOR RULEMAKING**

Dated: March 23, 2018

## INTRODUCTION

The State of New York and the New York State Department of Environmental Conservation (together, "New York") submit this petition for rulemaking to repeal and replace the state-by-state allocation of the annual commercial quota for summer flounder adopted in 1993 (the "1993 Allocations"). Even though both the summer flounder stock and commercial fishing activity have shifted northeast toward the waters off New York since 1993, the 1993 Allocations continue to allot New York 7.65% of the total coastwide commercial quota for commercial landings of summer flounder—landings at ports<sup>1</sup>—while allotting almost 50% of the quota to North Carolina and Virginia.

As a result, the 1993 Allocations require summer flounder to be disproportionately landed in southern ports hundreds of miles from the center of the species' biomass and from the center of commercial fishing activity. This is neither fair, rational, nor efficient. Indeed, in many cases, vessels weather significant time and distance at sea traveling from the northern fishery to southern ports, only to have their summer flounder catch shipped back to northern markets for sale. For New York-based fishermen, the options are bleak: to land summer flounder in New York subject to highly restrictive limits or to purchase costly licenses to land summer flounder in out-of-state ports potentially hundreds of miles further from the center of the fishery. For many, neither option is economically viable, and the impact on New York's commercial summer flounder fishermen has been devastating.

Under the Magnuson-Stevens Act, the allocation of commercial fishing quotas must comply with national standards for fishery conservation and management codified at 16 U.S.C. § 1851(a) (the "National Standards"). Among other things, the National Standards require that fishery rules be based upon the best scientific information available, not discriminate between residents of different states, consider efficiency in the utilization of fishery resources, minimize costs, and promote the safety of human life at sea.<sup>2</sup> After decades of change in the summer flounder fishery, the 1993 Allocations violate the National Standards because they are outdated, discriminatory, inefficient, costly, and unsafe.

The 1993 Allocations were prepared by the Mid-Atlantic Fishery Management Council and approved by the Department of Commerce, acting through the National Oceanic and Atmospheric Administration, which in turn acts through the National Marine Fisheries Service (together, the "Agencies"). New York requests that the Agencies replace the 1993 Allocations with allocations that are consistent with the National Standards. New York also proposes that the Agencies revise the allocations in a two-phase process, by first dispensing with state-by-state allocations and implementing coastwide management of the commercial quota for an interim period while the Agencies collect information that allows them to revise the allocations so that

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<sup>1</sup> To "land" fish is to "begin offloading fish, to offload fish, or to enter port with fish." To "offload" is to move fish from a vessel. 50 C.F.R. § 648.2. "Landings" refers to the amount of fish landed, measured by weight.

<sup>2</sup> 16 U.S.C. § 1851(a)(2), (4), (5), (7), (10).

they are fair to New York and otherwise consistent with the Magnuson-Stevens Act, and then issuing new state-by-state allocations.

## NEW YORK'S INTEREST IN RULEMAKING

This petition is brought by the State of New York as a body politic, sovereign entity, and representative of the people of New York; and by the New York State Department of Environmental Conservation as an executive department of the State of New York responsible for the protection, propagation, and management of fish and fisheries in the state. New York brings this petition on behalf of itself, as owner of the fish within the state, and as *parens patriae*, trustee, guardian, and representative of the people of New York, particularly those individuals and businesses who fish commercially for summer flounder, in addition to other participants in the summer flounder market, including dealers, processors, retailers, and end consumers. With this petition, New York seeks to advance the conservation and management of the summer flounder fishery in a manner that is scientifically informed, fair to New York, efficient, safe, and otherwise consistent with the requirements of the Magnuson-Stevens Act.

## STATUTORY AND REGULATORY FRAMEWORK

### A. Management of the Summer Flounder Fishery

The Magnuson-Stevens Act, 16 U.S.C. §§ 1801 *et seq.*, is designed to conserve and manage fishery resources in United States waters and coastal areas.<sup>3</sup> In general, the Act manages fisheries in the waters between three miles and two hundred miles off the coast of the United States, known as the Exclusive Economic Zone or “federal waters,” while states retain regulatory authority over inland marine waters and ocean waters up to three miles offshore of their respective coastlines, traditionally known as “state waters.”<sup>4</sup> To regulate fisheries within its jurisdiction, the Magnuson-Stevens Act establishes eight regional fishery management councils subject to Department of Commerce (“Commerce”) oversight through the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”).<sup>5</sup>

The regional council that manages fisheries in the mid-Atlantic region, including the summer flounder fishery, is the Mid-Atlantic Fishery Management Council, which is composed of voting representatives from the states of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina, and from NMFS.<sup>6</sup> The Mid-Atlantic Council manages

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<sup>3</sup> *Id.* § 1801(b). A “fishery” is “(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreation, and economic characteristics; and (B) any fishing for such stocks.” *Id.* § 1802(13).

<sup>4</sup> *See id.* § 1856(a).

<sup>5</sup> *See generally id.* §§ 1852–54.

<sup>6</sup> *See id.* § 1852(a)(1)(B). Among these states, Pennsylvania does not participate in the summer flounder fishery. The Council also has non-voting representatives from the U.S. Fish



the summer flounder fishery in consultation with the New England and South Atlantic Fishery Management Councils, which include representatives from other states that participate in the fishery, namely Massachusetts, Rhode Island, and Connecticut (New England) and North Carolina (South Atlantic).<sup>7</sup>

Meanwhile, the Atlantic States Marine Fisheries Commission regulates fisheries in state waters off the Atlantic coast, including the summer flounder fishery, pursuant to an interstate compact formed between the Atlantic states and approved by Congress.<sup>8</sup> Due to the migratory nature of summer flounder between state and federal waters, the Mid-Atlantic Council and the Atlantic Fisheries Commission coordinate joint regulatory oversight of the summer flounder fishery in both state and federal waters pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101 *et seq.*<sup>9</sup>

### **B. Regulatory Process Under the Magnuson-Stevens Act**

Under the Magnuson-Stevens Act, each regional council is responsible for management of the fisheries within the federal waters seaward of the states comprising that council, principally through developing and updating fishery management plans (“FMPs”) that establish the rules for each fishery and by proposing regulations to implement such plans.<sup>10</sup> FMPs consist primarily of “conservation and management measures” that are “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.”<sup>11</sup> Such measures may include quotas, size limits, and gear restrictions, among others.

A regional council submits any new FMP or FMP amendment to NMFS to review for consistency with applicable law, in particular with the Magnuson-Stevens Act’s National

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and Wildlife Service, the U.S. Coast Guard, the U.S. Department of State, and the Atlantic States Marine Fisheries Commission.

<sup>7</sup> See *id.* § 1852(a)(1)(A), (C). North Carolina is represented on both the Mid-Atlantic and South Atlantic Councils. Maine and New Hampshire, represented on the New England Council, also have limited participation in the summer flounder fishery.

<sup>8</sup> Pub. L. No. 77-539 (1942), *as amended by* Pub. L. No. 81-721 (1950). Each member state under the Compact is represented on the Commission. The Commission operates through species-specific management boards, including the Summer Flounder, Scup, and Black Sea Bass Management Board, which develops, proposes, and implements fishery management plans for summer flounder, including the commercial fishery. The Commission then oversees the states within the fishery with respect to the management measures they must develop and implement.

<sup>9</sup> States that are party to the Atlantic Fisheries Compact but which are not part of the summer flounder fishery do not participate in the management of summer flounder.

<sup>10</sup> 16 U.S.C. §§ 1852(h), 1853.

<sup>11</sup> *Id.* § 1853(a)(1).

Standards.<sup>12</sup> As necessary or appropriate to implement an FMP or amendment, a regional council may also submit proposed regulations to NMFS for review.<sup>13</sup>

NMFS must approve an FMP or amendment if it is consistent with the National Standards and other applicable law, and disapprove it if not.<sup>14</sup> Similarly, NMFS must promulgate regulations submitted by a regional council if the regulations are consistent with the National Standards, other applicable law, and the corresponding FMP or amendment, and return them to the council for revision if not.<sup>15</sup> If a regional council fails to develop an FMP or any necessary FMP amendment, NMFS may prepare an FMP or amendment, as appropriate, along with implementing regulations. NMFS may then adopt the FMP or amendment, and promulgate any implementing regulations after a notice and comment process.<sup>16</sup>

All FMPs, amendments, and regulations must be consistent with the National Standards.<sup>17</sup> The National Standards include:

- National Standard 2, which provides that “[c]onservation and management measures shall be based upon the best scientific information available.”<sup>18</sup>
- National Standard 4, which provides that

[c]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.<sup>19</sup>

- National Standard 5, which provides that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources[.]”<sup>20</sup>

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<sup>12</sup> *Id.* §§ 1853(a), 1854(a).

<sup>13</sup> *Id.* §§ 1853(c), 1854(b).

<sup>14</sup> *Id.* § 1854(a).

<sup>15</sup> *Id.* § 1854(b). The Service may make necessary technical changes in the course of promulgating regulations submitted by a regional council.

<sup>16</sup> *Id.* § 1854(c).

<sup>17</sup> *Id.* § 1851.

<sup>18</sup> *Id.* § 1851(a)(2).

<sup>19</sup> *Id.* § 1851(a)(4).

<sup>20</sup> *Id.* § 1851(a)(5).

- National Standard 7, which provides that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”<sup>21</sup>
- National Standard 10, which provides that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”<sup>22</sup>

The Magnuson-Stevens Act directs NMFS to establish guidelines based on the National Standards to “assist in the development of fishery management plans.”<sup>23</sup> These guidelines (the “National Standards Guidelines”) are codified at 50 C.F.R. §§ 600.305 *et seq.*

### C. The Summer Flounder FMP and the 1993 Allocations

The summer flounder fishery is governed by the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (the “Summer Flounder FMP”) and its implementing regulations.<sup>24</sup> Among other management measures, the Mid-Atlantic Council develops an annual fishery-wide catch limit for summer flounder and then formulates a commercial landings quota based on that limit. The commercial quota is allocated among the states based on the 1993 Allocations.

To start, the Mid-Atlantic Council’s Scientific and Statistical Committee recommends an “acceptable biological catch” representing the total amount of summer flounder that may be caught each year as necessary to prevent overfishing and sustain the fishery. The Council’s Summer Flounder Monitoring Committee then recommends “annual catch limits” that divide the acceptable catch between the commercial and recreational sectors. This process of setting acceptable catches and catch limits may occur annually, or for up to three years at a time subject to annual adjustment.<sup>25</sup>

Specifically for the commercial sector, the Monitoring Committee recommends an “annual landings quota” (among other measures) designed to achieve the commercial catch limit, accounting for a research set-aside and discards.<sup>26</sup> The Council’s Demersal Species Committee reviews the Monitoring Committee’s recommended commercial landings quota and in turn makes a recommendation to the Council, which in turn makes a recommendation to NMFS.

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<sup>21</sup> *Id.* § 1851(a)(7).

<sup>22</sup> *Id.* § 1851(a)(10).

<sup>23</sup> *Id.* § 1851(b).

<sup>24</sup> Among the amendments to the Summer Flounder FMP has been its expansion to cover two other demersal species, scup and black sea bass, under distinct management measures. The regulations implementing the Summer Flounder FMP are codified in relevant part at 50 C.F.R. §§ 648.100–648.110.

<sup>25</sup> *See* 50 C.F.R. § 648.100.

<sup>26</sup> Discards are fish that are caught but not landed.

NMFS then proposes and finalizes the annual commercial landings quota through a notice-and-comment rulemaking process.<sup>27</sup> In each final rule implementing an annual commercial quota, the total landings are distributed between the states on the eastern seaboard pursuant to the 1993 Allocations. The 1993 Allocations are in Amendments 2 and 4 of the Summer Flounder FMP and 50 C.F.R. § 648.102(c)(1)(i). The 1993 Allocations distribute the commercial landings quota for summer flounder each year as follows:

- 27.44585% to North Carolina;
- 21.31676% to Virginia;
- 2.03910% to Maryland;
- 16.72499% to New Jersey;
- 7.64699% to New York;
- 2.25708% to Connecticut;
- 15.68298% to Rhode Island; and
- 6.82046% to Massachusetts.<sup>28</sup>

Each state implements management measures (on top of generally applicable measures under the Summer Flounder FMP and regulations) designed so that commercial summer flounder landings in the ports of that state do not exceed the state's assigned allocation of the annual commercial quota.<sup>29</sup> These measures commonly include permitting or licensing requirements, periodic or seasonal landings quotas, and/or landings limits for individual vessels.<sup>30</sup>

#### **D. Rulemaking Petitions**

Section 553(e) of the Administrative Procedure Act ("APA") requires "[e]ach agency" to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule."<sup>31</sup> Commerce, NOAA, NMFS, and the Mid-Atlantic Council are agencies under the APA, as entities created by federal law and holding authority delegated by Congress to, among other things, manage the summer flounder fishery pursuant to the Magnuson-Stevens Act. The Summer Flounder FMP and its implementing regulations, including the 1993 Allocations, are rules under the APA. Accordingly, the APA gives New York the right to petition the Agencies to repeal or amend the 1993 Allocations and to issue new allocations.

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<sup>27</sup> See 50 C.F.R. § 648.102.

<sup>28</sup> *Id.* § 648.102(c)(1). Delaware, New Hampshire, and Maine are also allocated de minimis shares of 0.01779%, 0.00046%, and 0.04756%, respectively.

<sup>29</sup> See Mid-Atlantic Fishery Management Council Demersal Committee and Atlantic States Marine Fisheries Commission Board Subcommittee, *Summer Flounder Amendment—Draft Commercial Alternatives Discussion Document*, at 13 (July 2017) [hereinafter *Draft Alternatives*] (Exhibit A) (summarizing state-level management measures).

<sup>30</sup> See, e.g., 6 New York Codes, Rules and Regulations § 40.1.

<sup>31</sup> 5 U.S.C. § 553(e).

## RELEVANT FACTS

### A. Summer Flounder

Summer flounder (*Paralichthys dentatus*), also known as fluke, is a demersal (bottom-dwelling) flatfish distributed from the Gulf of Maine through the waters off North Carolina. As an excellent food fish, summer flounder is a valuable species to the commercial fishing industry along the Atlantic coast. The species is also highly sought after by recreational anglers. Important commercial and recreational fisheries exist from Cape Cod to Cape Hatteras.

Summer flounder are concentrated in bays and estuaries from late spring through early autumn, when the fish migrate to the outer continental shelf for the colder months. Spawning occurs during autumn and early winter, with the larvae carried by ocean currents toward coastal areas, where the development of post larvae and juveniles occurs.<sup>32</sup> Because summer flounder move northeast up the Atlantic coast as they age and grow, the summer flounder population is spatially distributed with larger individuals more abundant toward northern latitudes.<sup>33</sup> Commercial fishing for summer flounder occurs year-round, with the greatest activity between November and April, primarily in federal waters.<sup>34</sup>

### B. Historic Overfishing and Southwesterly Distribution

By the 1980s, the summer flounder stock had been overfished and was severely depleted, reaching a low point in approximately 1989.<sup>35</sup> This overfishing also truncated the average age and size of summer flounder.<sup>36</sup> Because younger fish are more heavily distributed toward the southwest of the species' range, researchers believe that overfishing had a southwest-shifting effect on the center of biomass of the stock.<sup>37</sup> Indeed, trawl survey data indicate that in the 1980s, summer flounder were concentrated between the southern mid-Atlantic waters east of

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<sup>32</sup> See generally Mid-Atlantic Fishery Management Council, *Summer Flounder Fishery Information Document* (June 2017), available at <http://www.mafmc.org/sf-s-bsb> (under "Fishery Information Documents").

<sup>33</sup> Richard J. Bell et al., *Disentangling the Effects of Climate, Abundance, and Size on the Distribution of Marine Fish: An Example Based on Four Stocks from the Northeast US Shelf*, 72 ICES J. MARINE SCI. 1311, 1318, 1320 (2015) (Exhibit B).

<sup>34</sup> *Draft Alternatives*, *supra* note 29, at 20–25.

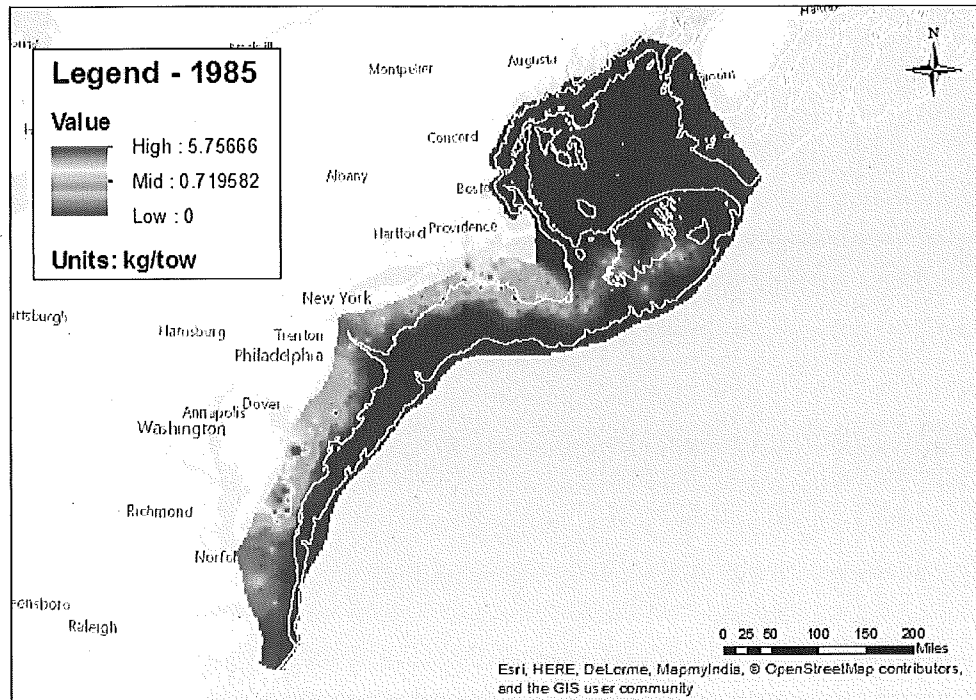
<sup>35</sup> Mark Terceiro, Northeast Fisheries Science Center, National Marine Fisheries Service, Ref. Doc. 15-13, *Stock Assessment Update of Summer Flounder for 2015*, at 5, 10 (2015) [hereinafter *NMFS Stock Assessment 2015*], available at <https://www.nefsc.noaa.gov/publications/crd/crd1513/crd1513.pdf>.

<sup>36</sup> Mark Terceiro, Northeast Fisheries Science Center, National Marine Fisheries Service, Ref. Doc. 16-15, *Stock Assessment of Summer Flounder for 2016*, at 55–58, 87 (2016) [hereinafter *NMFS Stock Assessment 2016*], available at <https://www.nefsc.noaa.gov/publications/crd/crd1615/crd1615.pdf>.

<sup>37</sup> Bell et al., *supra* note 33, at 1318 (Exhibit B).

Delaware, Maryland, and Virginia, and the waters east of Long Island and south of Rhode Island (see Figure 1).<sup>38</sup>

**Figure 1: Summer Flounder Stock Distribution in 1985<sup>39</sup>**



Unsurprisingly, the geographic distribution of commercial fishing for summer flounder in the 1980s roughly corresponded to the distribution of the stock at that time. In 1983–1989, 46% or more of commercial summer flounder landings were caught in the southern mid-Atlantic—that is, in waters south of the southern tip of New Jersey.<sup>40</sup> Meanwhile, 41% or less were caught

<sup>38</sup> OceanAdapt, Rutgers School of Environmental and Biological Sciences, Northeast US fall regional data for summer flounder, *available at* [http://oceanadapt.rutgers.edu/regional\\_data/northeast-us-fall/summer-flounder](http://oceanadapt.rutgers.edu/regional_data/northeast-us-fall/summer-flounder).

<sup>39</sup> *Id.*

<sup>40</sup> Mid-Atlantic Fishery Management Council, *Amendment 2 to the Fishery Management Plan for the Summer Flounder Fishery*, at 107 (Oct. 1991, adopted) (Apr. 1993, approved by NOAA [hereinafter *Amendment 2*]), *available at* <http://www.mafmc.org/sf-s-bsb> (under “Fishery Management Plan and Amendments”). For the purposes of this petition, the “southern mid-Atlantic waters” are comprised of NMFS statistical areas numbered 621–634. *See* Exhibit D (map of NMFS statistical areas), *available at* <https://www.nefsc.noaa.gov/sos/spsyn/fldrs/summer>. Forty-six percent is an underestimate of the percentage of landings caught in this region from 1983–1989 because this figure does not include data for landings made in North Carolina, Delaware, or Connecticut. *See Amendment 2* at 107. During 1983–1989, North Carolina landings represented the largest share of any state, while Connecticut landings were

in the northern mid-Atlantic and southern New England waters proximate to Long Island—that is, in waters east of New Jersey and New York, and south of Connecticut, Rhode Island, and Massachusetts.<sup>41</sup> The remaining approximately 13% were caught further to the east or north of these waters.<sup>42</sup>

### C. The Summer Flounder FMP and the 1993 Allocations

As of 1988, management measures in the summer flounder fishery were largely limited to state-enforced fish size limits: 14-inch minimums in New York, Connecticut, Rhode Island, and Massachusetts; a 13-inch minimum in New Jersey; 12-inch minimums in Maryland and Virginia; and an 11-inch minimum in North Carolina.<sup>43</sup> These measures proved inadequate to address overfishing and in 1988 the Mid-Atlantic Council adopted the Summer Flounder FMP, which NMFS approved.<sup>44</sup> Since then the Mid-Atlantic Council and NMFS have managed the fishery cooperatively with the Atlantic Fisheries Commission (which oversees fisheries in state waters) and in consultation with the New England and South Atlantic Fishery Management Councils.

The Summer Flounder FMP has been amended numerous times.<sup>45</sup> In 1993, the Agencies adopted Amendments 2 and 4 to the FMP, which established the 1993 Allocations to distribute the annual coastwide commercial landings quota for summer flounder among the states. When they were adopted, the 1993 Allocations were calculated based on commercial landings of summer flounder reported for the respective states between 1980 and 1989.<sup>46</sup> Those landings

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among the smallest and Delaware landings were de minimis. *Id.* at 98. Had catch location data been available for landings made in these three states, the likely result would have been to reflect an even greater share of catch in southern mid-Atlantic waters, where more North Carolina fishing activity would have occurred.

<sup>41</sup> *Amendment 2, supra* note 40, at 107. For the purposes of this petition, the “northern mid-Atlantic waters” are comprised of NMFS statistical areas numbered 611–616, and the “southern New England waters” are comprised of NMFS statistical areas numbered 533–534 and 537–539. See Exhibit D (map of NMFS statistical areas), available at <https://www.nefsc.noaa.gov/sos/spsyn/fldrs/summer>. Forty-one percent is likely an overestimate of the percentage of landings caught in these regions for the reasons discussed in note 40, *supra*.

<sup>42</sup> *Amendment 2, supra* note 40, at 107.

<sup>43</sup> Mid-Atlantic Fishery Management Council, *Fishery Management Plan for the Summer Flounder Fishery*, at 64 (Apr. 1988, adopted) (Sept. 1988, approved by NOAA) (the original Summer Flounder FMP), available at <http://www.mafmc.org/sf-s-bsb> (under “Fishery Management Plan and Amendments”). Some states, including New York, also had gear restrictions in the form of mesh size limits.

<sup>44</sup> See *id.*

<sup>45</sup> See Mid-Atlantic Fishery Management Council, *Fishery Management Plans and Amendments—Summer Flounder, Scup, Black Sea Bass*, <http://www.mafmc.org/fisheries/fmp/sf-s-bsb> (last visited Feb. 28, 2018).

<sup>46</sup> *Amendment 2, supra* note 40, at 58–59, 129; Mid-Atlantic Fishery Management Council, *Amendment 4 to the Fishery Management Plan for the Summer Flounder Fishery*, at 12–13, 29

reflected the geographic distribution of summer flounder in the 1980s, as well as other factors. In New York, landings may have been underreported as result of the business structure of the state's fishing industry, which has subsequently been restructured.

The Mid-Atlantic Council acknowledged that data collection methods used to establish the 1993 Allocations were not uniform between the states, and that in the future, "data collection should be improved" in order to "allow the Council to more finely tune the management system to the needs of the fishery."<sup>47</sup> Accordingly, the FMP was amended to establish a standardized reporting system to allow NMFS to reliably track catch and landings locations for summer flounder, among other data.<sup>48</sup> These "vessel trip report" data have been compiled ever since.

#### **D. Recovery and Northeasterly Shift of the Fishery**

The vessel trip report data collected by NMFS—which are corroborated by independent research studies—show that the fishery has materially changed since the 1980s as the summer flounder stock has rebounded: the geographic distribution of both the summer flounder stock and commercial fishing activity have shifted northeast toward the waters off New York. Yet the Agencies have yet to "finely tune" the 1993 Allocations, and each annual commercial quota continues to be allocated among the states according to the 1993 Allocations.<sup>49</sup>

The summer flounder stock has recovered from its former depleted condition as a result of the Summer Flounder FMP and other management measures, reaching peaks in 2003 and 2010.<sup>50</sup> The stock remains "not overfished," and although there have been decreases in stock since 2010, the most recent stock assessment indicates that the biomass of the summer flounder stock remains multiple times greater than its average level in the 1980s.<sup>51</sup> This recovery has also led to an increased proportion of older and larger fish among the summer flounder population since the 1980s.<sup>52</sup> This is reflected in NMFS catch data that show an increase in the age and size of fish among commercial summer flounder landings: the percentage of fish in the total summer

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(Apr. 1993, adopted) (Sept. 1993, approved by NOAA), *available at* <http://www.mafmc.org/sf-s-bsb> (under "Fishery Management Plan and Amendments"). Specifically, Amendment 2 implemented state-by-state allocations based upon the collected data. Just after the approval of Amendment 2, Amendment 4 was adopted to increase Connecticut's share to account for data collection gaps; the other states' shares were reduced incrementally to compensate.

<sup>47</sup> *Amendment 2*, *supra* note 40, at 13.

<sup>48</sup> *Id.* at 63.

<sup>49</sup> *See, e.g.*, 80 Fed. Reg. 80,689, 80,690–91 (Dec. 28, 2015) (establishing and distributing the annual commercial quotas for 2016 through 2018).

<sup>50</sup> *NMFS Stock Assessment 2015*, *supra* note 35, at 5, 10.

<sup>51</sup> *NMFS Stock Assessment 2016*, *supra* note 36, at 12, 107.

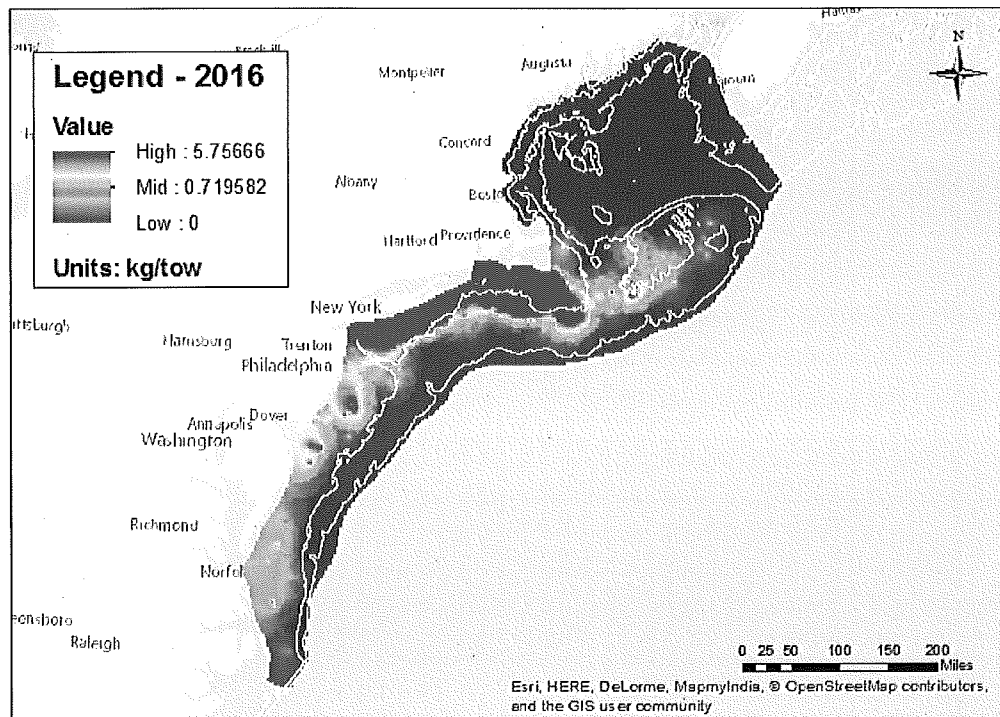
<sup>52</sup> *Id.* at 55–58, 87.



flounder catch aged three years and older has increased between 1993 and 2015 from approximately 4% to 75%.<sup>53</sup>

Because older and larger summer flounder are distributed further northeast in the summer flounder's range, and possibly due to other factors, the center of biomass of the summer flounder stock has shifted northeast since the 1980s.<sup>54</sup> Trawl survey data indicate that the stock is now concentrated in the northern mid-Atlantic waters east of New Jersey and south of Long Island, and in the southern New England waters east of Long Island and south of Rhode Island and Massachusetts (see Figure 2).<sup>55</sup>

**Figure 2: Summer Flounder Stock Distribution in 2016<sup>56</sup>**



The northeast shift in the center of biomass of the summer flounder stock toward the waters proximate to Long Island has in turn driven geographic changes in commercial fishing activity. In particular, the increase in summer flounder abundance and size in waters offshore of New York has been accompanied by an increase in commercial fishing for summer flounder in these waters, as reflected in catch data collected by NMFS. As discussed above, in 1983–1989, when the stock was becoming depleted, 46% or more of commercial summer flounder landings

<sup>53</sup> *Id.* at 6, 19–23.

<sup>54</sup> Bell at al., *supra* note 33, at 1315, 1318 (Exhibit B).

<sup>55</sup> OceanAdapt, *supra* note 38.

<sup>56</sup> *Id.*

were caught in the southern mid-Atlantic, while 41% or less were caught in the northern mid-Atlantic and southern New England waters proximate to Long Island.<sup>57</sup> Now, NMFS data show that in 2015–2016, approximately 12% of the commercial summer flounder catch was taken from southern mid-Atlantic waters, while more than 80% was taken from northern mid-Atlantic and southern New England waters.<sup>58</sup> This 80% of the commercial catch is caught in waters within approximately 150 miles of Long Island. These same waters are no closer than 200 miles, and as far as 400 miles or more, from Virginia and North Carolina.<sup>59</sup>

A presentation at the February 2018 meeting of the Mid-Atlantic Council supports this northeast shift in commercial fishing for summer flounder. At the council meeting, researchers presented their findings that the average commercial catch location for summer flounder, as determined based on NMFS vessel trip report data, has been shifting from the southern mid-Atlantic waters offshore of Delaware, Maryland, and Virginia in the mid-late 1990s to the northern mid-Atlantic waters south of eastern Long Island in the early-mid 2010s.<sup>60</sup> In 2014, the average commercial catch location was approximately 90 miles from Montauk, New York, approximately 300 miles from Hampton, Virginia, and approximately 450 miles from Beaufort, North Carolina (the largest summer flounder ports in these three states). According to the research findings presented to the Council, this shift in commercial fishing has been driven largely by vessels catching summer flounder in northern mid-Atlantic waters and then landing them in North Carolina and Virginia (and to a lesser extent, Maryland). Between 1996 and 2014, the average catch locations for summer flounder that was landed in Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts remained roughly consistent and in each case have been situated in the waters proximate to their respective states of landing. In contrast, the average catch locations for landings in North Carolina and Virginia have shifted over that

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<sup>57</sup> RELEVANT FACTS § B. The actual distribution of catch locations was likely even further skewed toward the southern mid-Atlantic, because these data did not include North Carolina landings. See notes 40–41, *supra*.

<sup>58</sup> *Draft Alternatives*, *supra* note 29, at 34–35 (Exhibit A); see also notes 40–41, *supra* (specifying the NMFS statistical areas comprising each of these regions). These percentages may represent slight underestimates because they do not include catch from statistical areas with less than 1% of total catch. See *Draft Alternatives* at 34.

<sup>59</sup> Note that the 2015–2016 data report share of catch, while the 1983–1989 data report share of landings (which does not include discards). Petitioners have no basis to believe that the striking contrast between the two data periods would be materially different if the same metric were used for both.

<sup>60</sup> Bradford Dubik et al., National Socio-Environmental Synthesis Center, *Spatial Shifts in the Summer Flounder Fishery*, at 23–42 (Feb. 13, 2018) (presentation to the Mid-Atlantic Fishery Management Council) (Exhibit C), available at <http://www.mafmc.org/briefing/february-2018>. It should be noted that while the authors of this presentation are preparing their findings for peer review and publication, that has not yet occurred.

same period from the waters offshore to those states to the waters east of New Jersey and south of Long Island and Rhode Island.<sup>61</sup>

### E. New York's Summer Flounder Industry

Historically, fishing for summer flounder has been part of the “bread and butter” of New York’s commercial fishermen: summer flounder’s high value and widespread popularity made it a reliable source of revenue for area fishing.<sup>62</sup> At present, available data report 416 active permits from 2012–2016 to land summer flounder in New York and 214 known commercial fishermen in New York making summer flounder landings on average for the years 2012–2016.<sup>63</sup>

Yet with a high number of active commercial fishermen and licensed vessels, New York must now impose stringent management measures in the summer flounder fishery in order to comply with its small share under the 1993 Allocations. In 2016, New York had daily trip limits of 70 to 100 pounds for summer flounder depending upon the time of year, and an alternative 800-pound weekly limit between January and March.<sup>64</sup> In contrast, North Carolina did not have daily or weekly trip limits, but instead enforced summer flounder possession limits between 9,000 and 12,500 pounds.<sup>65</sup> The Commonwealth of Virginia had landings limits of 7,500 (allowable once within five days) at certain times of year.<sup>66</sup> These possession and landings limits in North Carolina and Virginia are equivalent to one thousand or more pounds of summer flounder per day for a typical trip.

The stringent limits on commercial landings of summer flounder in New York ports have made summer flounder fishing no longer an economically viable choice for many fishermen based in New York: the limited revenue generated by a trip often cannot offset the costs, including fuel, time, and vessel wear-and-tear. For many fishermen, this has foreclosed or severely restricted participation in the fishery and New York’s commercial summer flounder industry has suffered considerably. In colder months, when fluke are further offshore, it makes little economic sense to travel round trip to and from port under the daily or weekly limits that New York imposes to meet its landings quota. This effectively limits many fishermen to making small day trips in the warmer months—rarely worth the cost or effort for larger vessels—or to

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<sup>61</sup> *Id.* at 45–54. In these presentation slides, lighter dots represent earlier years in the time range, and darker dots represent later years. The dots for each state are connected sequentially from 1996 (lightest) to 2014 (darkest).

<sup>62</sup> Affidavit of Capt. Bruce Beckwith (Exhibit F); Affidavit of Capt. John Berglin (Exhibit I).

<sup>63</sup> *Draft Alternatives*, *supra* note 29, at 9 (Exhibit A) (rounding to the nearest whole number).

<sup>64</sup> New York State Department of Environmental Conservation, *2016 Compliance Report to the ASMFC for Summer Flounder* (Exhibit E). Current regulations are even more stringent.

<sup>65</sup> North Carolina Division of Marine Fisheries, *2016 North Carolina Summer Flounder Compliance Report* (Exhibit E).

<sup>66</sup> Virginia Marine Resources Commission, *Virginia's 2016 Compliance Report for Summer Flounder* (Exhibit E).

landing summer flounder as a secondary catch or bycatch on trips for other fish species.<sup>67</sup> For those who continue to fish for summer flounder, they must often do so in direct sight of vessels licensed to land summer flounder in Virginia or North Carolina—pursuing the same fish at the same time—who may land those same fish in far greater quantities.<sup>68</sup>

While New York fishermen may purchase licenses to land summer flounder in states with larger quota allocations like North Carolina and Virginia, the price of such licenses—often in the range of multiple tens of thousands of dollars—has been prohibitive for many, especially for those operating smaller vessels.<sup>69</sup> Some operators of larger New York-based boats have made the business decision to purchase out-of-state licenses. These fishermen catch flounder in the waters near Long Island—the center of the fishery—and then travel to out-of-state ports to land their catch, only to return to their home ports in New York. In favorable weather conditions, it takes a seventy-foot vessel approximately eight hours to travel from prime summer flounder fishing waters to Montauk, New York. In contrast, it takes thirty or more hours to travel to port in Virginia, and forty-eight or more hours to travel to port in North Carolina—with commensurate increases in fuel use and vessel wear-and-tear.<sup>70</sup> If these New York fishermen were able to land more of their summer flounder catch in their home ports, the time and cost savings would be substantial. The fishermen would also be able to support more downstream industries in their port communities, such as pack houses that pack landed fish to be shipped to market.<sup>71</sup>

Meanwhile, summer flounder that is landed in New York is highly sought after by dealers in New York.<sup>72</sup> Indeed, within the seafood industry, New York has among the largest wholesale/distribution and retail sectors of any state in the fluke fishery, together with New Jersey and Massachusetts.<sup>73</sup> Much of the seafood supplied to the New York City metropolitan area passes through the New Fulton Fish Market in the Bronx, New York. Yet as one seller at the market estimates, no more than 5% of summer flounder he handles at Fulton has been landed in New York, while a majority has been landed in Virginia, North Carolina, or New Jersey.<sup>74</sup>

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<sup>67</sup> See Affidavit of Capt. Bruce Beckwith (Exhibit F); Affidavit of Capt. David Aripotch (Exhibit H); Affidavit of Capt. John Berglin (Exhibit I).

<sup>68</sup> See Affidavit of Capt. Bruce Beckwith (Exhibit F).

<sup>69</sup> See *id.*

<sup>70</sup> See Affidavit of Capt. David Aripotch (Exhibit H); Affidavit of Capt. John Berglin (Exhibit I).

<sup>71</sup> See Affidavit of Capt. David Aripotch (Exhibit H).

<sup>72</sup> See Affidavit of Warren D. Kremin (Exhibit G).

<sup>73</sup> National Marine Fisheries Service, NOAA Technical Memorandum NMFS-F/SPO-170, *Fisheries Economics of the United States 2015*, at 122 (May 2017), available at [https://www.st.nmfs.noaa.gov/economics/publications/feus/fisheries\\_economics\\_2015](https://www.st.nmfs.noaa.gov/economics/publications/feus/fisheries_economics_2015).

<sup>74</sup> See Affidavit of Warren D. Kremin (Exhibit G).

## ARGUMENT

The Magnuson-Stevens Act requires that FMPs and implementing regulations be consistent with all ten National Standards.<sup>75</sup> The 1993 Allocations in Amendments 2 and 4 to the Summer Flounder FMP and 50 C.F.R. § 648.102(c)(1)(i) violate National Standards 2, 4, 5, 7, and 10.

### **A. The 1993 Allocations Are Inconsistent with National Standard 2 Because They Are not Based Upon the Best Available Scientific Information**

National Standard 2 provides that “[c]onservation and management measures shall be based upon the best scientific information available.”<sup>76</sup> The 1993 Allocations are not based upon the best scientific information available because they are not based on current information about the summer flounder fishery. More recent information about the fishery—information that is available to, and in most cases compiled by, or based upon data collected by, the Agencies—shows that the geographic distribution of the fishery has changed significantly since 1993 in ways that must inform the geographic distribution of fishing privileges.

The National Standards Guidelines established by NMFS explain that “relevance” and “timeliness” are among the “[c]riteria to consider when evaluating best scientific information” under National Standard 2. As to relevance, the Guidelines state that “[s]cientific information should be pertinent to the current questions or issues under consideration and should be representative of the fishery being managed.” As to timeliness, the Guidelines explain that “the temporal gap between information collection and management implementation should be as short as possible,” and “[h]istorical information should be evaluated for its relevance to inform the current situation.”<sup>77</sup> The 1993 Allocations are based upon commercial landings reports from 1980 to 1989—which are neither relevant nor timely data about the summer flounder fishery.

In 1993, available data from the mid-1980s indicated that approximately 46% or more of summer flounder landings were caught in the southern mid-Atlantic waters proximate to Virginia and North Carolina, while approximately 41% or less were caught in the northern mid-Atlantic and southern New England waters proximate to New York. Yet information that has become available to the Agencies since 1993 shows that the commercial summer flounder fishery has moved northeast, with fishing activity now centered in the waters proximate to Long Island. Indeed, as the summer flounder stock has recovered in recent decades, the population has shifted northward to become increasingly distributed at higher latitudes: summer flounder migrate north as they age, and more fish are living to older ages as a result of effective fishery management. Current NMFS data show that only approximately 12% of commercially caught summer flounder now come from the southern mid-Atlantic waters proximate to North Carolina and Virginia, while over 80% come from the northern mid-Atlantic and southern New England

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<sup>75</sup> 16 U.S.C. § 1851.

<sup>76</sup> *Id.* § 1851(a)(2).

<sup>77</sup> 50 C.F.R. § 600.315(a)(6).

waters in the area east of New Jersey and mainland New York and south of Connecticut, Rhode Island, and Massachusetts—the waters in which Long Island is situated. Indeed, the average commercial catch location in 2014 was approximately 90 miles from Montauk, New York; approximately 300 miles from Hampton, Virginia; and approximately 450 miles from Beaufort, North Carolina.<sup>78</sup>

This more recently available information comes from better—and in particular, more timely and relevant—data on the geographic distribution of the fish stock and fishing activity, than does the information available in 1993, and collected in 1980–1989. The Summer Flounder FMP itself acknowledged that the 1980–1989 data were flawed and inconsistent between states, and implemented a standardized reporting system specifically to collect more accurate information that could inform future adjustments to the 1993 Allocations.<sup>79</sup> By not relying on timely and current data regarding the fishery, the Agencies have failed to ensure that the temporal gap between information collection and management implementation is as short as possible—even when more recently collected information is, in fact, available. Moreover, because the summer flounder fishery has changed over the decades, the historical 1980–1989 data are simply not representative of the current fishery. For these reasons, the 1993 Allocations violate National Standard 2 by failing to base their annual state allocations of the commercial summer flounder quota on the best scientific information available.<sup>80</sup>

**B. The 1993 Allocations Are Inconsistent with National Standard 4 Because They Are not Fair to the Commercial Fishing Industry in New York**

National Standard 4 requires that:

Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.<sup>81</sup>

In the commercial summer flounder fishery, the 1993 Allocations allocate fishing privileges between the states in a manner that is neither fair and equitable, reasonably calculated to promote conservation, nor carried out in a manner to prevent any entity from acquiring an excessive share. Rather, the 1993 Allocations are unfair to fishermen and other market participants in New York, to the benefit of fishermen and other market participants in North Carolina and Virginia, without any rational conservation basis. The 1993 Allocations are therefore inconsistent with National Standard 4, in violation of the Magnuson-Stevens Act.

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<sup>78</sup> See RELEVANT FACTS §§ B–D.

<sup>79</sup> See RELEVANT FACTS § C.

<sup>80</sup> See *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 195–97 (D.D.C. 2014) (holding that fishery rules may not ignore “superior or contrary data” where it is available).

<sup>81</sup> 16 U.S.C. § 1851(a)(4).

First, the 1993 Allocations are not fair and equitable to New York fishermen. As discussed in Section A above, information collected through 2016 shows that the summer flounder fishery is now concentrated in the waters south and east of Long Island, representing a significant shift from the distribution of the fishery according to information available in 1993. Yet still, as in 1993, New York receives only approximately 7.6% of the commercial allocation of summer flounder, compared with approximately 21.3% for Virginia and 27.4% for North Carolina. These allocations affect not just commercial fishermen in New York, but the rest of the summer flounder supply chain, including port-side businesses such as pack houses. As Amendment 2 recognized in 1993, the landings data upon which the 1993 Allocations were based were inconsistent and flawed.<sup>82</sup> With the subsequent institution of standardized vessel trip reporting, the best information available now shows that the summer flounder fishery has become centered much closer to New York than to North Carolina and Virginia.<sup>83</sup> Fishermen and other market participants in New York are fairly entitled to a share of the annual quota that is more proportional to the geographic distribution of the fish stock, and the continued reliance on the inequitable and outdated 1993 Allocations is inconsistent with National Standard 4.<sup>84</sup>

Nor do fairness and equity require that state allocations remain static. The National Standards Guidelines explain that “[a]n allocation need not preserve the status quo in the fishery to qualify as ‘fair and equitable,’ if a restructuring of fishing privileges would maximize overall benefits.”<sup>85</sup> The unfairness of the 1993 Allocations to New York militate against preserving the allocations simply in order to preserve the status quo for North Carolina and Virginia interests.

Second, the 1993 Allocations are not reasonably calculated to promote conservation. The Guidelines explain that “[a]n allocation scheme may promote conservation by encouraging a rational, more easily managed use of the resource,” or by “optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product.”<sup>86</sup> To distribute more fishing privileges to states further away from the fish, as the 1993 Allocations do, is not a rational or easily managed use of the summer flounder resource, nor does it optimize the economic or social benefit of the resource. A reasonably calculated distribution of privileges would more closely track the geographic distribution of the fishery in order to optimize benefits while conserving the summer flounder resource. For this reason as well, the 1993 Allocations are inconsistent with National Standard 4.

Third, the 1993 Allocations provide fishermen and the fishing industry in North Carolina and Virginia an excessive share of fishing privileges. The National Standards Guidelines

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<sup>82</sup> See RELEVANT FACTS § C.

<sup>83</sup> See RELEVANT FACTS § D.

<sup>84</sup> See *Mass. by Div. of Marine Fisheries v. Daley*, 10 F. Supp. 2d 74, 78 (D. Mass. 1998) (holding that fishery rules cannot rely upon data that is known to be flawed, and that “[t]his is particularly true when doing so will have a discriminatory effect”).

<sup>85</sup> 50 C.F.R. § 600.325(c)(3)(i)(B).

<sup>86</sup> *Id.* § 600.325(c)(3)(ii).

elaborate that “[a]n allocation scheme must be designed to . . . avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.”<sup>87</sup> The Guidelines also explain that such considerations are not limited to just fishermen: allocation schemes “should consider other factors relevant to the FMP’s objectives,” including “economic and social consequences of the scheme, food production, [and] consumer interest.”<sup>88</sup> Yet the 1993 Allocations unfairly and artificially skew fishing privileges—and thus market control—to fishermen and downstream market participants based in North Carolina and Virginia, to the detriment of fishermen and the seafood industry in New York. Given the northern geographic distribution of the fishery, this gives North Carolina and Virginia interests an excessive share of privileges in the summer flounder fishery, and inordinate control over the fishery.

Furthermore—and fundamentally—the perennial reliance on fixed allocations for approximately two and half decades has had the effect of entrenching control of and access to the fishery by those interests who benefit under the status quo, while relegating those who do not benefit to a perpetually disadvantaged status. Because the allocations have been fixed, commercial fishermen in states like New York have been afforded no opportunity to demonstrate their unrealized interest to participate in the fishery. This places some fishermen at a permanent disadvantage by affording no mechanism through which the allocations may be adjusted as underlying fishery conditions change. For the Summer Flounder FMP and 50 C.F.R. § 648.102(c)(1)(i) to set fixed state-by-state allocations, without any mechanism or practice to update those allocations based upon conditions in the fishery, is inherently unfair in violation of National Standard 4.<sup>89</sup>

### **C. The 1993 Allocations Are Inconsistent with National Standards 5 and 7 Because They Are Inefficient and Costly**

National Standard 5 requires that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources[.]”<sup>90</sup> Relatedly, National Standard 7 requires that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”<sup>91</sup> The 1993 Allocations are inconsistent with National Standards 5 and 7 because they do not foster efficiency in utilization of the summer flounder fishery and there are practicable means to minimize costs.

The National Standards Guidelines explain that the “efficiency” of a fishery under National Standard 5 encompasses the minimization of “economic inputs such as labor, capital, interest, and fuel” for a given yield, and that the “utilization” of a fishery includes “harvesting, processing, marketing, and non-consumptive uses of the resource.”<sup>92</sup> The Guidelines further

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<sup>87</sup> *Id.* § 600.325(c)(3)(iii).

<sup>88</sup> *Id.* § 600.325(c)(3)(iv).

<sup>89</sup> *See Guindon v. Pritzker*, 240 F. Supp. 3d 181, 194–95 (D.D.C. 2017).

<sup>90</sup> 16 U.S.C. § 1851(a)(5).

<sup>91</sup> *Id.* § 1851(a)(7).

<sup>92</sup> 50 C.F.R. § 600.330(b).



explain that, to comply with National Standard 7, “[m]anagement measures should not impose unnecessary burdens on the economy[ or] on individuals.”<sup>93</sup>

As discussed in Sections A and B above, the 1993 Allocations artificially skew the state-by-state quotas inconsistent with the geographic distribution of both the summer flounder stock and actual commercial fishing activity. In particular, North Carolina and Virginia together receive nearly half of the commercial summer flounder quota each year, even though the fishery is concentrated in the waters nearer to Long Island. As a result, boats landing summer flounder in North Carolina and Virginia must, on average, travel further from where they have caught summer flounder to their port of landing, than if those same flounder were landed in New York ports.<sup>94</sup> Besides greater inputs of travel time, this longer round trip also requires greater use of fuel and results in greater wear-and-tear on vessels. Moreover, in many cases, fishermen with boats licensed to land summer flounder in North Carolina and Virginia do not even reside in those states, but sail out of northern states such as New York.<sup>95</sup> Indeed, there are fisherman who sail out of ports like Montauk, New York to catch summer flounder in the waters off Long Island, only to travel to and from southern ports in order to land their catch—under a license that may have cost tens of thousands of dollars—when they would prefer to save time and expense by landing that catch at home in Montauk, if only New York’s quota allocation allowed for less stringent landings limits.<sup>96</sup> In some cases these inefficiencies are even further compounded: to the extent that market demand for summer flounder in the New York region is not satisfied by locally landed fish, there are additional shipping costs associated with the transport of summer flounder from southern ports to northern markets.<sup>97</sup>

The 1993 Allocations are therefore inconsistent with National Standard 5 by failing to consider more efficient alternatives that minimize labor, capital, and fuel inputs for a given yield of fish than is currently wasted by sending fishermen between southern ports and northern waters, when those same fish could be caught and landed with trips between northern ports and those same waters. For similar reasons, the 1993 Allocations are inconsistent with National Standard 7 by failing to minimize costs. The excessive costs created by the 1993 Allocations burden the fishing industry and are passed onto consumers in the form of higher prices.

In addition, it is eminently practicable for the annual commercial quota for summer flounder to be allocated in a way that considers efficiency and minimizes costs by no longer skewing the distribution of fishing privileges toward North Carolina and Virginia, and away from New York. The state-by-state allocations could simply be readjusted to more accurately track the geographic distribution of the fishery, based upon the best scientific information currently available. Yet in spite of the availability of practicable alternatives, the Agencies continue to use the 1993 Allocations, at the expense of efficiency and cost considerations.

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<sup>93</sup> *Id.* § 600.340(b).

<sup>94</sup> *See* RELEVANT FACTS § D.

<sup>95</sup> *See* RELEVANT FACTS § E.

<sup>96</sup> *See* Affidavit of Capt. David Aripotch (Exhibit H).

<sup>97</sup> *See* RELEVANT FACTS § E.

Because the 1993 Allocations are inconsistent with National Standards 5 and 7, they further violate the Magnuson-Stevens Act.

**D. The 1993 Allocations Are Inconsistent with National Standard 10 Because They Do not Promote Safety**

National Standard 10 requires that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”<sup>98</sup> The 1993 Allocations fail to do so because they cause fishermen to spend longer at sea than necessary for a given yield of summer flounder.

As the National Standards Guidelines note, “[f]ishing is an inherently dangerous occupation.”<sup>99</sup> The longer a fishing vessel spends at sea, the greater the risk to its crew. Recognizing this, the Guidelines advise that “[a]n FMP should try to avoid creating situations that result in vessels going out farther[ or] fishing longer . . . than they generally would have in the absence of management measures.”<sup>100</sup>

As discussed in Sections A through C above, the 1993 Allocations distribute disproportionate fishing privileges to Virginia and North Carolina, despite the summer flounder concentration in the waters close to New York. The result is that fishermen travel great distances between southern ports and northern waters to catch and land summer flounder that could otherwise be landed by fishermen traveling shorter distances from New York ports, if New York were afforded a greater allocation of fishing privileges. The 1993 Allocations are thus inconsistent with National Standard 10 by failing to promote the safety of human life at sea where practicable.

Indeed, because the 1993 Allocations were established prior to the addition of National Standard 10 to the National Standards, the Agencies necessarily did not originally evaluate the 1993 Allocations for compliance with that standard.<sup>101</sup> Because the 1993 Allocations are inconsistent with National Standard 10, they further violate the Magnuson-Stevens Act.

**PROPOSED RULEMAKING**

For the reasons stated above, the 1993 Allocations as set forth in Amendments 2 and 4 of the Summer Flounder FMP and 50 C.F.R. § 648.102(c)(1)(i) violate the Magnuson-Stevens Act. New York hereby petitions the Agencies to replace the 1993 Allocations with allocations that are consistent with the National Standards. Various alternative measures are available to update the 1993 Allocations. The most straightforward option is a simple redistribution of the state shares

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<sup>98</sup> 16 U.S.C. § 1851(a)(10).

<sup>99</sup> 50 C.F.R. § 600.355(b).

<sup>100</sup> *Id.* § 600.355(c)(1).

<sup>101</sup> See *Fairweather Fish, Inc. v. Pritzker*, 155 F. Supp. 3d 1136, 1141–42 (W.D. Wash. 2016).

of the commercial quota: to use the best scientific information available to reallocate fishing privileges between the eastern seaboard states in a way that is fair and equitable to New York, that considers efficiency and achieves cost minimization, that promotes the safety of human life at sea, and that is otherwise consistent with the National Standards.

To proceed with this necessary amendment of the 1993 Allocations, New York proposes that the Mid-Atlantic Council submit to NMFS an amendment to the Summer Flounder FMP and its implementing regulations. NMFS would then review and approve the FMP amendment and would review and promulgate the amendment's implementing regulations. Alternatively, if the Council does not act to develop and submit the necessary amendment to the Summer Flounder FMP, NMFS and the other Agencies would act on their own to prepare and adopt such an amendment and propose and promulgate implementing regulations.<sup>102</sup>

New York also proposes that the Agencies revise the 1993 Allocations in a two-phase process: (1) in the first phase, the Agencies would dispense with state-by-state allocations of the commercial landings quota and implement coastwide management of the commercial quota for an interim period while the Agencies collect information that allows them to revise the allocations so that they are fair to New York and otherwise comply with the National Standards; and (2) in the second phase, the Agencies would establish new state-by-state allocations that are consistent with the National Standards.

Specifically, New York proposes that the Agencies act as soon as practicable to establish a period of approximately three to five years (the "Coastwide Period") during which the annual commercial quota for summer flounder is not allocated between states and implemented by state-specific management, but instead is implemented with coastwide management measures developed and adopted by the Agencies. Seasonal quotas, trip limits, and other measures would allow the Agencies to enforce the annual commercial quota during the Coastwide Period while achieving balance within the fishery between different participants—e.g., between offshore winter fishermen and inshore summer fishermen. Critically, the Agencies' management measures during the Coastwide Period would apply to all commercial landings of summer flounder regardless of state of landing and commercial fishermen would be permitted to land summer flounder in any state in which they are licensed to do so. This would allow commercial fishermen to land summer flounder in whatever ports present the best opportunities for them, considering factors such as catch location, home port location, market price differentials, available packing and processing infrastructure, safety risk exposure, and other relevant concerns.

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<sup>102</sup> See 16 U.S.C. §§ 1852(h), 1853(a), (c), 1854(a)–(c). In the event that the Mid-Atlantic Council takes the position that it is not an agency subject to the rulemaking petition provision at 5 U.S.C. § 553(e), New York nevertheless requests that the Council submit amendments to the Summer Flounder FMP and the implementing regulations to NMFS, as set forth in this petition. If the Council fails to do so, New York petitions NMFS, NOAA, and Commerce under 5 U.S.C. § 553(e) to act on their own pursuant to 16 U.S.C. § 1854(a)–(c) to amend the Summer Flounder FMP and its implementing regulations as set forth in this proposed rulemaking.

After the Coastwide Period, the amended FMP and regulations would then establish new state-by-state allocations (the “New Allocations”) based on the data collected during the Coastwide Period. Consistent with National Standard 2, the data collected during the Coastwide Period would allow the Agencies to base the New Allocations upon actual, current landings data that reflect present conditions in the fishery. Consistent with National Standard 4, the New Allocations would fairly and equitably distribute fishing privileges between states because they would be based on new landings data from the Coastwide Period. Consistent with National Standards 5 and 7, the New Allocations would consider efficiency and minimize costs by allowing commercial fishermen to land summer flounder in one port or another based upon economic considerations. Because both the summer flounder stock and summer flounder fishing activity are centered around the waters proximate to New York, the likely outcome during the Coastwide Period would be that more commercial fishermen would opt to land summer flounder in New York. Because the Coastwide Period would allow commercial fishermen to make market-based economic decisions about where to land summer flounder, the New Allocations would improve economic efficiency and achieve cost minimization going forward. Finally, consistent with National Standard 10, the New Allocations would promote greater safety of human life at sea by decreasing the collective time and distance spent at sea by commercial fishermen.

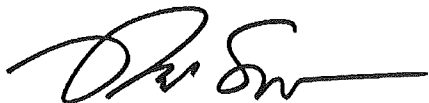
New York also submits that, whether through its proposed two-phase process or otherwise, any reallocation of fishing privileges need not—and should not—represent a permanent decision on the matter. Instead, future changes in the fishery should lead to new allocations of the annual commercial quota among states according to the best available information and other requirements of the Magnuson-Stevens Act.

## CONCLUSION

For the reasons stated above, New York petitions the Agencies to replace the 1993 Allocations in Amendments 2 and 4 of the Summer Flounder FMP and 50 C.F.R. § 648.102(c)(1)(i) with allocations that are fair to New York and otherwise consistent with the National Standards.

Dated: New York, New York  
March 23, 2018

BASIL SEGGOS  
Commissioner of the New York State  
Department of Environmental Conservation



ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York

By:



Channing Jones, Assistant Attorney General  
Danielle Fidler, Assistant Attorney General  
Andrew Gershon, Senior Counsel  
*Attorneys for Petitioners*

New York State Department of Law  
Environmental Protection Bureau  
120 Broadway, 26th Floor  
New York, New York 10271  
(212) 416-8082  
channing.jones@ag.ny.gov



**Mid-Atlantic Fishery Management Council**  
800 North State Street, Suite 201, Dover, DE 19901  
Phone: 302-674-2331 | FAX: 302-674-5399 | www.mafmc.org  
Michael P. Luisi, Chairman | G. Warren Elliott, Vice Chairman  
Christopher M. Moore, Ph.D., Executive Director

## MEMORANDUM

**Date:** March 27, 2018  
**To:** Chris Moore  
**From:** Jason Didden  
**Subject:** South Atlantic Party/Charter Electronic Reporting

A Notice of Availability (NOA) with a comment deadline of May 13, 2018 has published regarding the South and Gulf Councils' submission of their For-hire Reporting Amendment.

The South Atlantic Amendment proposes mandatory weekly electronic reporting for charter vessel operators with a federal for-hire permit in the snapper grouper, dolphin wahoo, or coastal migratory pelagic fisheries; reduces the time allowed for headboat operators to complete their electronic reports; and proposes requiring location reporting by charter vessels with the same detail now required for headboat vessels.

The proposed Gulf for-hire electronic reporting program would require trip-level reporting, a pre-trip notification to NMFS, and location information monitored by a vessel monitoring system, among other requirements.

Staff suggests that the Mid-Atlantic Fishery Management Council submit a comment letter recommending that any reporting implemented in this action utilize technologies that eliminate duplicate reporting. Specifically, we recommend one questionnaire that addresses all relevant federal and state reporting requirements and allows the data to be sent to the relevant agencies. It is staff's understanding that the reporting applications from the Atlantic Coastal Cooperative Statistics Program (ACCSP) have this capability.

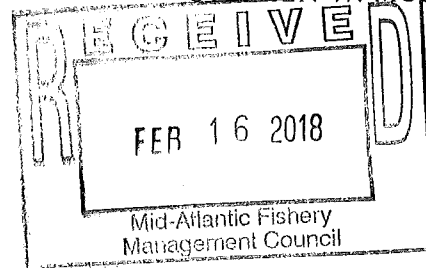


ROY COOPER  
*Governor*

MICHAEL S. REGAN  
*Secretary*

STEPHEN W. MURPHEY  
*Director*

Feb. 9, 2018



Dr. Christopher M. Moore, Executive Director  
Mid-Atlantic Fishery Management Council  
800 North State Street, Suite 201  
Dover, DE 19901

Dear Director Moore:

The North Carolina Division of Marine Fisheries supports and administers the leasing of public trust waters for the culture and harvest of shellfish. In addition, the division permits non-shellfish land based aquaculture operations for marine and estuarine species. However, until recently the use of public trust waters for aquaculture purposes was limited to shellfish species.

During the 2017 session, the North Carolina General Assembly introduced a bill to expand aquaculture of non-shellfish species in the estuarine and state ocean waters of the state. Senate Bill 410 or the Marine Aquaculture Act, (attached) was signed into law by Governor Roy Cooper on July 27, 2017. To allow for the development and expansion of deep water aquaculture opportunities, the law tasked the division to request that the Mid-Atlantic and South Atlantic Fishery Management Councils develop a Fishery Management Plan for regulating offshore aquaculture in federal waters off the North Carolina coast.

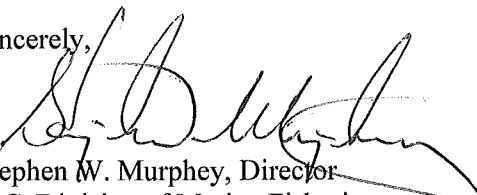
Additionally, the law requires that the division also petition the National Oceanic and Atmospheric Administration to initiate rule making proceedings to implement a comprehensive regulatory program for managing the development of an environmentally sound and economically sustainable aquaculture fishery in federal waters offshore from the North Carolina coast.

Under this law, the North Carolina General Assembly declared it is the policy of the State to encourage the development of private, commercial marine aquaculture in ways that are compatible with other public uses of marine and estuarine resources such as navigation, fishing, and recreation.

In fulfilling the requirements of the law, I would like to respectfully request that the Mid-Atlantic Fishery Management Council provide the division with criteria needed to begin the process outlined in the bill along with estimated timelines for implementation of development of a fishery management plan for regulating offshore aquaculture. The division will submit a preliminary report in early 2018 to the North Carolina General Assembly and a final report in April, 2018.

The new Marine Aquaculture Program will be administered under the division's Habitat Enhancement Section. If you need additional information, please contact me at 252-808-8013.

Sincerely,



Stephen W. Murphey, Director  
N.C. Division of Marine Fisheries

Enclosure

 Nothing Compares

## Saunders, Jan

---

**From:** Moore, Christopher  
**Sent:** Friday, March 23, 2018 5:31 PM  
**To:** Saunders, Jan  
**Subject:** FW: Request for support of an Ecosystem Working Group  
**Attachments:** Draft Plan and Agenda for a Ecosystem Working group for squids mackerels 2017.docx

FYA

**From:** Greg DiDomenico <gregdi@voicenet.com>  
**Sent:** Friday, March 23, 2018 5:28 PM  
**To:** Moore, Christopher <cmoore@mafmc.org>  
**Subject:** Request for support of an Ecosystem Working Group

FYI please use this version.

Dear Chris,

Attached you will find a draft document that outlines an approach to prepare for the challenges of EBM and future fishery issues.

We feel that the formation of a "Ecosystem Working Group" can be structured in such a way that experienced stakeholders can provide input and recommendations, academia can provide technical expertise and Agency and Council staff can participate in a meaningful way that produces potential solutions to mutual management and science challenges.

I respectfully request your consideration of this working group, support from the Council and participation from your staff.

Thank you.

Greg DiDomenico  
Executive Director  
Garden State Seafood Association



Draft Rationale & Objectives for an expert scientific working group supporting Ecosystem Based Fishery Assessment & Management of fisheries in the MAFMC Squid, Mackerel and Butterfish FMP

**Rational:** Calls for the implementation of Ecosystem Based Fishery Management (EBFM) arise from the recognition that fisheries emerge from complex interactions between “wild” components of marine ecosystems and human socio-economic components including human food requirements. In the face of complexity, EBFM requires application of transdisciplinary approaches integrating expertise in fisheries, oceanography, ecology, natural resource economics and other social sciences. Natural and human processes driving marine fisheries are also changing rapidly. Distributions and productivities of marine species are shifting in response to changing ocean dynamics due to changing weather and climate. Fishing effort and landings are changing as a result, but in the context of regional fishing regulations and seafood supply and demand chains that are also changing. When so many dimensions are changing simultaneously fishery systems cannot be forecast with certainty. Most fishery problems and solutions are therefore provisional and transdisciplinary approaches need to define problems and solutions based on an awareness of current ecological states. Fishing industry experts have practical, fine grained, real time understanding of the changing socio-ecological systems in which their fisheries operate. In contrast, fishery scientists have perspectives that are relatively coarse grained. The perspectives of industry experts and fisheries scientists are therefore complementary and industry experts must be included as partners in expert working groups tasked with the timely identification of problems and development of practical technical solutions for Ecosystem Based Fisheries Assessment & Management (EBFA&M) in rapidly changing ecosystems.

We will establish a transdisciplinary working group of experts focused on the identification of problems and development of solutions for effective EBFA&M of fisheries in the Mid-Atlantic Fisheries Management Councils Squid, Mackerel, Butterfish Fisheries Management Plan (FMP). We will focus on the FMP because the species included are pelagic, highly productive, responsive to environmental change, and play important roles in the Northeast US continental shelf food web including providing food for humans. The fleets fishing for the stocks are also closely related. Our expert working group builds on work and relationships developed in earlier working groups that successfully delivered products for benchmark and update stock assessments of two species in the FMP (Atlantic Mackerel, 2017, Atlantic Butterfish 2014). The working group will be sustained in a research mode over the long term to provide practical technical information and products for population assessment working groups, Fisheries Management Action Teams, the Scientific and Statistical Committee, and MAFMC staff working in the FMP. However, there is no guarantee the groups work will be considered in, or impact assessments or other forms of applied science. Sustained engagement with the fisheries should allow the group to identify emerging problems and practical evidence based solutions

much more rapidly than is currently possible. We believe solutions should support more coherent and proactive management that better sustains fish populations and the fisheries that rely upon them.

**Administrative Issues:**

Timing of first Working Group meeting: Late April-Early May fishery transition period

Location: Rhode Island

Duration: 3 consecutive days.

Size of WG: No larger than 30-35 max.

Funding: Individual workgroup members will be responsible for the costs of their participation.

**Potential Membership**

Industry: Goodwins, Roebucks, Axelssons, Ruhle, Lackner others?

Shoreside: Lunds, Town Dock, Seafreeze, Cape Seafood.

Industry Representatives:

Conservation Representatives:

Government: NEFSC; Sara Gaiches, Curti (Mackerel), Adams (Butterfish), Hendrickson (Squids), David Richardson, Coop Research /Manderson. Patricia DeSilva NEFSC-Social Science Branch, GARFO: Doug Christel, Josh O'Connor

Academia/ Non-Governmental Scientific Expertise Including Economist and Oceanographer

Council staff: Jason Didden, Julia Beattie

SSC: David Secor, Rob Latour, Others?

MAFMC Council: Peter Hughes (MAFMC SMB Committee chair

**Science:**

- 1) Butterfish
  - a) Recruitment issues and survey considerations
  - b) Are there availability issues? Empirical data vs model based approaches.
  - c) How does life history affect risk policy?
  - d) Regulations drive effort and patterns of catch?
  - e) Global and Domestic economic effects on markets and price and therefor perhaps effort and landings
- 2) Atlantic Mackerel
  - a) Outcome of 2017 assessment
  - b) Effects of the change in dominance of US and Canadian Contingents
  - c) What are the drivers of interactions/overlap with herring
  - d) Effects of EM/PS sampling costs in herring fishery that affect mackerel fishery

**Management:**

- 1) What is the goal of EFBM?

- a) Is human food security a primary ecosystem service?
  - b) How are and should the various ecosystem components and services be weighted
  - c) Are forage buffers redundant with estimates of M
  - d) Socio-economic drivers: Economics?
  - e) Socio-economic drivers: Regulations?
- 2) Survey/fishery Catchability issues
- a) Net efficiency
- 3) What is the optimal yield?
- 4) What is the risk that we overfishing stocks?
- 5) What is the risk if we overfish these stocks?

**From:** [Moore, Christopher](#)  
**To:** [Saunders, Jan](#); [Mary Clark Sabo](#)  
**Subject:** FW: Regional Habitat Steering Committee  
**Date:** Friday, March 30, 2018 11:37:32 AM  
**Attachments:** [MAFMC Habitat Steering.doc](#)

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Email and attachment for BB

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**From:** Guy Simmons <[guy@seaclam.com](mailto:guy@seaclam.com)>  
**Sent:** Wednesday, March 21, 2018 2:17 PM  
**To:** Moore, Christopher <[cmoore@mafmc.org](mailto:cmoore@mafmc.org)>  
**Cc:** Rubin Shen, Leah (Coons) <[Leah\\_RubinShen@coons.senate.gov](mailto:Leah_RubinShen@coons.senate.gov)>  
**Subject:** Regional Habitat Steering Committee

Dear Mr. Moore,

I have attached a letter addressed to you from me as the Chairman of the Industry Advisory Board for S CeMFis pertaining to the Regional Habitat Steering Committee. I have copied Senator Coons on the letter as he has always been very supportive of and shown great interest in the cooperative science that we are involved in.

I will not be able to attend the next MAFMC meeting in April as I will be speaking at Mississippi State University that week but I can make myself available to discuss this request with you via telephone most any time.

Thank you for your consideration of this request.

Guy B Simmons  
Sea Watch International, Ltd  
Senior VP Marketing and Product Development  
8978 Glebe Park Dr.  
Easton, MD 21601  
Direct Line: 410-819-8521  
Cell Phone: 410-726-1995  
Email: [guy@seaclam.com](mailto:guy@seaclam.com)



*Science & Industry  
Working Together for  
Sustainable Fisheries*

- A National Science Foundation Industry/University Cooperative Research Center (I/UCRC)

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March 16, 2018

Mr. Chris Moore  
Executive Director  
Mid-Atlantic Fishery  
Management Council  
800 North State St  
Dover, DE 19901

Dear Mr. Moore,

I am writing to you in regards to the Regional Habitat Steering Committee that was discussed at the last MAFMC meeting held in North Carolina. I was not in attendance at the meeting but I was made aware of the formation of the committee and the discussion of the recommendation as a result of a Webinar held on January 11, 2018.

As you are aware the National Science Foundation approved a charter for the Science Center for Marine Fisheries in 2013. The membership of SCeMFiS is comprised of companies based in the Mid-Atlantic and New England states. Our member companies have over 100 fishing vessels operating in federal waters referred to as the Mid-Atlantic Bight harvesting many species managed under the Magnuson-Stevens Act. The recommendations of the Regional Habitat Steering Committee will have a direct effect on the future of the membership's ability to maintain and grow our industry providing thousands of jobs within the region.

Over the past 3 years the Atlantic Surclam and Ocean Quahog fishery has done extensive work on Habitat issues in conjunction with the New England Fishery Management Councils Planning and Development Team. We believe that SCeMFiS can bring great value to the Regional Habitat Steering Committee at no cost to the Federal Government.

I am asking that you to provide an appointment to the Regional Habitat Steering Committee for one of our scientists or members from SCeMFiS. I believe that the knowledge of the fishing community and the science from SCeMFiS can be of great benefit to the committee.

Thank you for your leadership and consideration of this request.

Best Regards,  
Guy B Simmons  
Sea Watch International, Ltd.  
Chairman  
SCeMFiS Industry Advisory Board

CC: Senator Christopher A. Coons  
127-A Russell Senate Building  
Washington, DC 20510

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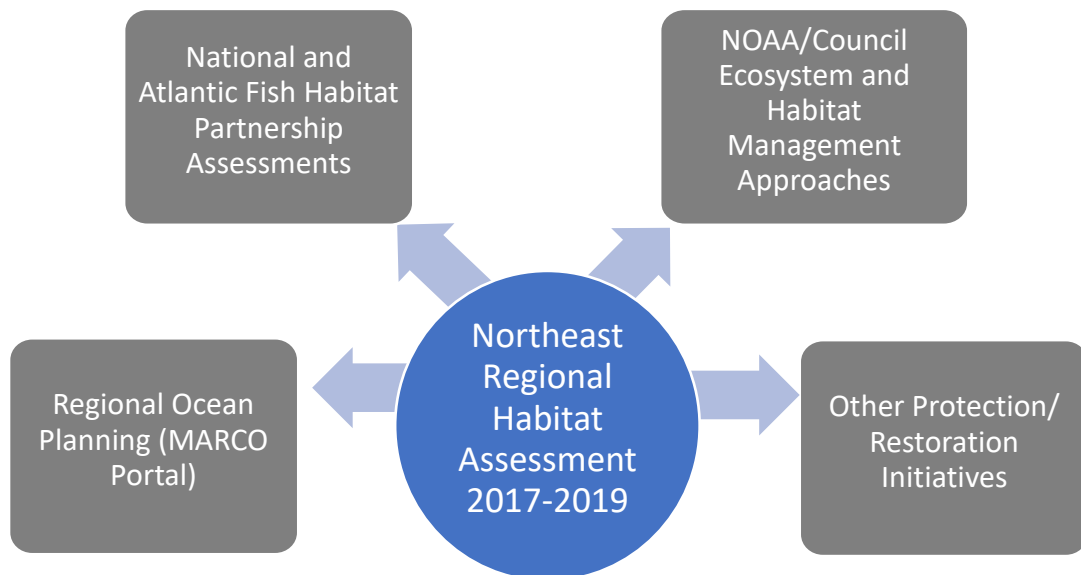
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Phone: 228-818-8847 | Fax: 228-818-8848  
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Phone: 804-684-7360 | Fax: 804-684-7537  
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## Regional Habitat Assessment 2017-2019

**Purpose:** To describe and characterize estuarine, coastal, and offshore fish habitat in the Northeast using a partnership driven approach.

**Expected Outcome:** This partner driven initiative will develop information and tools to support the National Fish Habitat Assessment<sup>1</sup>, provide spatial products that describe fish habitat for the Mid-Atlantic Regional Planning Body data portals (MARCO), support the National Oceanic and Atmospheric Administration (NOAA) Fisheries and the Mid-Atlantic Fishery Management Council’s (Council) essential fish habitat (EFH) and habitat area of particular concern (HAPC) descriptions as well as other ecosystem related management outcomes, and provide tools and information to the region to support other state or regional habitat protection and restoration initiatives.



**Geographic scope:** The scope will include Northeast US estuarine and marine waters, north of Cape Hatteras, NC. The full scope of the project will be refined by the project steering committee.

**Background:** As amended in 1997, the Magnuson-Stevens Act states that the purpose of the EFH mandate is to protect and conserve “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” NOAA Fisheries and the regional fishery management councils work together to update EFH designations for the fish stocks in federal fishery management plans to support the EFH consultation process, an important procedural tool which requires other federal agencies to consult with NOAA Fisheries on projects that may impact fish habitat. More detailed habitat information is also needed to identify Habitat Areas of Particular Concern (HAPCs), which are specific areas that can be targeted for habitat conservation, protection, or research. The Council has a

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<sup>1</sup> National Fish Habitat Partnership, <http://www.fishhabitat.org/>

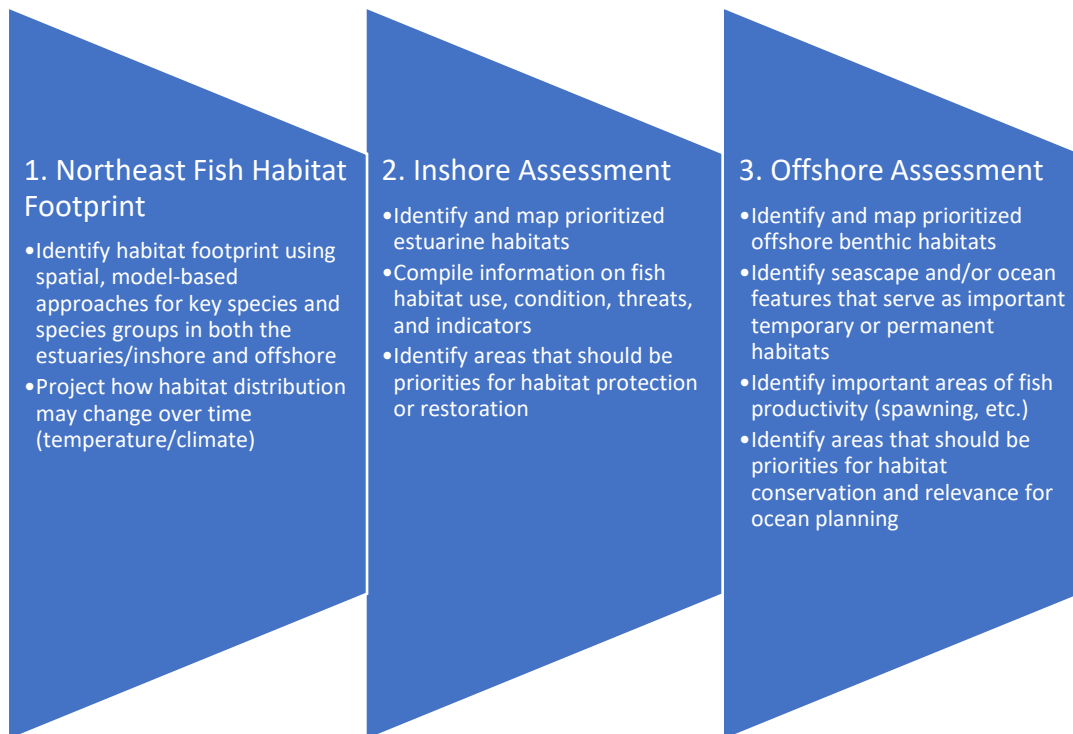
need to meet its regulatory requirements for EFH review while advancing policies set forward in its new Ecosystem Approach to Fisheries Management (EAFM) Guidance Document.<sup>2</sup>

In addition, the National Fish Habitat Assessment (2010 and 2015), has had limited success providing information on coastal fish habitat at the scale needed to support its regional partners such as Atlantic Coastal Fish Habitat Partnership (ACFHP). Both state agencies and ACFHP, while not subject to the EFH mandate, address coastal zone development impacts on fish habitat and would benefit from consolidated, spatial information on fish habitats within state waters.

There is also a growing commitment to ecosystem-based fisheries management on the part of the Council and NOAA Fisheries. Fish habitat information at appropriate scales is needed to support and advance these activities.

Clearly, new and innovative approaches are needed to integrate information available from a variety of sources throughout the region and develop improved, spatially informative descriptions of habitat to support decisions made by fisheries and habitat managers, as well as decisions related to ecosystem and ocean planning within this region.

**Deliverables:** An integrative, evaluation of fish habitat in the Northeast.



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<sup>2</sup> The Council’s EAFM Guidance Document (<http://www.mafmc.org/eafm/>) states that EFH should be strengthened by considering essential habitat from a multispecies/ecosystem perspective, emphasizing the connectivity between species and life history stages, and inshore and offshore habitats. In addition, it was noted that approaches should be developed that recognize and account for climate change.

### **1. Identify the footprint of fish habitat and how it is changing.**

Using the best available information on fish life history and habitat use in the marine and estuarine environments, model-based approaches<sup>3</sup> will be developed to describe the footprint of fish habitat for key species and species groups that are state and federal fisheries management priorities. Model based approaches will allow the development of longer-term projections into how that habitat may change over time – and allow managers to more directly consider these climate/temperature driven impacts and their implications to habitat and fish in the region.

This tool will specifically support the designation of EFH for the Council, and provide the broad map products and tools needed to trigger EFH consultations with NOAA Fisheries in the region.

### **2. Conduct an inshore assessment.**

This project will compile/review/and inventory information, including maps and spatial data, on important estuarine habitats (e.g., submerged-aquatic vegetation, marine shellfish beds, etc.) based on ACFHP species-habitat matrix<sup>4</sup> for state/federal managed species. Depending on the needs identified by partners, these data products could include physical or biological habitat characteristics, stressors, fish survey data, or other factors as identified by the work plans. Based on knowledge of data resources and need in their region, the steering committee will identify and prioritize the kinds of information to be included in this inshore assessment.

This information will support the identification of HAPCs for the Council, as well as support the work of ACFHP and other state and regional groups focused on nearshore habitat protection and restoration. In addition, this information will be used to support the National Fish Habitat Assessment in 2020.

### **3. Conduct an offshore assessment.**

This project will compile/review/and inventory information, including maps and spatial data, on prioritized benthic habitats for state/federally managed species. In addition, this project will identify areas in the offshore environment that are important to fish productivity, such as spawning areas, seascapes, or other permanent or temporary habitat types that play an important role for state and federally managed species. Additional model-based approaches may be developed as needed. This assessment should also examine the relationship between inshore nursery habitat use and pathways/timing of movements to offshore habitats for important fisheries. Based on knowledge of data resources and need in their region, the steering committee will identify and prioritize the kinds of information to be included in this offshore assessment.

This information will support the identification of HAPCs for the Council, as well as support the need for spatially explicit information for marine spatial planning in the region to identify and prioritize areas that are important to fish and the ecology of the offshore marine environment.

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<sup>3</sup> These could include approaches such as generalized additive modeling, habitat suitability modeling, or other spatially explicit approaches as appropriate.

<sup>4</sup> The matrix summary and publication of the results in the journal BioScience can be found here:

<http://www.atlanticfishhabitat.org/Documents/Species%20Habitat%20Matrix%20Summary%20Report.pdf>

<https://academic.oup.com/bioscience/article/66/4/274/2464081/The-Importance-of-Benthic-Habitats-for-Coastal>



**Steering Committee:** The steering committee will be comprised of experts from the major habitat conservation, restoration, and science partners in the region, and its coordination will be supported by staff from the Council. Members<sup>5</sup> should include:

Mid-Atlantic Fishery Management Council (Chair)  
Atlantic States Marine Fisheries Commission  
Atlantic Coast Fish Habitat Partnership  
Monmouth University  
National Fish Habitat Partnership  
New England Fishery Management Council  
NOAA Fisheries Offices of Habitat Conservation (Headquarters and Region)  
NOAA Fisheries Offices of Science and Technology (Ecosystems and Monitoring)  
NOAA Northeast Fisheries Science Center  
NOAA NCCOS Marine Spatial Ecology Division  
The Nature Conservancy  
Other needed membership as identified by the steering committee

The steering committee will provide oversight for the regional habitat assessment. The committee will identify project team(s) that will develop a detailed regional work plan to be reviewed and approved by the steering committee. This plan will identify specific products and delivery dates, any financial commitments, and participant responsibilities in completing the regional assessment.

The project team(s) will carry out the work plan, providing updates and delivering the products to the steering committee, as well as all the involved partners.

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<sup>5</sup> Suggested membership – will depend on identification of member by agencies/entities.



## Mid-Atlantic Fishery Management Council

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Michael P. Luisi, Chairman | G. Warren Elliott, Vice Chairman  
Christopher M. Moore, Ph.D., Executive Director

# MEMORANDUM

**Date:** March 30, 2018  
**To:** Chris Moore  
**From:** Mary Sabo  
**Subject:** Magnuson-Stevens Reauthorization Update

On December 13, 2017, the House Natural Resources Committee marked up and ordered to be reported H.R. 200 (as amended), the “Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act.” H.R. 200 is the main House bill that would amend the Magnuson-Stevens Act (MSA). Behind this memo is a section-by-section analysis of the amended bill prepared by Dave Whaley, legislative consultant to the Council Coordination Committee (CCC). The amended version of H.R. 200 (not including minor Committee amendments) is available at [https://naturalresources.house.gov/uploadedfiles/hr\\_200\\_ans\\_young\\_002.pdf](https://naturalresources.house.gov/uploadedfiles/hr_200_ans_young_002.pdf).

On February 28, 2018 the U.S. Senate Committee on Commerce, Science, and Transportation Committee met during an Executive Session and voted to advance S. 1520, “The Modernizing Recreational Fisheries Management Act,” to the Senate floor. The full text of S. 1520 is available at <https://www.congress.gov/115/bills/s1520/BILLS-115s1520is.pdf>.

The CCC has been asked by Congressman Don Young to provide comments on H.R. 200 as amended. The CCC’s legislative working group is developing a draft letter for consideration at the May 2018 CCC meeting.

Additional information and resources related to MSA reauthorization are available on the joint fishery management council website at <http://www.fisherycouncils.org/msa-reauthorization/>.

**H.R. 200 - The “Strengthening Fishing Communities  
and Increasing Flexibility in Fisheries Management Act”**

**Sponsor – Congressman Young (R-Alaska)**

**Introduced on January 3, 2017**

(Section-by-section of the bill as amended and ordered reported by the  
House Natural Resources Committee on December 13, 2017)

**Section 1 – Short Title.**

**Section 2 – Table of Contents.**

**Section 3 – Definitions.** This section clarifies that terms used in the bill have the same meaning as those terms are defined in the Magnuson-Stevens Fishery Conservation and Management Act.

**Section 4 – References.** This section clarifies that unless otherwise specified, the amendments made by the bill are made to the Magnuson-Stevens Fishery Conservation and Management Act.

**Section 101 – References.** This section clarifies that unless otherwise specified, the amendments made by the bill are made to the Magnuson-Stevens Fishery Conservation and Management Act.

**Section 102 – Amendments to Findings.** This section would amend two findings to insert “cultural well-being” to finding #1, and to add “traditional way of life” to finding #10.

**Section 103 – Amendments to Definitions.** This section would amend the definition of “bycatch” to remove the words “management program” at the end of the definition. This section would add a definition of “depleted” and would modify the existing definitions (34) of “overfishing” and “overfished” to clarify that the definition for the term “overfishing” means “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce maximum sustainable yield on a continuing basis.”

This section defines “subsistence fishing”, “family”, and “barter”.

This section would replace the term “overfished” with the term “depleted” throughout the Act.

This section would require the Secretary when issuing the annual report on the status of fisheries note if a stock was “depleted” as a result of something other than fishing.

This section would also require that the report state, for each fishery identified as depleted, whether the fishery is a target of directed fishing.

**Section 104 – Authorization of Appropriations.** This section would reauthorize the Act for five years beginning in Fiscal Year 2018 at the currently authorized level.

**Section 201 – Definitions.** This section would define “appropriate committees of Congress” to mean the Senate Commerce, Science, and Transportation Committee and the House Natural Resources Committee.

This section would define “limited access privilege program” and “mixed-use fishery”.

**Section 202 – Process for Allocation Review for South Atlantic and Gulf of Mexico Mixed-Use Fisheries.**

This section would require the Secretary, within 60 days of the date of the enactment of this legislation, to contract with the National Academy of Sciences (NAS) to conduct a study of the mixed-use fisheries of the South Atlantic and Gulf of Mexico: to provide guidance to each of the applicable Councils (South Atlantic and Gulf of Mexico) on criteria that could be used for allocating fishing privileges (including the consideration of the conservation and socioeconomic benefits of each sector of the fishery) in a fishery management plan; to identify sources of information that could support the use of such criteria in allocation decisions; to develop procedures for allocation reviews and potential adjustments in allocations; and require that the NAS to consider the ecological, economic and social factors relevant to each sector of the mixed-use fishery including – fairness and equitability of current allocations, percent utilization of available allocations by each sector, consumer and public access to the resource, and the application of economic models for estimating the direct and indirect value-added contributions of commercial and recreational fishing industry market sectors throughout the chain of custody.

This section would require the NAS to report back to the Secretary within one year of the contract being awarded.

This section would require the applicable Councils (South Atlantic and Gulf of Mexico Councils) to perform – within 2 years – a review of allocations among the commercial and recreational sectors in all mixed-use fisheries within their jurisdiction and perform a similar review every 5 years thereafter. This section would require the Councils, in conducting the reviews, to consider in each allocation decision the conservation and socioeconomic benefits the commercial fishing sector and the recreational fishing sector.

**Section 203 – Alternative Fishery Management Measures.** This section would allow Councils to use alternative fishery management measures in a recreational fishery or for the recreational component of a mixed-use fishery including the use of extraction rates, fishing mortality targets, and harvest control rules in developing fishery management plans, plan amendments, or proposed regulations.

**Section 204 – Modifications to the Annual Catch Limit Requirement.** This section would allow a Council, after notifying the Secretary, to maintain the current annual catch limit for a stock of fish until a peer-reviewed stock survey and stock assessment are conducted and the results are considered by the Council and its SSC for fisheries for which: the total allowable catch limit is 25 percent or more below the overfishing limit; a peer-reviewed stock survey and stock assessment have not been performed during the preceding 5 years; and the stock is not subject to overfishing. *(Note: This appears to be the new criteria for a “data-poor” fishery.)*

This section would allow Councils to consider changes in the ecosystem and the economic needs of the fishing communities when setting Annual Catch Limits (ACLs). This allows flexibility but does not allow Councils to set an ACL at a level that allows overfishing.

This section would provide an exception to the requirement that Councils set an ACL for “ecosystem component species” or for those stocks of fish with a life cycle of approximately 1 year as long as the Secretary has determine the fishery is not subject to overfishing. This section would also provide an exemption to the ACL requirement for a stock for which more than half of a single year class will

complete their life cycle in less than 18 months and for which fishing mortality will have little impact on the stock.

This section would allow Councils, when setting ACLs, take into account management measures under international agreements in which the U.S. participates and, in the case of an annual catch limit developed by a Council for a species, may take into account fishing activities for that species outside the U.S. EEZ and the life-history characteristics of the species that are not subject to the jurisdiction of the Council.

This section would provide an exemption to the ACL requirement if fishery management activities by another country outside the US EEZ may hinder conservation efforts by US fishermen for a fish species for which recruitment, distribution, life history, of fishing activities are transboundary and for which no informal transboundary agreements are in effect. In this case, if an annual catch limit is developed by a Council for the species, the ACL shall take into account fishing for the species outside the U.S. EEZ that is not subject to the jurisdiction of the Council.

This section would allow Councils to establish ACLs for multi-species stock complexes and allow Councils to set ACLs for up to a three year period.

This section would define the term “ecosystem component species” to mean those stocks of fish that are not targeted and are caught incidentally in a fishery as long as that stock of fish is not subject to overfishing, is not approaching a condition of being depleted, and is not likely to become subject to overfishing or depleted in the absence of conservation and management measures.

This section would clarify that noting in this subsection is to be construed to provide an exemption from the National Standards in the Act.

This section would amend section 304 to require the Secretary, within 2 years of a notification from a Council of a data-poor stock, complete a peer-reviewed stock survey and stock assessment of the applicable stock and transmit the results of the survey and assessment to the Council.

**Section 205 – Limitation on Future Catch Share Programs.** This section would define the term “catch share” and create a pilot program for four Councils - the New England, Mid-Atlantic, South Atlantic, and Gulf of Mexico Councils - which would prohibit those Councils from submitting and prohibit the Secretary from approving or implementing any new catch share program from those Councils or under a secretarial plan or amendment unless the final program has been approved in a referendum by a majority of the permit holders eligible to participate in the fishery.

This section would clarify that for multispecies permits in the Gulf of Mexico, any permit holder with landings within the last five years from within the sector being considered for the catch share program and who is still active in the fishery shall be eligible to participate in the referendum.

This section would clarify that if a referendum fails, it may be revised and submitted in a subsequent referendum.

This section would allow the Secretary, at the request of the New England Council, to include crew members who derive a significant portion of their livelihood from fishing to participate in a referendum for any fishery within that Council’s jurisdiction.

This section would also require that prior to the referendum, the Secretary must provide all eligible permit holders with a copy of the proposed program, an estimate of the costs of the program (including the costs to participants), an estimate of the amount of fish or percentage of the quota each permit holder would be allocated, and information on the schedule, procedures and eligibility criteria for the referendum.

This section defines “permit holder eligible to participate” in a referendum as a permit holder who has fished in at least 3 of the 5 years preceding the referendum unless sickness, injury or other unavoidable hardship prevented the permit holder from fishing.

This section would clarify that the Secretary may not implement any catch share program for any fishery managed exclusively by the Secretary unless first petitioned by a majority of the permit holders eligible to participate in the fishery.

This section clarifies that the requirement for the referendum does not apply to any catch share program that is submitted to or proposed by the Secretary before the date of enactment of the bill.

This section would require the Secretary to issue regulations and provide for public comment on the referendum prior to conducting any referendum.

**Section 206- Study of Limited Access Privilege Programs for Mixed-Use Fisheries.** This section would require the Secretary to enter into an agreement with the Ocean Studies Board of the National Academies of Sciences, Engineering, and Medicine to study the use of limited access privilege programs in mixed-use fisheries. The study would: identify any inequities caused by a limited access privilege program; recommend policies to address any identified inequities; identify and recommend different factors and information to mitigate any identified inequities that should be considered when designing, establishing or maintaining a limited access privilege program in a mixed-use fishery; and submit the report including recommendations to the appropriate committees of Congress.

This section would place a moratorium on the submission and approval of a limited access privilege program for a mixed-use fishery until the report is submitted. This moratorium does not restrict a Council from submitting and does not prevent the Secretary from approving a limited access system or limited access privilege program if the program was part of a pending fishery management plan or plan amendment prior to the enactment of this legislation.

This section would require that if a Council submits a limited access privilege program under the exemption to the moratorium described above, the Council must, upon the issuance of the report, review and, to the extent practicable, revise the program to be consistent with the recommendations of the report or any subsequent statutory or regulatory requirements designed to implement the recommendations of the report.

This section clarifies that nothing in this section may be construed to affect a limited access privilege program approved by the Secretary prior to the date of enactment of this legislation.

**Section 207 – Cooperative Data Collection.** This section would require the Secretary – within 1 year – to develop, in consultation with the Councils and the Marine Fisheries Commissions a report to Congress on facilitating greater incorporation of data, analysis, stock assessments and surveys from State agencies and non-governmental sources into fishery management decisions. This section also includes a list of

entities considered to be non-governmental sources to include fishermen, fishing communities, universities, and research and philanthropic institutions.

In developing the report, the Secretary would be required to identify types of data and analysis, especially concerning recreational fishing, that could be reliably be used for the purposes of the Act as a basis for conservation and management measures. The Secretary would also be required to provide specific recommendations for collecting data and performing analyses identified as necessary to reduce uncertainty and improve the accuracy of future stock assessments and including whether such data and analyses could be provided by non-governmental sources.

The Secretary is also required to develop and publish guidelines for improving data collection and analysis within one year of the date of the enactment of this legislation.

The Secretary would also be required to take into consideration and, to the extent feasible, implement the recommendations of the NAS report titled “Review of the Marine Recreational Information Program (2017). The Secretary would be required to prioritize the evaluation of electronic data collection, including smartphone applications, electronic diaries for prospective data collection and internet website options.

The Secretary would be required to evaluate whether the design of MRIP for the purposes of stock assessments and determination of stock management reference points is compatible with the needs of in-season management of annual catch limits.

The Secretary would be required, if MRIP is incompatible with the needs of in-season management of annual catch limits, determine an alternative method for in-season management.

**Section 208 – Recreational Fishing Data.** This section would require the Secretary to establish partnerships with States to develop best practices for implementing State recreational fisheries programs.

This section would require the Secretary to develop guidance, in cooperation with the States, that detail best practices for administering State programs and to provide the guidance to the States.

**Section 209 – Miscellaneous Amendments Relating to Fishery Management Councils.** This section would add one voting seat to the New England Council to provide a liaison – and require that this additional seat be a current member of the Mid-Atlantic Council - to represent the interests of fisheries under the jurisdiction of the Mid-Atlantic Council and add one voting seat to the Mid-Atlantic Council to provide a liaison – and require that this additional seat be a current member of the New England Council - to represent the interests of fisheries under the jurisdiction of the New England Council.

In addition, this section would add subsistence fishing as a qualification that could be required of Council appointees (to be individuals who are knowledgeable regarding the conservation and management of commercial, recreational, or subsistence fisheries). In addition, the amendment would amend the purposes section of the Act to add the promotion of subsistence fishing as a purpose of the Act (it is a purpose of the Act “to promote domestic commercial, recreational, and subsistence fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing”).

This section would prohibit the Secretary of Commerce from counting red snapper mortality that is a result of the removal of offshore oil rigs against the total allowable catch and prohibits the Secretary from counting those fish toward the quota for U.S. fishermen for the purposes of closing the fishery when the quota has been reached.

This section would prohibit the Secretary of Commerce from counting any fish seized from a foreign vessel engaging in illegal fishing in the U.S. EEZ against the total allowable catch for U.S. fishermen.

**Section 301 – Healthy Fisheries Through Better Science.** This section would add a definition of “stock assessment” to the Act.

This section would require the Secretary to develop and publish in the Federal Register a plan to conduct stock assessments for all stocks of fish under a fishery management plan and use the same schedule as is already required for the strategic plan.

The plan must establish a schedule for updating stock assessments – for each stock of fish for which a stock assessment has already been conducted - that is reasonable based on the biology and characteristics of the stock. Subject to the availability of appropriations, these new stock assessments or update of the most recent stock assessment must be completed every five years or within a time period specified and justified by the Secretary.

For each stock of fish for which a stock assessment has not been conducted, the plan must establish a schedule for conducting an initial stock assessment that is reasonable given the biology and characteristics of the stock and, subject to the availability of appropriations, the Secretary would be required to complete the initial stock assessment within 3 years after the plan is published unless a different time period is specified and justified by the Secretary.

The plan must also identify data and analysis, especially concerning recreational fishing, that if available would reduce uncertainty and improve the accuracy of future stock assessments and whether such data could be provided by non-governmental sources to the extent that the use of such data would be consistent with the requirements of the National Standards to base conservation and management measures on the best scientific information available.

If the Secretary determines that a stock assessment is not required for a stock of fish, the Secretary must justify that determination in the Federal Register.

The Secretary would be required to issue the first stock assessment under the plan within 2 years of the date of the enactment of this legislation.

**Section 302 – Transparency and Public Process.** This section would require Scientific and Statistical Committees (SSCs) of the Councils to develop the scientific advice that they provide to the Councils in a transparent manner and to allow for public involvement in the process.

This section would also require that each Council, to the extent practicable, provide a Webcast, an audio recording or a live broadcast of each Council meeting and for the Council Coordination Committee meetings. In addition, the bill would require audio, video, searchable audio or written transcript for each Council and SSC meeting on the Council’s website not more than 30 days after the conclusion of the meeting. The bill would require that the Secretary maintain these audios, videos and transcripts and make them available to the public.



This section would require that each fishery management plan, plan amendment, or proposed regulation contain a fishery impact statement which are required to assess, specify, and analyze the likely effects and impacts of the proposed action on the quality of the human environment.

This section would require that each fishery impact statement describe: the purpose of the proposed action; the environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should the proposed action be implemented; a reasonable range of alternatives to the proposed action; the relationship between short-term use of the fishery resources and the enhancement of long-term productivity; the cumulative conservation and management effects; and the economic and social impacts of the proposed action on participants in the fisheries affected by the proposed action, on fishing communities affected by the proposed action, on participants in fisheries conducted in adjacent areas, and on the safety of human life at sea.

This section would require that a “substantially complete” fishery impact statement be available not less than 14 days before the beginning of the meeting at which the Council makes its final decision on the proposal. The bill would require that the availability of this fishery impact statement be announced by the same methods currently used by Councils to disseminate public information and that relevant government agencies and the public be invited to comment on the fishery impact statement.

This section would require that a completed fishery impact statement accompany the transmittal of a fishery plan or plan amendment as well as the transmittal of proposed regulations.

This section would require Councils, subject to approval by the Secretary, to establish criteria to determine actions or classes of actions of minor significance for which the preparation of a fishery impact statement is unnecessary and for which a categorical exception to the fishery impact statement may allow an exclusion from this requirement.

This section would require the Councils, subject to the approval of the Secretary, prepare procedures for compliance with the fishery impact statement requirement that provide for timely, clear, and concise analysis that will be useful to decision makers and the public as well as reducing extraneous paperwork. These procedures may include using Council meetings to determine the scope of issues to be addressed, may include the integration of the fishery impact statement development process with preliminary and final Council decisionmaking, and may include providing scientific, technical, and legal advice at an early stage of development of the fishery impact statement.

This section would require the Secretary of Commerce, when reviewing plans or plan amendments, to evaluate the adequacy of the accompanying fishery impact statement for fully considering the environmental impacts of implementing the plan or plan amendment.

This section would require the Secretary, upon the transmittal of proposed regulations by a Council, to immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan or plan amendment and an evaluation as to whether the accompanying fishery impact statement is a basis for fully considering the environmental impacts of implementing the proposed regulations. The Secretary would be required to make a determination within 15 days of initiating any such evaluation.

**Section 303 – Flexibility in Rebuilding Fish Stocks.** This section would remove the term “possible” and replace it with “practicable” in the requirement in section 304 of the Act that a rebuilding period “be as

short as possible". This section would remove the language requiring a 10-year time frame for rebuilding overfished/depleted fisheries and replace it with a requirement that the rebuilding timeframe be the time it would take for the fishery to rebuild without any fishing occurring plus one mean generation time except in the case that: the biology of the stock, other environmental conditions, or management measures under an international agreement dictate otherwise; the Secretary determines that the cause of the stock being overfished/depleted is outside the jurisdiction of the Council or the rebuilding program cannot be effective only by limiting fishing activities; the Secretary determines that one or more components of a mixed-stock fishery is depleted but cannot be rebuilt within the timeframe without significant economic harm to the fishery or cannot be rebuilt without causing another component of the mixed-stock fishery to approach a depleted status; the Secretary determines that recruitment, distribution, or life history of or fishing activities for are affected by informal transboundary agreements under which management activities outside the EEZ by another country may hinder conservation and management efforts by the US; and the Secretary determines that the stock has been affected by unusual events that make rebuilding within the specified time period improbable without significant economic harm to fishing communities.

This section would allow Councils to take into account environmental conditions and predator/prey relationships when developing rebuilding plans.

This section would also require that the fishery management plan for any fishery that is considered overfished/depleted must specify a schedule for reviewing the rebuilding targets, evaluating environmental impacts on rebuilding progress, and evaluating the progress that is being made toward reaching the rebuilding targets.

This section would allow a fishery management plan for any fishery that is considered overfished/depleted to use alternative rebuilding strategies including harvest control rules and fishing mortality rate targets.

This section would allow a Council to terminate any rebuilding plan for a fishery that was initially determined to be overfished/depleted and then found not to be overfished/depleted within two years or within 90 days after the completion of the next stock assessment.

Finally, current law allows the Secretary to implement emergency interim measures for fisheries in which overfishing is taking place. If the action is taken for a fishery that is under a fishery management plan, the interim measure may only remain in place for 180 days; however, the measures may then be extended for an additional 186 days (with the extension, this allows the Secretary to implement interim measures for a year and a day). This section would modify this authority to allow the Secretary to implement the interim measures for one year with the ability to extend for a second year. Current law allows a Council to take up to two years to prepare and implement a fishery management plan or plan amendment to address a fishery that is overfished yet current law only allows interim measure to be implemented for one year (assuming the extension is granted). This provision would allow the interim measure authority to be consistent with the time period allowed for a Council to prepare and implement a rebuilding plan for a fishery identified overfished.

**Section 304 – Exempted Fishing Permits.** This section would require the Secretary, prior to an exempted fishing permit to be approved or issued, to: direct a joint peer review of the EFP application by the appropriate regional fisheries science center and State marine fisheries commission; certify that

the Council or federal agency has determined that the fishing activity to be conducted under the EFP will not negatively impact any conservation or management objectives in existing FMPs; certify the Council or federal agency has determined that the social and economic impacts and loss of fishing opportunities on all participants in each sector of the fishery will be minimal; certify the Council or federal agency has determined that the information collected under the EFP will have a positive and direct impact on conservation and management; and certify that the Council or federal agency has determined the Governor of each coastal state potentially impacted by the EFP has been consulted on the fishing activity to be conducted under the EFP.

This section would prohibit the Secretary from issuing an EFP if the EFP establishes a limited access system or establishes a catch share program; however, this prohibition would not apply to EFPs approved prior to the date of the enactment of this legislation.

**Section 305 – Cooperative Research and Management Program.** This section would amend Section 318 of the Act to require the Secretary, within one year of the enactment of this Act and after consulting with the Councils, to publish a plan for implementing and conducting a cooperative research and management program. This section would require that the plan identify and describe critical regional fishery management and research needs, possible projects to address the identified needs, and the estimated costs for such projects.

This section would require that the plan be updated every five years and each update must include a description of projects that were funded during the previous five years and which management and research needs were addressed by those projects.

This section would also amend current language to give priority to projects that use fishing vessels or acoustic or other marine technology, expand the use of electronic catch reporting programs and technology, and improve monitoring and observer coverage through the expanded use of electronic monitoring devices.

**Section 306 – Gulf of Mexico Fisheries Cooperative Research and Red Snapper Management.** This section would strike section 407 of the Act.

This section would require the Secretary to include Gulf State recreational surveys that are certified by the Secretary and include other data related to red snapper gathered by the Gulf States Marine Fisheries Commission, non-governmental organizations and other non-governmental sources (such as universities and research institutions) in establishing the acceptable biological catch and total allowable catch for Gulf of Mexico red snapper.

This section would allow a Gulf State that conducts a recreational fisheries survey to submit the survey to the Secretary for certification. The Secretary would be required to make a certification or a denial of the certification for any submitted survey within six months of the survey being submitted. If the Secretary does not make a certification or a denial, the survey will be deemed to be certified.

If the Secretary denies the certification of a survey, the Secretary would be required – within 60 days - to provide the Gulf State a proposal for modifications to the survey. The proposed modifications must: be specific to the survey and may not be construed to apply to any other submitted survey; require revisions to the fewest possible provisions of the survey; and may not unduly burden the ability of the Gulf State to revise the survey.

This section would allow a Gulf State which had a survey denied certification to modify the survey and submit the modified survey for certification. This section would require the Secretary to certify or deny certification of the modified survey within 30 days of the modified survey being submitted. If the Secretary does not act on the modified survey within the 30 days, the survey will be deemed certified.

This section would define “Gulf State” and “red snapper”.

This section would require the Secretary, acting through the NMFS Regional Administrator of the Southeast Region to develop a schedule of stock surveys and stock assessments for the Gulf of Mexico region and the Southeast region for the 5-year period beginning on the date of enactment and for every 5-year period thereafter giving priority to those stocks that are commercially or recreationally important and ensuring that each important stock is surveyed at least once every five years. The Secretary is required to direct the Science Center Director of the Southeast region to implement the schedule of stock surveys and stock assessments.

This section also would require that the Science Center Director of the Southeast region ensure that the information gathered as a result of research funded through the RESTORE Act be incorporated as soon as possible into any stock assessments conducted after the date of enactment.

This section would extend state management out to 9 nautical miles for the Gulf of Mexico red snapper recreational sector of the fishery.

**Section 307 – Ensuring Consistent Management for Fisheries Throughout Their Range.** This section would clarify that the Magnuson-Stevens Fishery Conservation and Management Act would be the controlling fishery management authority in the case of any conflict within a national marine sanctuary or an area designated under the Antiquities Act of 1906.

This section would require that if any restrictions on the management of fish in the exclusive economic zone are required to implement a recovery plan under the Endangered Species Act, the restrictions would be implemented under the authorities, processes, and timelines of the Magnuson-Stevens Fishery Conservation and Management Act.

**Section 401 – Estimation of Cost of Recovery from Fishery Resource Disaster.** This section would require the Secretary to publish the estimated cost of recovery from a fishery resource disaster within 30 days from the time the Secretary makes the disaster determination.

**Section 402 – Deadline for Action on Request by Governor for Determination Regarding Fishery Resource Disaster.** This section would require the Secretary of Commerce to make a decision regarding a disaster assistance request - submitted under the provisions of section 312(a) of the Magnuson-Stevens Act - within 90 days of receiving an estimate of the economic impact of the fishery resource disaster from the entity seeking the disaster declaration.

**Section 403 – North Pacific Fishery Management Clarification.** This section would remove a specific date that is currently in the Act regarding State management of vessels in the North Pacific region.

**Section 404 – Limitation on Harvest in North Pacific Directed Pollock Fishery.** This section would allow the North Pacific Council to change the harvest limitation under the American Fisheries Act for entities engaged in the directed pollock fishery as long as that percentage does not exceed 24 percent.

**Section 405 – Arctic Community Development Quota.** This section would amend section 313 of the Act to require the North Pacific Fishery Management Council, if the Council issues a fishery management plan for the EEZ in the Arctic Ocean or an amendment to the Fishery Management Plan for Fish Resources of the Arctic Management Area that makes fish available to commercial fishing and establishes a sustainable harvest level for any part of that zone, to set aside no less than 10 percent of the total allowable catch for a community development quota for coastal villages located north and east of the Bering Strait.

**Section 406 – Reallocation of Certain Unused Harvest Allocation.** This section would require the Regional Administrator, beginning on January 1, 2018 and annually thereafter, to provide the allocation provided in section 803 of the Consolidated Appropriations Act (P.L. 108-199) to the Aleut Corporation for the purposes of economic development in Adak, Alaska under certain circumstances.

Prior to making this allocation, the Regional Director must receive written notification that the allocation holder specified in P.L. 108-199 will not harvest some or all of the Aleutian Islands directed pollock quota.

In allocating this quota to the Aleut Corporation, the Regional Administrator must reallocate the projected unused quota if the allocation does not exceed the total allowable catch for the Bering Sea subarea or if the allocation exceeds the total allowable catch for the Bering Sea subarea, reallocate a portion of the allocation up to the total allowable catch.

This section would mandate that the allocation holder specified in P.L. 108-199 retain control of the allocation including such portions of the allocation that may be reallocated pursuant to this section and that the allocations made under section 206(b) of the American Fisheries Act apply to the Bering Sea portion of the directed pollock fishery and not to the allocation holder specified in P.L. 108-199.

This section would require the Aleut Corporation to provide written consent for other vessels to take or process the allocation and the written consent must be on the vessel.

This section would require the North Pacific Fishery Management Council, in consultation with the National Marine Fisheries Service (NMFS), to modify all applicable regulations and management plans so that the allocation holder specified in P.L. 108-199 may harvest the reallocated Aleutian Islands directed pollock fishery in the Bering Sea subarea as soon as possible.

This section would require NMFS, in consultation with the North Pacific Fishery Management Council, to manage the Aleutian Islands directed pollock fishery to ensure compliance with the implemented statute and with the annual harvest specifications.

This section would clarify that the taking or processing of any part of the allocation made by section 803 of P.L. 108-199 and reallocated under this section shall be considered violations of section 307 of the Magnuson-Stevens Fishery Conservation and Management Act and subject to the penalties and sanctions under section 308 of that Act. In addition, any fish harvested or processed under such taking or possessing shall be subject to forfeiture.

**Section 407 – Prohibition on Shark Feeding Off Coast of Florida.** This section would amend section 307 of the Act to make it unlawful for any diver to engage in shark feeding in covered waters and for any person to operate a vessel for hire for the purpose of carrying a passenger to a site if the person knew or

should have known the passenger intended to be a diver who engaged in shark feeding in covered waters or engaged in observing shark feeding in covered waters.

This section defines “covered waters”, “diver”, and “shark feeding”.

This section would clarify that this provision does not apply to shark feeding conducted by a research institution, university, or government agency for research purposes or for the purpose of harvesting sharks.

**Section 408 – Restoration of Historically Freshwater Environment.** This section would amend the definition of “essential fish habitat” so that it would now read “The term ‘essential fish habitat’ means those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity, *except that such term shall not include any area previously covered by land or a fresh water environment in a State where the average annual land loss of such State during the 20 years before the date of enactment of the Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act exceeds 10 square miles.*”



## Mid-Atlantic Fishery Management Council

800 North State Street, Suite 201, Dover, DE 19901  
Phone: 302-674-2331 | FAX: 302-674-5399 | [www.mafmc.org](http://www.mafmc.org)  
Michael P. Luisi, Chairman | G. Warren Elliott, Vice Chairman  
Christopher M. Moore, Ph.D., Executive Director

March 19, 2018

The Honorable Wilbur Ross  
Secretary  
U.S. Department of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230

Dear Secretary Ross,

Please accept these comments from the Mid-Atlantic Fishery Management Council on wind energy development in the Northeast region. The Council manages more than 64 marine species with 7 fishery management plans (FMPs)<sup>1</sup> in federal waters and is composed of members from the coastal states of New York to North Carolina (including Pennsylvania). Marine fisheries are profoundly important to the social and economic well-being of Mid-Atlantic communities and provide numerous benefits to the nation, including domestic food security. In 2015, the commercial seafood industry in the Mid-Atlantic region supported 100,954 jobs, \$13.9 billion in sales, \$3.2 billion in income, and \$5.1 billion in value added impacts across the Mid-Atlantic.<sup>2</sup> Commercial fishermen landed 648 million pounds of finfish and shellfish, earning \$512 million in landings revenue, while 2.0 million recreational anglers took 12.4 million fishing trips and spent nearly \$3.5 billion on trip and equipment expenditures.<sup>2</sup>

At its February meeting, the Council passed the following motion:

“Move to submit a letter to the Secretaries of Interior and Commerce requesting that: (1) no new wind energy areas be sited, nor project designs finalized, until the study is complete and fisheries impacts can be properly evaluated and (2) request that NOAA [National Oceanic and Atmospheric Administration] adopt a more active role in working with BOEM [Bureau of Ocean Energy Management] to effectively site future wind energy projects.”

The study noted in the motion refers to the work that the Council staff are doing with the NOAA Fisheries “Wind Team” to spatially document the fisheries value of the Northeast US continental shelf

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<sup>1</sup> Fourteen species are directly managed with specific FMPs. These include summer flounder, scup, black sea bass, Atlantic bluefish, Atlantic mackerel, *Illex* and longfin squids, butterfly, Atlantic surfclams, ocean quahogs, golden and blueline tilefish, spiny dogfish (joint with the New England Council), and monkfish (joint with the New England Council). In addition, more than 50 forage species are managed as “ecosystem components” in all seven FMPs. The Council sets possession and landing limits to prevent the expansion of directed fisheries on these forage species in the Mid-Atlantic.

<sup>2</sup> National Marine Fisheries Service. 2017. Fisheries Economics of the United States, 2015. U.S. Dept. Commerce, NOAA Tech. Memo. NMFS-F/SPO-170, 247p. Available at: [http://www.st.nmfs.noaa.gov/Assets/economics/publications/FEUS/FEUS-2015/Report-Chapters/FEUS%202015-AllChapters\\_Final.pdf](http://www.st.nmfs.noaa.gov/Assets/economics/publications/FEUS/FEUS-2015/Report-Chapters/FEUS%202015-AllChapters_Final.pdf).

and identify key biological/ecological resources in our region. This information is being developed during 2018 with the intent of allowing NOAA Fisheries and the Council and its stakeholders to more effectively engage with BOEM on wind energy planning discussions in the Northeast region.

The Council supports policies for US energy development including wind energy development and operations that will sustain the health of marine ecosystems and fisheries resources while minimizing the risks to the marine environment and fisheries. It is critical that the best information be used to identify areas for wind leasing within our region.

The Council's Policy on Wind Energy (attached) should be considered with these comments and can also be found at: <http://www.mafmc.org/habitat/>.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "C Moore". The signature is written in a cursive, slightly slanted style.

Christopher M. Moore, Ph.D.  
Executive Director, Mid-Atlantic Fishery Management Council

cc: J. Coakley, W. Elliott, M. Luisi, C. Oliver





# MID-ATLANTIC

FISHERY MANAGEMENT COUNCIL

## PRESS RELEASE

FOR IMMEDIATE RELEASE  
March 13, 2018

PRESS CONTACT: Mary Sabo  
(302) 518-1143

### Mid-Atlantic Council Seeking Applicants for Advisory Panels

*Applications Due by April 20, 2018*

The Mid-Atlantic Fishery Management Council is soliciting applications from qualified individuals to serve on eight advisory panels. Advisory panels provide information and recommendations to the Council during the development of fishery management plans, amendments, specifications, and management measures. One of the chief responsibilities of advisory panels is the development of annual Fishery Performance Reports. These reports provide the Council and SSC with information about the factors that influenced fishing effort and catch within each fishery during the previous year.

Advisory panels are composed of individuals with diverse experience and interest in Mid-Atlantic fisheries. Members include commercial fishermen, recreational anglers, for-hire operators, dealers, scientists, environmentalists, and other members of the interested public. Most advisory panels meet 1-2 times per year. Members are compensated for travel and per diem expenses for all meetings. Individuals who are appointed to advisory panels serve for three-year terms. **All current advisory panel members must reapply in order to be considered for reappointment.**

The Council is accepting applications for the following advisory panels:

- Summer Flounder, Scup, and Black Sea Bass
- Mackerel, Squid, and Butterfish
- Surfclam and Ocean Quahog
- Tilefish
- Bluefish
- Ecosystem and Ocean Planning
- River Herring and Shad
- Dogfish (Jointly managed with New England Council)

#### ***How to Apply***

Anyone interested in serving on an advisory panel may apply online or download an application at [www.mafmc.org/forms/advisory-panel-application](http://www.mafmc.org/forms/advisory-panel-application). Applications can also be obtained by calling the Council office at (877) 446-2362.

Completed applications must be received by **Friday, April 20, 2018**.

If you have questions or need additional information, please contact Mary Sabo at (302) 518-1143, [msabo@mafmc.org](mailto:msabo@mafmc.org).