

April 10, 2019

Melanie Carter
Independent Adjudicator

Dear Ms. Carter,

Thank you for your letter requesting clarification to sections of the objection submitted on behalf of The Nature Conservancy and the Chesapeake Bay Foundation. In order to respond to your request, we have provided the additional information as below.

Regarding Part 5 and the objection to conditions, Condition 1 calls on the Client Group to provide “evidence of the implementation of a harvest strategy” that does several things. Exactly such a harvest strategy is under development by the Atlantic States Marine Fisheries Commission (ASMFC). The condition is arbitrary in failing to acknowledge the existence of the ASMFC process and failing to require conformance to requirements that may arise from that process. The condition is also unreasonable given that the Client Group has actively opposed Virginia’s enactment of the ASMFC Atlantic Menhaden Fishery Management Plan¹. Looking at the Table of Conditions on page 250 of the Final Report², it appears as if the Milestones and Client Action Plan are part of the Condition, describing the progress of how the Client will meet the Condition. If indeed “the Client Action Plan is outside the jurisdiction of this ground of objection” as stipulated in your letter, then the Condition itself must be strengthened to ensure full implementation of a harvest strategy appropriate for Key-LTL species in the timeframe that has already been established by the management body (the ASMFC). We suggest the following changes (highlighted in red) to Condition 1:

The Client Group must provide evidence of the complete implementation of any management changes by the Commonwealth of Virginia, as required by the Interstate Fisheries Management Program Charter³ of Atlantic States Marine Fisheries Commission, of a harvest strategy that is designed to take into consideration the ecological role of Atlantic menhaden and is responsive to the state of the stock with respect to its role in the U.S. Northwest Atlantic ecosystem, at such time the harvest strategy is established by the ASMFC.

¹ <https://www.delmarvanow.com/story/news/local/virginia/2018/03/11/menhaden-fishery-harvest-limits-chesapeake/414082002/>

² Final Report and Determination - Omega Protein Corporation U.S. Atlantic menhaden purse seine <https://fisheries.msc.org/en/fisheries/omega-protein-corporation-u.s.-atlantic-menhaden-purse-seine/@@assessments>

³ Interstate Fisheries Management Program (ISFMP) Charter, Nov 2017, ASMFC, http://www.asmfc.org/files/pub/ISFMPCharter_Nov2017.pdf

Condition 2 calls on the Client Group to provide “evidence of implementation of well-defined harvest control rules.” Harvest control rules are adopted by ASMFC, and the states that comprise ASMFC are obligated to enact those rules (per ISFMP Charter referenced above). The condition is arbitrary in failing to acknowledge and require compliance with ASMFC rules AND state rules that Virginia is obligated to enact. The condition is also unreasonable given that the Client Group has actively opposed Virginia’s enactment of these rules (see Delmarva Now article cited on previous page).

The rationale for Condition 2 for PI 1.2.2 is that given the fact that Virginia has not codified Amendment 3 regulations into VA law, as required by the ISFMP Charter of the ASMFC, there is no reason to think that the Commonwealth would implement future harvest control rules and tools. The letter from ASMFC Executive Director, Robert Beal, included in the Final Report (p.258), highlights the need for states to implement ASMFC regulations:

“The CAP state the ERPs will be “adopted by the ASMFC” as a final step for meeting Conditions 1 and 2. However, the Commission’s “adoption” does not ensure the ERPs are full implemented by all jurisdictions along the Atlantic coast. The final step in ensuring there is a robust and precautionary harvest strategy for lower tropic level species important to the ecosystem, such as Atlantic menhaden, requires the full implementation and enforcement of new management measures by all jurisdictions. As a primary harvester of the resource, the cooperation of the Client is an important step in achieving full implementation.”

Also, the letter from the VA Governor’s office (p. 390 of the Final Report) states that Virginia is currently out of compliance.

Regarding the new information in section 7 of the objection form. In order to clarify our comments, we agree to submit these concerns under the scoring section in Part 6, Objection Pursuant to PD 2.7.2.3. The concerns are specific to the scoring on PI 3.1.3 for which the CAB incorrectly scored as meeting SG 100. During its review, the CAB only referenced actions by the ASMFC and incorrectly stated that, “... the menhaden fisheries operating in State water are managed in accordance with the same long-term objectives...” In doing this, the CAB made two significant errors: first, it referenced Amendment 2 to the Interstate Fishery Management Plan instead of Amendment 3 which is the most current update, and second, it failed to recognize Virginia’s lack of compliance by with the Chesapeake Harvest Cap contained in Amendment 3.

This error was compounded by the fact that the CAB did not uncover Omega Protein’s efforts to keep Virginia from adopting necessary updates to its fishery management plan to comply with Amendment 3 the Interstate Fishery Management Plan for Atlantic Management as adopted by the Atlantic States Marine Fisheries Commission in November 2017.

As detailed in our submission, Omega Protein, who holds approximately 80-percent of the coastwide quota, was strategically working to keep the Commonwealth from adopting the management plan that was adopted by ASMFC. It is important to note that the ASMFC process to develop and adopt Amendment 3 to the Interstate Fishery Management Plan included broad public engagement and comment process along the Atlantic Coast, during which the company had the opportunity to participate—and they did participate by providing public and written testimony. The CAB incorrectly classified Omega Protein’s actions in the Virginia General Assembly as participating in the management process, but at time, the Management Plan had already been finalized and needed to be codified into Virginia law. These actions are inconsistent with the MSC fisheries standard and more importantly the precautionary approach which is highlighted in this scoring section.

We find it completely unreasonable that the CAB could have in any way considered Omega Protein’s actions were consistent with MSC fisheries standard and especially the precautionary approach as the specific management measure that Omega Protein has objected to was developed specifically as a precautionary cap to protect the ecology of the Chesapeake Bay that serves as a primary nursery ground for menhaden and important predators of menhaden such as striped bass.⁴

The two articles that were attached to the original submission, and referenced^{5,6} here as well, indicate how over two legislative sessions Omega Protein worked to undermine adoption of an effective precautionary fishery management effort with the long-term objective to protect both the forage base and predator species in Chesapeake Bay. This specific long-term fishery management objective had been in place for over 10 years and had the wide support of member states and federal agencies of the Atlantic States Marine Fisheries Commission.

Whether ASMFC is currently acting to find Virginia out of compliance or not is irrelevant to the fact that the client who is currently seeking to have its fishery certified by the Marine Stewardship Council (MSC) has fought all efforts to bring the state in which its lands its quota into compliance with the most precautionary aspects of Amendment 3 to Interstate Fishery Management Plan for this species.

This problem is even more acute given the fact that two of the conditions proposed by the CAB require management action by ASMFC and then adoption of those management actions by the

⁴ ASMFC. Addendum III to the Amendment 1 to the Interstate Fishery Management Plan for Atlantic Menhaden. 2006.

⁵ Richmond Times Dispatch. https://www.richmond.com/news/virginia/government-politics/general-assembly/house-kills-fish-bill-does-virginia-risk-falling-out-of/article_b0a7f75f-f95f-582a-8556-7b2f4bd30806.html

⁶ WVTF. <https://www.wvtf.org/post/tiny-fish-causes-big-controversy-richmond#stream/0>

Commonwealth of Virginia. If MSC were to continue to look the other way as the CAB has done in the assessment case, not only the proposed conditions, but the entire Marine Stewardship Council certification of this fishery would be rendered meaningless.

Please feel to contact either of us if you need additional clarification.

Sincerely,



Kate Wilke
The Nature Conservancy



Chris Moore
Chesapeake Bay Foundation