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May 6, 2019

BY EMAIL:

USAtlanticMenhadenobjection@msc.org

Ms. Melanie Carter, Independent Adjudicator
c/o Marine Stewardship Council
1255 23rd Street, NW
Suite 275
Washington, DC 20037

**Re: Response of Omega Protein Corporation, Applicant for MSC Certification of
the U.S. Atlantic Menhaden Purse Seine Fishery, to Objections Raised**

Dear Ms. Carter:

This constitutes the response of Applicant Omega Protein Corporation to the two objections lodged against the Marine Stewardship Council's ("MSC") conditional certification of the Atlantic menhaden purse seine fishery. One set of objections was brought by the Theodore Roosevelt Conservation Partnership, Coastal Conservation Association, and the American Sportfishing Association (collectively, "TRCP"). The second set of objections was lodged by The Nature Conservancy and the Chesapeake Bay Foundation (collectively, "TNC"). As explained below and in the response from the certification assessment body ("CAB") which conducted the assessment, SAI Global ("SAI"), these objections are without merit and the Independent Adjudicator ("IA") should allow the certification to stand.

As part of our response, specifically to questions raised as to the adequacy of the legal framework governing the unit of certification ("UoC"), we have included a detailed summary of the applicable authorities. Also included, as Exhibit 1, is a list of factual misrepresentations which are rife in the objections and corrections of these misrepresentations. Many of these matters, such as the incorrect allegation that only the Commonwealth of Virginia allows the harvest of menhaden with purse seines, evidence Objectors' fundamental misunderstanding of the fishery, its governing authorities, and pertinent scientific information. Such misunderstandings should not be allowed to color these proceedings.

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We have endeavored to highlight materials that were before SAI and its assessment's peer reviewers during the process. Also provided are links to relevant materials and, where not readily available, we have attached such materials as further exhibits. Omega Protein appreciates the significant challenge the IA faces and stands ready to help resolve the issues raised in an expeditious and amicable manner.

I. Legal Framework

Because the Objectors focus much attention on the legal and regulatory framework, and allege supposed inadequacies therein, the Client provides the IA with a comprehensive review of the applicable governing authorities.¹ Whilst the statutory governance structure is relatively unique, given the United States' federal structure, the regulatory scheme in place is similar in substance and application to the Magnuson-Stevens Fisheries Conservation and Management Act, which governs fisheries management at the federal level in the U.S. Moreover, the MSC itself has already certified at least one fishery—Maine lobster—which, like Atlantic menhaden, is managed by the Atlantic States Marine Fisheries Commission (“ASMFC” or “Commission”) and governed under the exact same legal regime.

More specifically, the ASMFC's organic authorities, its processes, and the federal (not inter-state) enforcement the U.S. Congress overlaid on the Commission's functions are all relevant to understanding both the robust management system and contextualizing the current situation involving the Chesapeake Bay reduction fishery catch cap. As the Client will demonstrate, this dispute has not reached the point of irreconcilable impasse, with the ASFMC left powerless to take what it may consider to be constructive next steps.

Objectors omit two salient factual points. First, the ASMFC voted—nearly unanimously—in February 2019 to not invoke the applicable enforcement processes, in deference to the ongoing development of ecological references points for the Atlantic menhaden fishery and in light of Omega Protein's actual compliance. Indeed, contrary to the Virginia Governor's designee's representation (attached to the TNC Objection), the Commission has explicitly not found the Commonwealth out of compliance with management plan governing the menhaden fishery. As you will see, only the full Commission has the authority to designate a Member State out of compliance in any event.

¹ We note, however, here at the outset, that the CAB was well aware of these authorities during its review of the fishery. See SAI Global, Marine Stewardship Council Full Assessment, Public Comment Draft Report (“PCDR”) For: Omega Protein Corporation U.S. Atlantic menhaden purse seine, § 3.5.3, at 107-08 (Dec. 4, 2018) *see also id.* §§ 3.5.4, 3.5.5, 3.5.6, 3.5.7. As such, Objectors raise no new issues or provide any information not before SAI, and any related complaints based on the processes should fail.

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Second, as the Chairmen of the relevant Committees of the Virginia General Assembly² explained in correspondence with the ASMFC, Omega Protein's Atlantic menhaden catches in the Chesapeake Bay have not exceeded the Bay cap level of 51,000 metric tons ("mt") that is specified in Amendment 3 to the Interstate Fishery Management Plan for Atlantic Menhaden ("Amendment 3"). Nor, moreover, has either Omega Protein or the Commonwealth as a whole exceeded their respective allocations of coast-wide allowable menhaden catch. These facts are pertinent to a complete understanding of the matters at issue.

Omega Protein hopes the IA finds this summary helpful and will answer any questions which may arise.

A. The Atlantic States Marine Fisheries Compact and Implementing Rules

The Atlantic coastal states, from Maine to Florida, inclusive, established the Atlantic States Marine Fisheries Compact, which the U.S. Congress approved in 1942. *See* Pub. L. No. 77-539, 77th Cong., 2d Sess. (1942) ("Compact").³ The Compact was amended in 1950. *See* Pub. L. No. 87-721, 81st Cong., 2d Sess. (1950). It was created to assist compacting States in coordinating conservation and management of interstate coastal stocks of fish. Through such coordination, Compact participants seek to "promote the better utilization of the[se] fisheries ... by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause." Compact, Article 1.

In order to achieve this end, the Member States authorized the creation of a Commission, which is composed of three representatives from each compacting State, as well as a representative of the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("FWS"). Compact, Article III. Each compacting state's delegation is comprised of: (1) "the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources to which this compact pertains"; (2) a member of the state's legislature; and (3) "a citizen who shall have knowledge of the interest in the marine fisheries problem, to be appointed by the governor." *Id.*

The Commission "is a fact finding and deliberative body with the power to make recommendations to the Member States and to the Congress of the United States." Rules and Regulations of the Commission, Section 2. It is the role of the Commission to "recommend" to the governors and legislatures of the signatory States "legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard." Compact, Article IV. In

² These same leaders also wrote the MSC in support of the Client's application. *See* SAI Global, PCDR, at 250.

³ A copy of the Compact and other referenced documents governing the Commission may be found at <http://www.asmfc.org/about-us/guiding-documents>.

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addition, the Commission is empowered to “recommend” to the pertinent administrative agencies in the signatory States “the adoption of such regulations as it deems advisable.” *Id.*

Under the U.S. Constitution, Art. 1, § 10, cl. 3, and as explained in well-established case law, an interstate compact represents a contract among participating States in which each agrees to take certain – often politically difficult – actions in exchange for an agreement from other States to undertake similar activity. *C.T. Hellmuth & Assoc. v. Washington Metropolitan Transit Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976). A major benefit of the contractual bargain a compacting State gains is that another participating State may not pass any law which renders rights granted under a compact “any less valid and secure.” *Green v. Biddle*, 21 U.S. 1, 92-93 (1823). In the case of this Compact, the benefit of the bargain that each participating State derives is uniformity and consistency among the participating States’ fishery laws.

Although the Compact confers on the Commission the power to recommend fishery management measures applicable to compacting States, the Compact also provides that “[n]othing in this compact shall be construed to limit the power of any signatory state” Compact, Article IX. In this regard, the Compact also provides that each compacting State may renounce the Compact. Compact, Article XII. However, a State may not renounce the Compact unless it first has provided “six months’ notice in writing of [its] intention to withdraw from the [C]ompact to the other signatory states...” *Id.*

B. The Atlantic Coastal Fisheries Cooperative Management Act (1993)

In 1993, in order to further ensure consistency in in-shore Atlantic state fishery regulations, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (the “Act” or “ACFMCA”).⁴ See 16 U.S.C. §§ 5101-5108. Under the Act, Congress clarified and strengthened the compacting Member States’ obligations to implement coastal fishery management plans developed by the Commission. Indeed, the Act states that Member States “shall implement and enforce the measures of such plans within the time frame established in the plans.” *Id.* §5104(b)(1) (emphasis added). Moreover, the Act defines the terms “implement and enforce” used in Section 5104(b)(1) as “mean[ing] to enact and implement laws or regulations as required to conform with the provisions of a coastal fishery management plan” *Id.* § 5102(10).

The Act details its rationale for enhanced enforcement of Commission recommendations. It thus explains that, “[b]ecause no single governmental entity has exclusive management authority for Atlantic coastal fishery resources, harvesting of such resources is frequently subject

⁴ Enacted as Title VIII of the Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, 103rd Cong., 1st Sess., 107 STAT. 2419, 2449 (Dec. 20, 1993).

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to disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole.” *Id.* § 5101(a)(3). “The failure by one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of Atlantic coastal fisheries, and can discourage other States from fully implementing coastal fishery management plans.” *Id.* § (5). “It is in the national interest to provide for more effective Atlantic State fishery resource conservation and management.” *Id.* § (6).

Under ACFCMA, the Commission must “prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources.” *Id.* § 5104(a)(1). The Act also requires the Commission to “establish standards and procedures to govern the preparation of coastal fishery management plans,” and imposes both substantive requirements and administrative procedural mandates. *Id.* § (1) & (2). Affected States (*i.e.*, those with citizens that participate in the managed fishery) “shall implement and enforce the measures of such plan within the timeframe established in the plan.” *Id.* § (b)(1) (emphasis added). The Commission is further required to annually review each State’s compliance, and “report the result of the reviews to the” Secretaries of Commerce and the Interior. *Id.* § (c).

ACFCMA further provides an enforcement mechanism to be employed against a State that fails to implement “conservation” measures required to be adopted by the Commission. *See id.* §§ 5105 & 5106. Once the ASMFC formally invokes the ACFCMA non-compliance process, the Act states that “[w]ithin 30 days after receiving a notification from the Commission under section 5105(b) of this title and after review of the Commission’s determination of noncompliance, the [U.S.] Secretary [of Commerce] shall make a finding on - (1) whether the State in question has failed to carry out its responsibility under section 5104 of this title; and (2) if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question.” *Id.* § 5106(a).

If the Commerce Secretary determines that a State has failed to adopt required conservation regulations, he or she “shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State.” *Id.* § 5106(c)(1). The Act contains a detailed list of prohibited activities during such a moratorium, *id.* § (e), and these prohibitions are lifted only after the Secretary determines, upon notification by the Commission, that a State has adopted the conservation measures determined to be necessary. *Id.* § (c)(2).

Thus, while the ASMFC makes the initial determinations of noncompliance and compliance with the plans it is charged with developing, the final determinations are made by the federal authorities.

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C. The Interstate Fisheries Management Program (“ISFMP”) Charter

The Commission also developed the Interstate Fisheries Management Program Charter (“Charter”) to support its mission. Among other things, the Charter sets forth the procedural and substantive requirements for managing fishery resources, establishes scientific review panels, and allows for the creation of species-specific management boards.

As relevant here, and consistent with the requirements of ACFCMA, the Charter establishes standards for fishery management plans (“FMP”) and management measures. *See* Charter, Sec. Six. The Commission is required “to prevent overfishing and maintain over time, abundant, self-sustaining stocks of coastal fishery resources.” *Id.* (a)(1). “In cases where stocks have become depleted as a result of overfishing and/or other causes, such programs shall be designed to rebuild, restore, and subsequently maintain such stocks so as to assure their sustained availability in fishable abundance on a long-term basis.” *Id.* The Commission must base its decisions on “the best scientific information available.” *Id.*

Each fishery management plan, or amendment thereto, must contain “a detailed statement on a State-by-State basis of each specific regulatory, monitoring, and research requirement that each State must implement in order to be in compliance with the plan.” *Id.* (b)(iv)(A). When adopting new conservation and management measures, the Commission must promulgate a “complete schedule by which States must take particular actions in order to be in compliance with the plan.” *Id.* (C). Finally, each member state must, at least annually, submit a report on compliance. *Id.* (D).

It is the responsible of the species-specific Management Board in the first instance to develop fishery management plans, and amendments and addenda thereto. *Id.* Sec. Four(e)(1). Once adopted, a Management Board must “monitor the implementation, enforcement, and effectiveness of the plan, amendment, or addendum or take other actions specified in the applicable document that are necessary to ensure its full and effective implementation.” *Id.* Sec. Four(e)(3). Member States are “responsible for the full and effective implementation and enforcement of fishery management plans within areas subject to their jurisdiction.” *Id.* Sec. Seven(a).

To that end, each State must file an annual compliance report, which the relevant Management Board, the ISFMP Policy Board, and the Plan Review Team review. *Id.* (a)-(c). “Based upon that written review, as well as other information that it has or may receive, the Management Board/Section may recommend to the Policy Board that a State be found out of compliance, including the rationale for the recommended finding of non-compliance. The recommendation shall specifically address the required measures of the fishery management plan that the State has not implemented or enforced, a statement of how that failure to implement or

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enforce the required measures jeopardizes the conservation of the resource, and the actions a State must take in order to comply with requirements of the FMP.” *Id.*

Any findings of non-compliance by a Management Board are reviewed by the ISFMP Policy Board. “If it concurs in the [non-compliance] decision, [the ISFMP Policy Board] shall recommend at that time to the Commission that a State be found out of compliance.” *Id.* (d). The “final determination of a State’s non-compliance with the provisions of a Commission-approved plan must be made by the Commission.” *Id.* Sec. Two(b). “If the Commission agrees with the recommendation of the Policy Board, it may determine that a State is not in compliance with the relevant fishery management plan, and specify the actions the State must take to come into compliance. Upon a non-compliance determination, the Executive Director shall within ten working days notify the State, the Secretary of Commerce, and the Secretary of the Interior of the Commission’s determination.” *Id.* (e). Subject to the possibility of an appeal of this determination, *id.* (g), actual compliance, or withdrawal of the non-compliance finding, the process is then governed by ACFCMA and the proceedings are taken over by the U.S. Secretary of Commerce as described above.

However, prior to the initiation of the non-compliance process, a Member State that disagrees with a particular conservation or management requirement imposed has the right of appeal. *See id.* Sec. Four(h) (“Any state that is aggrieved by an action of the Management Board may appeal that action to the Policy Board.”) Among the bases for appealing a required management action are: (1) A claim that the “[d]ecision [is] not consistent with the FMP”; (2) an alleged “[f]ailure to follow process”; and (3) “Insufficient/inaccurate /incorrect application of technical information.”⁵ Appeals are decided by a majority of members of the ISFMP Policy Board. *See id.* at 3.

D. Synthesis

The various relevant authorities discussed above establish the regulatory framework governing the Commission’s management of the Atlantic menhaden and other fisheries, as well as the obligations and rights of the compacting States. This Synthesis provides additional context and specific examples relevant to the issues before the IA.

The enforcement process begins with the ASMFC undertaking a step it has never taken with respect to Atlantic menhaden; that is, the ASMFC must take a formal vote to find a Member State out of compliance. Indeed, the ASMFC has made exactly this type of non-compliance determination over two dozen times since the federal enforcement overlay was created. Then,

⁵ ASMFC Appeals Process, at 1 (Aug. 18, 2004), *available at* <http://www.asmfc.org/uploads/file/ASMFCAppealsProcess.pdf>.

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assuming that ASMFC's non-compliance finding itself does not spur compliance, the Commission must then notify the Commerce Secretary of the State's failure to adopt the measure for further administrative process. At all stages—from initial referral from the Management Board to the ISFMP Policy Board, and all subsequent stages up to the secretarial level—there must be written justifications as to how “the required measures jeopardizes [sic] the conservation of the resource.”⁶ ISFMP Charter, Sec. 7(c).

Furthermore, before the situation rises to the non-compliance stage, there are provisions allowing for an administrative appeals process, of which the CAB itself took note. SAI Global, PCDR, at 107-08. Significantly, as to the Amendment 3 Bay cap reduction, the previous Virginia Gubernatorial Administration had initiated an appeal, which the ASMFC leadership team found had raised substantial questions with respect to the Chesapeake Bay reduction cap's lack of scientific justification, at least within the Amendment 3 record. For reasons other than merit, however, the new Administration withdrew the appeal soon after Governor Northam's inauguration, though the appeal is subject to renewal if the Commonwealth so elects.

Relevant both to the potential merits of the Virginia's appeal and the IA's understanding of the Chesapeake Bay reduction cap issue, the Commission's decisions, like those of NMFS, must be based on the best scientific information available. As Amendment 3 states, and the ASMFC leadership team acknowledged, the Bay cap lacks a scientific basis despite completion of an extensive research program designed to investigate the potential for ecosystem impacts of the menhaden reduction fishery within the Chesapeake Bay. *See* detailed discussion, *infra* at 20-22. Further, and even in the absence of such a scientific basis, the Commonwealth of Virginia (via the General Assembly) acceded to a “precautionary” Bay cap as a “political compromise” in 2006, and to its subsequent reduction by twenty percent in 2013.

As mentioned, there have been over two dozen instances where the ASMFC actually has found (contrary to the current Bay cap situation) a compacting State out of compliance and invoked federal enforcement procedures.⁷ For instance, the ASMFC has found Virginia out of compliance one time. In that instance, and somewhat ironically, the regulatory implementing body was not the General Assembly, but rather the Virginia Marine Resource Commission (“VMRC”). It is this body under which most of the Objectors and the current Virginia Governor

⁶ For his part, the Secretary is required to find that the measure with which a state is not in compliance is “necessary for the conservation of the species in question.” 16 U.S.C. § 5106(a)(2).

⁷ Attached hereto as Exhibit 2 is a full listing, prepared and maintained by the ASMFC, of its compliance proceedings, and how they were resolved.

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would like to place management authority over Atlantic menhaden.⁸ In nearly every single instance to date,⁹ it is important to note, compliance has been achieved, most always based merely on the prospect – not the reality – of the coercive and compulsory enforcement tools contained in federal law.

To be clear, in conclusion, if it so chooses, in its sole discretion, the ASMFC can invoke coercive processes to ensure compliance with its recommendations. And, as the IA can well imagine, when a Compacting State is confronted with a federally-imposed fishery moratorium in its waters, any impasse with the recalcitrant compacting state is invariably resolved. There are thus no grounds for questioning, as Objectors do, the robustness of the regulatory regime governing Atlantic menhaden.

II. Standard of Review

While the Objections Procedure is not a legal proceeding, “the process of adjudication is very much one of review as seen against principles of English or US administrative law.” *In re: Echebistar Indian Ocean Skipjack Tuna Purse Seine Fishery* ¶ 64 (MSC, 24 Oct., 2017). “The standard is narrow, and deference to the determinations of the CAB is appropriate.” *See, e.g., In re: Germany Lower Saxony Mussel Dredge and Mussel Culture Fishery* ¶¶ 9-12 (MSC, 23 Sept., 2013). Under principles of U.S. common law, the highest deference is likewise owed to scientific determinations made by expert administrative bodies. *See, e.g., Oceana, Inc. v. Ross*, 275 F. Supp. 3d 270, 281 (D.D.C. 2017) (“When an agency’s action involves ‘complex judgments about sampling methodology and data analysis that are within the agency’s technical expertise,’ a court gives those judgments ‘an extreme degree of deference.’”) (quoting *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 956 (D.C. Cir. 2007)).

A CAB’s decision should only be remanded only “on account of being so unreasonable or arbitrary that no reasonable certification body could have reached those conclusions” and the “flaw would be material to the fairness of the assessment or the outcome of the Determination.” *In re: Objection to the certification of the CVO Plaice and Sole fishery by the World Wildlife Fund and Nordzee Foundation* ¶¶ 7-8 (MSC, 12 Nov., 2012). “[T]his is a high

⁸ More ironically, the Commonwealth of Massachusetts, a designee of which interceded in opposition to the Client’s MSC certification, has been formally found out of compliance with various management requirements by the ASMFC on not less than four occasions.

⁹ The exception shows the importance of having a second, federal level of scientific review. In 2017, the ASMFC found the State of New Jersey out of compliance with its Summer Flounder FMP for failure to adopt a 19-inch minimum size limit. The state argued that it had implemented other measures that achieved “conservation equivalency,” which is generally allowable under the Commission’s rules. Contrary to the findings by the ASMFC, NMFS and the Secretary of Commerce agreed that New Jersey’s measures had the same conservation benefit as the increased size limit, and therefore did not impose a moratorium.

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threshold.” *Id.* ¶ 8. The grounds for remanding a certification determination to a CAB are set forth in the MSC’s Fishery Certification Requirements PD2.7.2 and PD2.7.3. This case involves no alleged procedural deficiencies under PD2.7.2.1.

III. Responses to Objections

A. General Observation

At the outset, Omega Protein notes that neither TRCP nor TNC raised any procedural objections under PD2.7.2.1. Moreover, as a general matter, the Objectors raise no new issues that were not presented during the public participation process. All objections, therefore, amount only to disputes with the resolution of the concerns by the CAB in a manner contrary to Objectors’ preferences. Most notably in this regard are the questions raised by Objectors regarding the use of total biomass, as opposed to spawning stock biomass, a matter which SAI formally elevated to the MSC for guidance. *See* SAI, PCDR, at 7. As these are matters within the expertise of SAI, the MSC, and the peer review team, and the process which led to the decisions was fair and impartial, there are no reasonable grounds upon which to upset the decisions made pursuant to explicit directions from the MSC.

B. Objections Under PI 1.2.1 and PI 1.2.2 Do Not Warrant a Revision of the Score Awarded the Client

1. Atlantic Menhaden Management

The Atlantic menhaden resource and fishery have been well managed under the governance of the ASMFC since the initial Fishery Management Plan (“FMP”) for Atlantic Menhaden was adopted in August 1981. NMFS has maintained the database for Atlantic menhaden benchmark and update assessments extending back well over sixty years to 1955 and has provided personnel to serve as the lead analyst for all assessments conducted on Atlantic menhaden. The database for this highly important commercial fishery is historically rich, especially in documenting the characterizations of the reduction and bait fisheries landings by maintaining an extensive fish aging database since 1955.

Atlantic menhaden are currently managed under Amendment 3 to the Interstate Fishery FMP for Atlantic Menhaden. Approved in November 2017, the Amendment maintains the management program’s current single-species biological reference points until the review and adoption of menhaden-specific ecological reference points as part of the on-going 2019 benchmark stock assessment process.

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It is important to note that the ASMFC has long worked towards incorporating ecosystem considerations and accounting for Atlantic menhaden's role as forage into both the assessment and management. To capture predator/prey interactions among Atlantic menhaden and its top predators (striped bass, weakfish, and bluefish), the stock assessment team began developing a model called the Multi-Species Virtual Population Analysis or MSVPA-X, which produced time- and age-varying estimates of natural mortality for Atlantic menhaden in 2001.

MSVPA-X results were used in several prior assessments, from 2006 up through the statistically flawed 2012 update assessment. While preparing for the 2014 benchmark, however, the stock assessment team determined that the MSVPA-X model suffered from certain fundamental problems relating to some of the data inputs and reproducibility. Intensive efforts to improve both the model and the data in preparation for the 2014 benchmark assessment resolved many of the MSVPA-X's issues. However, there was not time to vet these changes. Further, the MSVPA-X is not compatible with the new spatial component of the menhaden stock assessment model. Thus, the MSVPA-X model results were not employed in the 2014 benchmark assessment.¹⁰

As a term of reference for the 2014 stock assessment, the Assessment Committee was task with evaluating "potential ecological reference points that account for Atlantic menhaden's role as a forage fish." *Id.* at AE:1. While that task could not be accomplished as part of the 2014 assessment workshop, the Menhaden Board created the Biological Ecological Reference Points ("BERP") Working Group ("WG"), which itself was an offshoot of the Multispecies Technical Committee ("TC") and the Menhaden TC. The BERP was tasked with developing models and ecosystem management approaches that more explicitly account for menhaden's role as forage. This work is progressing towards a peer review of a suite of ecosystem models in December 2019. *See* SAI Global, PCDR, at 48-49; *see also id.* at 86-88 (discussing the various technical bodies advising the Commission).

Even as this work has progressed, and as explained below, both the Menhaden Stock Assessment Subcommittee and the Menhaden Management Board have long been working to incorporate this key lower trophic level ("KLTL") species' forage role and consider predator needs in both the assessment and management decisions.

¹⁰ For a general history of the development and use of the MSVPA-X model, see SEDAR 40, Stock Assessment Report, Atlantic Menhaden, at 30-32 (Jan. 2015), *available at* http://www.asmfc.org/uploads/file/55089931S40_AtlMenhadenSAR_CombinedFINAL_1.15.2015-reduced.pdf.

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2. Objections Raised

A common theme voiced by all the Objectors in opposition to the recommendation by the CAB for MSC's Certification for the Atlantic menhaden purse seine fishery is a criticism that Atlantic menhaden is only managed by a single species assessment, and menhaden's role in the ecosystem, as a KLTL species, is not being met, especially in providing sufficient forage for predators. Objections are voiced regarding scoring on PI 1.2.1 Harvest Strategy and PI 1.2.2 Harvest control rules and tools. The objectors are especially critical of the client action plan's ("CAP") 4-year time line in meeting these two PI conditional scores and claim that menhaden's role as a KLTL species in the ecosystem is not presently being met. Statements that the current management of Atlantic menhaden do not account for the resource's role as a KLTL species in the ecosystem are entirely subjective and lack a scientific basis.

While the Atlantic menhaden is currently assessed using the single-species Beaufort Assessment Model ("BAM"), it is important to note that the BAM represents the best available scientific information. The BAM does include age-specific natural mortality estimates that account for the extremely high natural mortality experienced by juvenile fish (age-0 and age-1), largely due to predation. Thus, predator needs are, to the extent possible, taken into account in the assessment model.

The ASMFC Atlantic Menhaden Management Board ("Board") considered and rejected the implementation of "rules of thumb" ERPs when it adopted measures in Amendment 3 in November 2017. It overwhelmingly voted (16-2) to continue managing the Atlantic menhaden resource using the 2017 assessment update to the BAM, rather than adopt interim ERPs derived from the Lenfest and Smith *et al.*, rather than adopt published "rules of thumb" methods for calculating interim ERPs.

In so doing, the Board was following the advice of its ASMFC scientists, the BERP, that the interim ERPs developed through "rules of thumb" calculations did not represent the best available scientific information for management while the BERP continued to develop menhaden-specific ERPs. For instance, in a memorandum from the BERP to the Board analyzing the interim ERPs, they noted a number of technical and practical concerns with these rules of thumb's application to this fishery.¹¹ At the final meeting to adopt Amendment 3, Dr. Katie Drew, the ASMFC's senior stock assessment scientist and BERP member, with respect to the use of interim ERPs vis-à-vis the current reference points, commented:

I think the BERP has always advocated for waiting until the reference points that are ecosystem reference points specific for menhaden can be

¹¹ BERP WG, Memo to Board re: Interim Reference Points Calculations, at 3 (July 14, 2017) (attached as Exh. 3).

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developed. We would not advocate that if we thought that current management was detrimental to the single species health of the stock. I think we can do what we can do with menhaden-specific reference points. It will be great and a great movement forward for the stock, but I don't think we would have advocated for that if we had serious concerns about the single-species management.¹²

Currently the BERP is evaluating a suite of scientific ecosystem models that are slated to be peer reviewed later this year. *See* SAI Global, PCDR, at 48-49 (BERP schedule).

In addition to its Amendment 3 deliberations in November 2017, the Board set the TAC for the 2018 and 2019 fishing seasons at 216,000 metric tons with the expectation that the setting of the TAC for subsequent years will be guided by menhaden-specific ERPs. When setting a TAC for 2018 and 2019 in November 2017, the Board's Menhaden TC provided TAC projections and associated risks of exceeding either the Target F or the Threshold F, each based on the existing single species reference points.¹³

Though not directly applicable to ASMFC rulemaking, under federal fisheries management case law, a federal management council created under the MSA may not set an annual catch limit at level with a greater than fifty percent probability of resulting in overfishing (*i.e.*, exceeding the threshold fishing mortality rate).¹⁴ However, the Menhaden Board took a much more precautionary approach. The highest TAC considered, 314,500 mt, was based on the level of catch associated with a fifty percent chance of exceeding the target fishing mortality rate. In the end, however, the Board established a highly precautionary TAC for 2018 and 2019 of only 216,000 mt, a modest eight percent increase from the prior year.¹⁵

¹² ASMFC, Menhaden Management Board, Meeting Transcript, November 13-14, 2017, at 23, *available at* <http://www.asmfc.org/uploads/file/5af07725AtlMenhadenBoardProceedingsNov2017.pdf>.

¹³ ASMFC Menhaden TC, Memo to Board (June 30, 2017), *attached as* Exh. 4.

¹⁴ *Natural Resources Def. Coun. v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000) (holding that to be consistent with the National Standard 1 command to prevent overfishing, a quota must not have more than a 50% chance of resulting in overfishing). Cases such as these are not applicable or controlling on the Commission, but are informative of the legal meaning of common fishery management issues in the U.S.

¹⁵ Fishing at a mortality rate above the threshold fishing mortality rate would, in general, constitute "overfishing." The target fishing mortality rate is below the threshold F and is based on a fishery's control rule. Application of the target rate to estimated biomass yields the total catch limit or quota. Generally speaking, there is a significant buffer between the threshold and target to promote conservation. The additional buffer (between the target and actual TAC) established by the ASMFC for the Atlantic menhaden fishery is unusually precautionary.

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In so doing, the Board was mindful both of menhaden's importance in the ecosystem as a KLTL, and in anticipation of the development of ERPs for the fishery which explicitly consider menhaden's ecological role, which are expected to be available in 2020. This highly precautionary TAC has a zero percent chance of resulting in overfishing or an overfished condition, and less than 15 percent chance of exceeding the target fishing mortality rate in 2018 and less than 3.5 percent chance in 2019. *See* Exh. 4 (Memo from the Menhaden TC).

It should be noted that in its comments on Amendment 3, Omega Protein did advocate for a TAC that was higher than that adopted by the Board, but one that was far lower than the amount of harvest that could have been allocated under the federal standard. *See* Omega Protein's Comments of Amendment 3, at 2, attached as Exh. 5 (advocating for a 240,000 mt TAC). More importantly, and contrary to the erroneous claims made by the Objectors, Omega Protein explicitly endorsed the development of ERPs for the menhaden fishery. *See id.* at 4 ("A subsidiary question is whether the BERP should continue work on its menhaden-specific ERPs which Omega Protein supports.").

To recap, during the transition period (*i.e.*, 2018 and 2019) where Atlantic menhaden management evolves from the single-species BAM assessment model to an ecosystem model developed explicitly to account for menhaden's role as a KLTL species, its ecological functions are being addressed through the highly precautionary TAC setting process. Specifically, the Board has allocated an additional 98,500 mt (*i.e.*, the difference between the TAC calculated under single-species reference points at a level with a fifty percent chance of exceeding the target fishing mortality rate and the TAC established for 2018 and 2019) to help menhaden fulfill its ecological role.¹⁶

There are objections voiced on PI 1.2.1 Harvest strategy and PI 1.2.2 Harvest control rules and tools, stating that the timeline for the conditions is much too long given the current pace of development of ERPs by the ASMFC, available for peer review in 2019. The Client recognizes that the ASMFC's timeline calls for both the single-species BAM benchmark assessment and the ecosystem modeling to produce ERPs will be peer-reviewed through the SouthEast Data Assessment Review ("SEDAR") process at the end of 2019.

However, by convention according to MSC guidelines, the Client is required to develop a four-year CAP to satisfy a conditional score, bringing it up to an 80. Condition timelines as outlined are based on the requirement that the Client close the condition within the certification

¹⁶ Not to mention the additional buffer between the target and threshold, as explained *supra*. The ASMFC did not even consider an allowable landings level based on the federal standard of the fishing mortality rate which has a less than fifty percent chance of exceeding the threshold mortality rate. Needless to say, the resulting quota associated with this approach would be far in excess of the highest level considered, specifically 314,500 mt.

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cycle. The timeline set forth by the Menhaden Board provides ample time to close this condition early, but, of course, the exigencies of the management process could cause the ASMFC-established timeline to vary.

Assuming a favorable peer review, the ASMFC should have ERPs available in 2020 that can be incorporated into the management regime through the appropriate regulatory vehicle. If done through an Amendment, implementation of peer reviewed ERPs specific for Atlantic menhaden could be completed by the end of 2020. As further specified in the condition, the Client will comply with any resulting management measures. Notably, Omega Protein is bound to satisfy the conditional scores through its developed CAP or the Client risks losing MSC Certification.

Objectors' expressed doubts that the Client will adopt the appropriate harvest strategy and control rule are both speculative and unfounded, especially inasmuch as Omega Protein has fished in compliance with Amendment 3 Bay cap as long as it has been operative. The Objectors' attacks therefore do not warrant a revision of the scores under these PIs, particularly given that the conditions can be fulfilled and are not arbitrary or unreasonable. *See* MSC, PD2.7.2.2. If the Client fails to meet its obligations under the conditions, the appropriate response is to withdraw the provisional certification. As detailed below, Virginia has never been out of compliance with the ASMFC's Atlantic Menhaden FMP, and the Client will, as committed, work with the state's General Assembly to codify compliance issues resulting from the implementation of ERPs in 2020, or as soon as they represent the best available scientific advice for managing Atlantic menhaden.

In conclusion, the objections to scoring on PI 1.2.1 Harvest strategy and PI 1.2.2 Harvest control rules and tools based on the timeline for implementing ERPs in the CAP as being too long and not in compliance with the ASMFC timeline for developing and implementing ERPs for Atlantic menhaden have no merit. The CAB was well aware of the process that was underway at the ASMFC. SAI recognized that the harvest control rules which more fully take into account menhaden as a KLTL species are in development and on track for adoption. The CAB made no mistake of material fact and considered Objectors' comments. The CAB decisions made were well-justified and reasonable. There are thus no grounds for revising the score or remanding the matter to the CAB based on these objections.

In short, the Client recognizes the difference in the timelines and maintains that it will advocate for implementation of any peer reviewed ERPs accepted for management by the ASMFC.

C. Claims Under PI 2.1.3 Relating to Bycatch Have No Merit

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In its Notice of Objection Form, TRCP claims that the CAB made a mistake as to material facts and its conclusions are supported by data available in the record, PI 2.1.3 Primary species information. The objection is based on the statement that the most recent study on bycatch in the Atlantic menhaden fishery was conducted over 20 years ago (*i.e.*, Kirkley 1995) and that more-recent data that was collected by the National Oceanic and Atmospheric Administration (“NOAA”)¹⁷ in the Gulf of Mexico, were the basis for a score of 80 on PI 2.1.3. The objections further state that Omega has no incentive to increase observer coverage.

The objecting organizations’ statements on the data used to score PI 2.1.3 are incorrect. The CAB utilized NMFS data from the Atlantic menhaden fishery, not the Gulf of Mexico fishery, for 29 observed trips from 2007 through 2012. These data provided by the Northeast Fisheries Observer Program (“NEFOP”) are far more recent than the Kirkley (1995) observer program and certainly more applicable than any observer program in the Gulf of Mexico, which is an entirely different ecosystem. The NEFOP data for 2007-2012 NMFS observed trips for the Atlantic menhaden purse seine fishery showed extremely low levels of by-catch species, no marine mammals, and only 3 endangered, threatened or protected (“ETP”) species (1 loon, and 2 loggerhead turtles).¹⁸ All three ETP species were released alive.

The Client does not decide the extent of observer coverage for the Atlantic menhaden purse seine fishery. NMFS, through NEFOP, allocates observer coverage to the Atlantic menhaden purse seine fishery under three separate and legally authorized observer programs. The NMFS allocates observers to fisheries under the following programs: 1) the Standard By-Catch Reduction Methodology (“SBRM”) program that provides data to the Northeast Fisheries Science Center’s Population Dynamics Branch¹⁹; 2) the Marine Mammal Protection Act to provide data for marine mammal assessments; and 3) the Endangered Species Act. If any of these NEFOP observers are allocated to the Atlantic menhaden purse seine fishery, the Client’s vessel chosen must accommodate an observer for that fishing trip or the vessel is not permitted to fish and will face appropriate legal action by the NMFS Office of Law Enforcement.

¹⁷ NOAA is the parent agency of NMFS within the U.S. Department of Commerce.

¹⁸ The bycatch rate for all 27 sets was less than one percent. This rate is consistent with the findings in Kirkley (1995).

¹⁹ The SBRM is a non-discretionary tool that first calculates the number of observer days by fleet, such as the purse seine fleet, and region needed to achieve bycatch estimates with the coefficient of variation of 30%, and then applies an “importance filter” to allocate the total number of available observer days among the fleet. *See Oceana, Inc. v. Ross*, Civ. No. 17-5247 (D.C. Cir., April 12, 2019), *slip op.* at 7-8. The “importance filter” reduces observer days from fleets where “the actual magnitude in frequency of discards may be low and of small consequence to the discarded species.” *Id.* at 8. The mid-Atlantic purse seine fishery is a non-grouped category under the SBRM. *See* NMFS, U.S. National Bycatch Report, at 82 (2011), *available at* <https://www.fisheries.noaa.gov/resource/document/national-bycatch-report>.

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The CAB recognized the low and sporadic observer coverage in the Atlantic menhaden purse seine fishery and scored the PI accordingly with milestones to meet in the four year CAP. The CAB also readily admits that it is not the fault of the Client that observer coverage has been low and sporadic. The NMFS has the authority to assign observer coverage to any fishery and given their budget for covering all East coast fisheries, observers are assigned on the basis of the likelihood of encountering by-catch of non-target species, and interactions with marine mammals and/or ETP species. The fact that the NEFOP has not assigned an observer for Omega Protein's purse seine vessels fishing out of Reedville, VA since 2012 represent NMFS' empirically-based acknowledgement that the likelihood of catching significant non-target species, and/or having any interactions with marine mammals and ETP species is relatively insignificant. The Atlantic menhaden purse seine fishery is referred to as a "clean fishery," being highly selective for Atlantic menhaden and very little else.

From the narrative above, the Client has addressed objections to scoring on PI 2.1.3 Primary species information by correcting the statements made by the objecting organizations on data used to evaluate by-catch and interactions with marine mammals and/or ETP species. The Client first identified the appropriate database used by the CAB in scoring PI 2.1.3. Then, the Client explained the several existing NEFOP observer programs whereby the NMFS can and does allocate observer coverage to the Atlantic menhaden purse seine fishery. The low level and sporadic allocation by the NMFS observer programs to the Atlantic menhaden purse seine fishery represents NMFS' empirically-based determination of the low likelihood that observers will encounter significant amounts of by-catch species on Atlantic menhaden trips, or document any actions with marine mammals or ETP species.

Moreover, the CAB made the empirical finding that there were no Main Primary bycatch species and that, as a result, SG 60 and SG 80 were both met because neither a strategy or information necessary to implement such a strategy were required. SAI Global, PCDR at 180. This finding was based on NMFS observer data, as well as studies referenced. In this regard, and with the additional fact that the UoA is subject to observer requirements, this fishery far exceeds the conditions governing bycatch standards found acceptable in, for example, the Russian Sea of Okhotsk Mid-Water Trawl Walleye Pollock fishery. *See* MSC, Final Decision of the IA ¶¶ 19-21 (16 Sept. 2013).

As shown, the CAB made no mistakes of material fact and its conclusions are supported by the record. SAI was aware of the observer coverage allocated to Omega Protein's fleet and the reasons why those levels are relatively low. Parenthetically, it must be stated that in no sense is the allocation of observer resources "ad hoc," as claimed. The SBRM is based on an algorithm that takes into account bycatch rates, resource conditions, and management needs. Its application is mandatory and NMFS lacks discretion it used to have (because of the *Oceana*

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series of cases) to allocate observer days outside the context of the SBRM.²⁰ No revision of the score is warranted based on this objection.

D. Virginia is Not Out of Compliance with the Interstate Fishery Management Plan for Atlantic Menhaden

Objector TRCP alleges that the CAB made a mistake of material fact in concluding that the Client met the standard for PI 3.1.1, Legal and/or customary framework, and PI 3.2.3, Compliance and enforcement. These Objectors raise questions both about the legal framework and Omega Protein's compliance with the Atlantic Menhaden ISFMP. Objector TNC claims failings both under PD2.7.2.3, although the only relevant claim arises under PI 3.1.3,²¹ and PD2.7.3 on substantially the same grounds.

TNC's claims under PD2.7.3 must be dismissed outright, because the CAB was made aware of the Objectors' belief that the Client was not in compliance with the plan during the comment period. Thus, there is no "additional information" for the IA to ask the CAB to consider, and no new information that is described in PD2.6.5.2 is identified.

The claims under PD2.7.2.3 likewise have no merit. First of all, TRCP's claims under PI 3.2.3 are misdirected. This PI deals with "monitoring, control, and surveillance," *i.e.*, systems of legal enforcement of rules and regulations. The only claims the TRCP Objectors raise under this PI is a recitation of their claims under PI 3.1.1 relating to the management structure. To the extent such claims appropriate arise under PI 3.2.3, they are addressed below.

As to the claims under PI 3.1.1 and PI 3.1.3, the CAB was well aware of the extensive legal and regulatory regime described in detail above, and Objectors point to no material information which the CAB did not consider, either by a stakeholder or the peer reviewers. *See supra* n.1. Finally, for the reasons explained in detail below, the CAB's decisions were not arbitrary or unreasonable in light of the evidence before it.

Specifically, Objectors claim that the Commonwealth of Virginia is out of compliance with the Atlantic Menhaden FMP because it has not yet adopted the recommended revised cap on removals of menhaden from the Chesapeake Bay. As noted above, however, only the Commission, sitting as a whole, can make a "final determination of a State's non-compliance." Charter Sec. Two(b). And, as a matter of fact, Virginia has not been found out of compliance by

²⁰ *See Oceana Inc.*, *supra* n.19.

²¹ Relating to management policy and consistency with MSC policies. TNC's claim under this PI was originally brought under PD2.7.3, but TNC "clarified" that they were bringing this claim under PD PD2.7.2.3 in their response to the IA.

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the Commission. That finding is based on Omega Protein's actual compliance with the currently established cap level of 51,000 mt.²² On these facts alone, the CAB's decision was reasonable.

With due respect to all involved, moreover, the Chesapeake Bay reduction cap issue resulted from a Virginia executive branch decision, hard on the heels of a new Governor's inauguration, to snatch controversy from the jaws of resolution. And, moreover, this controversy emerged only after the written record shows the principals had nearly resolved the matter in accordance with ASMFC processes.

Specifically, Virginia's previous Governor, exercising the state's rights under the Compact and ISFMP Charter, filed an appeal challenging Amendment 3's forty percent reduction in the Bay cap for the reduction fishery on the grounds that "[t]he decision to lower the Bay Cap is unnecessary and unsupported by scientific evidence."²³ In its response to the Commonwealth's duly-filed appeal, the ASMFC's Chair, Vice Chair, immediate past Chair, and staff issued a formal response containing recommendations to the whole Commission.²⁴ The ASMFC's senior executive group agreed with Virginia that the Cap "was not based on a scientifically quantified harvest threshold, fishery health index, or fishery population level study." *Id.* Rather, the leadership team's response recognized—as did Amendment 3 itself—that "[t]he Bay Cap limit was a compromise reached by managers, fishery stakeholders, and environmental NGOs." *Id.* The respondents also recognized that "Amendment [3 to the Atlantic Menhaden ISFMP, which recommended the lower cap] does not provide sufficient evidence to support" the contention that the reduced cap was "necessary to protect the Bay as a nursery for other species." *Id.* at 5.

The response called for a "fact finding" team to conduct "a literature review of the science" and answer questions felt relevant to the issue. *Id.* at 6. The leadership team also recommended that the ISFMP Policy Board and the Atlantic Menhaden Management Board consider appropriate cap levels while the review was conducted. *Id.*

Before this process could come to fruition, the incoming Virginia gubernatorial administration withdrew its support for the appeal, thus terminating the process. As explained above, however, cooler heads are prevailing. Omega Protein has been observing the new 51,000

²² See ASMFC, Press Release, ASMFC Indefinitely Postpones Action on VA Compliance with Atlantic Menhaden Amendment 3 Chesapeake Bay Reduction Fishery Cap (Feb. 7, 2019), *available at* http://www.asafc.org/uploads/file/5c5c6f03pr06VA_MenhadenCompliance.pdf.

²³ See Letter to ASMFC Chair James J. Gilmore, Jr. from Virginia Delegation, at 5 (Dec. 20, 2017), attached as Exh. 7.

²⁴ See ASFMC Response, at 4 (Jan. 17, 2018), *attached as* Exh. 8.

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mt cap level and the administrative review processes called for by the Compact, the ISFMP Charter, and ACFCMA are currently in abeyance.

It is important to understand the genesis and history of the Chesapeake Bay cap, which is detailed with citations in Virginia's appeal. *See* Exh. 7, at 5-6. Adopted in 2006, "[i]t was initially justified as a precautionary measure to ensure that localized depletion ["LD"] of menhaden would not occur while the issue was studied. *Id.* at 5 (citing Amendment 3 at 24). This measure, though unsupported by scientific evidence that the fishery was causing problems, was meant to maintain the status quo while the question of LD was investigated.²⁵ Notably, however, the cap is not applied throughout the Chesapeake Bay nor to total menhaden removals. Rather, it applies solely to harvests made for reduction purposes only. Menhaden harvested for bait purposes by Virginia and Maryland fishermen are exempt.

Addendum III identified a specific research program aimed at determining whether LD was occurring in the Bay, such as by exacerbating mycobacteriosis in striped bass or causing other biological problems. This research program consisted of four areas of investigation designed to help answer the question of LD in the Chesapeake Bay; specifically to –

- (1) determine menhaden abundance in Chesapeake Bay;
- (2) determine estimates of menhaden removals by predators;
- (3) evaluate the rate of exchange of menhaden between Bay and coastal systems; and
- (4) conduct larval studies to determine recruitment to the Bay.

Id. at 2-3. For purposes of the investigation, LD was defined as "a reduction in menhaden population size or density below the level of abundance that is sufficient to maintain its basic ecological (e.g. forage base, grazer of plankton), economic and social/cultural functions."²⁶ The ASMFC further elaborated that LD "can occur as a result of fishing pressure, environmental conditions, and predation pressures on a limited spatial and temporal scale." *Id.*

The NOAA Chesapeake Bay Office funded certain research projects designed to meet the four identified investigatory areas. After these yielded some preliminary findings, NOAA and ASMFC held a peer review conducted by the Center for Independent Experts ("CIE") to evaluate

²⁵ ASMFC, Addendum III to Amendment 1 to the Interstate FMP for Atlantic Menhaden, at 2 (Nov. 2006), available at http://www.asmfc.org/uploads/file/546b96d4AtlMenhadenAddendumIII_06.pdf.

²⁶ Maguire, J.J. "Report on the evaluation of the Chesapeake Bay Fisheries Science Program: Atlantic Menhaden Research Program Laurel, MD, April 22-24, 2009," at 4 (May 2009), available at https://www.st.nmfs.noaa.gov/Assets/Quality-Assurance/documents/peer-review-reports/2009/2009_05_08%20Maguire%20Chesapeake%20Bay%20menhaden%20program%20review%20report.pdf.

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progress and assess how well the projects were meeting the goal of identifying the potential for LD.

None of the individual studies purported to answer question of whether LD was occurring, but did further the objective of providing an empirical basis for answering the question. For instance, as one reviewer noted, the question of site fidelity is particularly important. “For local depletion to occur the stock would need to be relatively site attached.”²⁷ This reviewer went on to note that menhaden are highly migratory and (wide-spread) larval dispersal is effected by large oceanic processes. *Id.*

Likewise, the reviewers agreed that removals by predators is a key piece of evidence. One, however, noted that it “is necessary to understand the dynamics of the prey as well as those of the predators.” Maguire, *supra* n.26, at 8. He went to observe “this is not a simple question to resolve: predator – prey relationships are likely to change as the abundance and distribution of predators, prey and competitors are changing,” and they are effected by environmental factors like climate change. *Id.*

Beyond the specifics of the research priorities and interim results, the reviewers noted the overarching importance of identifying and defining the problem. With regard to the latter, one reviewer observed:

This definition would not consistently lead to the same conclusion following an evaluation of the available information: based on the same information, one observer could conclude that localized depletion is occurring while a different one might conclude the opposite. This is possible because the quantity of menhaden needed for each of the basic ecological, economic and social/cultural function is not quantified. Therefore, depending on their own, generally unstated objectives, different observers could legitimately reach different conclusions from the same information.

Id. at 4. Another states: “Unfortunately, while it is possible to use such a definition it does not offer any suggestions about how to measure the basic ecological, economic, and social/cultural functions mentioned in the definition. What is left, in the absence of performance measures that relate to local depletion, is conflict.” Haddon, *supra* n.27, at 8. The reviewers were able to conclude, however, that “given the high mobility of menhaden, the potential for localized

²⁷ Haddon, M. “Review Research on Atlantic Menhaden (*Brevoortia tyrannus*),” at 8 (April 2009), available at https://www.st.nmfs.noaa.gov/Assets/Quality-Assurance/documents/peer-review-reports/2009/2009_05_08%20Haddon%20Chesapeake%20Bay%20menhaden%20program%20review%20report.pdf.

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depletion could only occur on a ‘relatively small scale for a relatively short time.’”
Amendment 3, at 24.

In point of fact, the potential for LD in the Chesapeake Bay from Omega Protein’s purse seine operations is, as a practical matter, even less likely currently relative to the time these studies were conducted, given the twenty percent reduction in the Bay cap in 2013 to 87,216 mt. Overall, recent harvest levels are, moreover, far lower than historical averages. For instance, the first cap of 109,020 mt was based on average Bay reduction harvest levels for 2001-2005. This was a time that only Omega Protein’s reduction plant was operating in Bay. In the 1980s and before, there were as many three plants and many more vessels operating in these waters. Despite these much higher levels of catch, the striped bass population fully recovered from a severely depleted state in the 1980s.

Even more generally, there were once as many as 25 reduction plants in operation along the Eastern seaboard, from Nova Scotia to Florida.²⁸ Now there is one. At the peak of the fishery, there were as many as 150 vessels participating in the fishery. *Id.* Now there are eight.

The MSC adopts the definition of the precautionary approach adopted in the United Nations Fish Stocks Agreement, 1995. The Agreement states: “The precautionary approach shall be interpreted to mean being cautious when information is uncertain, unreliable or inadequate and that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.” The existence of a precautionary Bay cap is, in itself, proof that the lack of scientific certainty did not prevent the Commission from implementing what it considered to be a necessary conservation measure.

Hopefully, the on-going ecosystem modeling by the BERP will provide lacking empirical information to help determine if Amendment 3’s forty percent reduction provides ecological benefits proportionate to the human and economic impacts it entails. There is, however, little question that a precautionary cap will remain in place; the only issue one of an appropriate level. And while the MSC’s standards for KLTL species require more than sustainability on a single-species basis, the CAB was well aware that ERPs are well into development and on track for implementation. Thus, there is a process underway to ensure that the fishery as a whole does not adversely impact the ecosystem or dependent predators.

In the meantime, and already, the Atlantic menhaden fishery mortality rate has been at the lowest sustained rates in the recorded time series in recent years, SAI Global, PCDR, at 41, recruitment is trending upwards, *id.* at 42, and menhaden biomass is stable at fairly high levels.

²⁸ See Amendment 1 to the Interstate Fishery Management Plan for Atl. Menhaden, Table 8, at 103 (July 2001), available at http://www.asafc.org/uploads/file/menhadenAm_1.PDF.

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Id. at 38. Omega Protein has never exceeded its allowable catch level, either coast-wide or in the Chesapeake Bay. Moreover, Virginia has always complied with its overall catch limits, even as it objected to the significant reduction in its share under Amendment 3. *See* Virginia Appeal Letter, Exh. 7. Finally, and most generally, a responsible governance structure is in place. While the active participation and presence of fifteen sovereign states and juridical entities on the Menhaden Management Board yields a process that may not always be fully linear, Congress has engrafted a federal enforcement mechanism—a moratorium process under ACFCMA—onto the ASMFC Compact structure to ensure compliance.

It is rare, as a matter of U.S. federalism, for Congress to alter the terms by which states surrender their sovereignty via such interstate compacts, but here Congress elected to do so to achieve uniformity in the management of Atlantic coastal marine resources in state and federal waters. As a result, precedents such as the Faroese mackerel or Indian Ocean tuna fishery operating under the authority of an international regional fisheries management organization are simply not applicable or analogous.

Briefly turning to some of the specific claims raised, TRCP claims that “when states do not adopt regulations supported by the ASMFC, there is no binding procedure in place for the ASMFC to require such states to adopt and implement measures adopted by the Commission to ensure a sustainable fishery.” This is obvious error. The CAB was well aware of ACFCMA, *see* SAI Global, PCDR, at 217. Objectors’ faint acknowledgment of this fact misunderstands the processes underway with respect to the Bay cap and ignores the many times the sanctions process under ACFCMA has been invoked and resulted in compliance.

Likewise, in its objections under PI 3.2.3, TRCP evidences a similar misunderstanding of the ACFCMA process. Specifically, Objectors claim that “the federal enforcement arm—the Department of Commerce—does not and has not brought any action requiring the Virginia state legislature to comply with the federal standards.” Just as courts do not act as “roving commissions,” neither does the U.S. Secretary of Commerce independently investigate and prosecute alleged violations of FMPs. The Secretary hears and decides matters brought to him by the Commission, which it has not done in this case.

(Parenthetically, the allegation that Virginia “operate[s] under a different management system and set of rules than fishery operators in other states” because it has not adopted the Bay cap is misleading at best. The cap only applies to Virginia in general, and Omega Protein specifically. In all material respects, including the implementation of ERPs for the Atlantic menhaden fishery, which in all likelihood will be implemented through adjustments to the coastwide TAC and allocated to states according to the system established in Amendment 3, Virginia has been and will continue to be in compliance.)

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For their part, TNC (in its clarification letter), alleges that the CAB made material mistakes in scoring PI 3.1.3 with respect its citation to Amendment 2 to the Atlantic Menhaden FMP and its supposed failure to recognize the Commonwealth's failure to change the Chesapeake Bay reduction fishery cap. However, the citation to Amendment 2 was merely for the ASMFC's goal for managing the Atlantic menhaden fishery.²⁹ That goal has not changed with Amendment 3. The remainder of TNC's objections with this PI are addressed in detail above.

For all the above reasons, the IA should deny the objections and allow the certification to proceed forthwith.

Respectfully submitted.



David E. Frulla



Shaun M. Gehan

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authw:3/5/20

Attachments

²⁹ That is, "to manage the Atlantic menhaden fishery in a manner that is biologically, economically, socially and ecologically sound, while protecting the resource and those who benefit from it." SAI Global, PCDR at 223.