

Atlantic States Marine Fisheries Commission

Executive Committee

October 20, 2021

8:00 – 10:00 a.m.

Webinar

Draft Agenda

The order in which these items will be taken is subject to change; other items may be added as necessary.

1. Welcome/Introductions (*P. Keliher*)
2. Board Consent
 - Approval of Agenda
 - Approval of Proceedings from August 2021
3. Public Comment
4. Review and Consider Approval of FY2021 Audit **Action** (*S. Woodward*)
5. Discuss Policy on Responding to FOIA Requests (*R. Beal*)
6. Discuss Commission Involvement in Wind Energy Development (*J. Cimino*)
7. Discuss Seafood Processors Pandemic Response and Safety (SPRS) Block Grant Program
8. Discuss Appeals Process (*R. Beal*)
9. Future Annual Meetings Update (*L. Leach*)
10. Other Business/Adjourn

**MEETING SUMMARY OF THE
ATLANTIC STATES MARINE FISHERIES COMMISSION
EXECUTIVE COMMITTEE**

**Virtual via GoToMeeting
Arlington, VA
August 4, 2021**

INDEX OF MOTIONS

1. **Approval of Agenda by Consent. (Page 1)**
2. **Approval of Meeting Summary from May 5, 2021 by Consent. (Page 1)**
3. **Adjournment by Consent (Page 2)**

ATTENDANCE

Committee Members

Pat Keliher, ME
Cheri Patterson, NH
Dennis Abbott, NH (LA Chair)
Dan McKiernan, MA
Jason McNamee, RI
Jim Gilmore, NY
Justin Davis, CT
Joe Cimino, NJ
Kris Kuhn, PA

Roy Miller, DE (GA Chair)
John Clark, proxy for David Saveikis (DE)
Kris Kuhn, PA
Bill Anderson, MD
Chris Batsavage, proxy for Kathy Rawls, NC
Mel Bell, proxy for Phil Maier, SC
Spud Woodward, GA
Brian McManus, proxy for Jessica McCawley, FL

Other Commissioners/Proxies

Lynn Fegley MD DNR
Tom Fote, NJ (GA)
Pat Geer, VMRC
Emerson Hasbrouck, NY (GA)
Doug Haymans, GA (AA)
Bill Hyatt, CT (GA)
Raymond Kane, MA (GA)

Mike Luisi, MD DNR
Nichola Meserve, MA DMF
Eric Reid, RI (LA Proxy)
Dave Sikorski, MD (LA Proxy)
Megan Ware, ME DMR
Ritchie White, NH (GA)

Staff

Bob Beal
Laura Leach
Toni Kerns
Tina Berger
Lisa Carty
Pat Campfield
Geoff White
Kristen Anstead

Lindsey Aubart
Chris Jacobs
Jeff Kipp
Savannah Lewis
Kirby Rootes-Murdy
Sarah Murray
Deke Tompkins

Others

Karen Abrams, NOAA
Fred Akers
Max Appelman, NOAA
Julia Beaty, MAFMC
Jeff Brust, NJ DEP
Allison Colden, CBF
Peter deFur
Alexa Galvan, VMRC
Marty Gary, PRFC
Hannah Hart, FL FWC
Adam Hart, VMRC
Adam Kenyon, VMRC
Wilson Laney

Shanna Madsen, VMRC
Alyson Martin, CBF
Chair McDonough, SC DNR
Brandon Muffley, MAFMC
Allison Murphy, NOAA
Nicholas Popoff, USFWS
Jill Ramsey, VMRC
Somers Smott, VMRC
Kevin Sullivan, NH FGD
Lowell Whitney, USFWS
Chris Wright, NOAA
Renee Zobel, NH FGD

CALL TO ORDER

The Executive Committee (EC) of the Atlantic States Marine Fisheries Commission convened August 4, 2021 virtually via a GoToMeeting webinar. The meeting was called to order at 8:00 a.m. by Chair Pat Keliher.

APPROVAL OF AGENDA

The agenda was approved, with the addition of discussion on Conservation Equivalency and the Recovering Americas Wildlife Act.

APPROVAL OF PROCEEDINGS

The summary minutes from the May 5, 2021 meeting were approved as presented.

PUBLIC COMMENT

There was no public comment.

CONSOLIDATED APPROPRIATIONS ACT OF 2021

Mr. Beal provided a brief overview of the second round of CARES assistance, technically known as the Consolidated Appropriations Act of 2021, or "The ACT". The Commission has received the Cooperative Agreement and half of the states have submitted Spend Plans. Mr. Beal reminded the Committee the funds must be obligated by 9/30/21, and Congress prefers the funds are disbursed by this date, but the funds will not revert if not spent by the states by 9/30/21. We have the flexibility and time to get these funds to fisheries participants who need them.

ADMINISTRATIVE OVERSIGHT COMMITTEE

The Administrative Oversight Committee was unable to meet to discuss the Statement of Investment Policy Guidelines; but will meet before the Annual Meeting to discuss it. The Vice-Chair proposed this topic be moved to the EC agenda at Annual Meeting for action.

LEGISLATIVE COMMITTEE REPORT

The Committee received an update on federal shark conservation legislation introduced in the 117th Congress. The four bills discussed were:

- S.1106 - Shark Fin Sales Elimination Act, Booker (D-NJ)
- H.R.2811 - Shark Fin Sales Elimination Act of 2021, Sablan (D-MP)
- S.1372 - Sustainable Shark Fisheries and Trade Act of 2021, Rubio (R-FL)
- H.R.3360 - Sustainable Shark Fisheries and Trade Act of 2021, Webster (R-FL)

The Commission's Legislative Committee has raised concerns about discarding legally harvested shark parts, as required by S. 1106 and H.R. 2811. The Legislative Committee will continue to monitor these bills and will react as needed.

ANNUAL MEETING UPDATE

Mr. Beal reported the staff will be looking into the possibility of a hybrid meeting for the 80th Annual Meeting in Long Branch, NJ October 18-21, 2021. Leadership will continue to monitor the situation regarding the Delta variant of Covid-19 and keep the Commissioners apprised. Chair Keliher recommended travelers hold off on purchasing plane tickets at this time.

OTHER BUSINESS

The Committee approved sending a letter in support of the Recovering Americas Wildlife Act to Senate Leadership.

The Committee discussed Conservation Equivalency (CE) with the thought it might be time to review its policy, based on the successes and failures of the current approach to CE. The policy was last revised in 2016 and much has changed in the

interim. Chair Keliher will appoint a workgroup to develop a specific charge, which, after approval by the Executive Committee will be given to the Management & Science Committee for action.

ADJOURN

The Executive Committee adjourned at 9:02 a.m.

Considerations for Updating the Appeals Process

October 5, 2021

The ASMFC appeals process is a seldom-used procedure to address the concern of an aggrieved state or group of states. The recent appeal on black sea bass allocation from New York is the first time the appeal process has resulted in changes to a management program. This experience raised some process questions that may justify updates to the appeals process. The following three topics were raised at the Policy Board meeting on August 5th.

1. What happens if a species management board is unable to take action to satisfy the direction from the Policy Board?
2. Should the timeline be flexible to allow for additional analyses or other technical work to assist the species management board in responding to the direction from the Policy Board?
3. Should the Policy Board weigh in on allocation (reallocation) when a decision is made by a management board comprised of the affected states?

The following document includes potential language to address the three questions above. These changes are not staff recommendations; however they are options that would address the questions if the Policy Board agrees changes are needed to the process. The potential changes are highlighted as track changes.

As a reminder the ISFMP Charter provides that the Policy Board will be responsible for the overall administration and management of the Commission's fishery management programs. The Charter also defines one specific role of the Policy Board is to Consider and decide upon appeals of states to actions of any management board or section.

Atlantic States Marine Fisheries Commission

APPEALS PROCESS

Revised by the ISFMP Policy Board February 7, 2019

Background

The Atlantic States Marine Fisheries Commission's interstate fisheries management process is based on the voluntary commitment and cooperation of the states. The involved states have frequently demonstrated their willingness to compromise and the overall process has proven to

be very successful. However, there have been instances where a state/jurisdiction has expressed concern that the Board decisions have not been consistent with language of an FMP, resulted in unforeseen circumstances or impacts, did not follow established processes, or were based on flawed technical information. In order to address these concerns, the ISFMP Policy Board charged the Administrative Oversight Committee with “exploring and further developing an appeals process”.

Under the current management process the primary policy development responsibility lies with species management boards. And, in the case of development of new fishery management plans or amendments the full Commission has final approval authority prior to implementation. The purpose of the appeals process is to provide a mechanism for a state/jurisdiction to petition for a management decision to be reconsidered, repealed or altered. The appeals process is intended to only be used in extraordinary circumstances where all other options have been exhausted. The management boards have the ability to go back and correct errors or address additional technical information through the recently clarified process on “amending or rescinding previous board actions”.

During the December 2003 ISFMP Policy Board meeting, the decision was made to continue to have the Policy Board serve as the deliberative body that will consider valid appeals. This decision is consistent with the language that is included in the ISFMP Charter. However, the Charter does not provide detailed guidance on how an appeal is to be addressed.

This paper details for the Commission appeals process.

Appeal Criteria – The intent of the appeals process is to provide a state with the opportunity to have a decision made by a species management board or section reconsidered by the Policy Board. The following criteria will be used to guide what type of decisions can be appealed. In general, management measures established through the FMP/amendment/addendum process can be appealed. However, the appellant must use one of the following criteria to justify an appeal:

1. Decision not consistent with, or is contrary to, the stated goal and objectives of the current FMP (Goal and Objective Section of FMPs/Amendments or Statement of the Problem Section of Addenda).
2. Failure to follow process as identified in the ISFMP Charter, Rules and Regulations or other ASMFC guiding documents (e.g. conservation equivalency guidance).
3. Insufficient/inaccurate/incorrect application of technical information. Examples can include but are not limited to:
 - a. If for any calculations used in the decision, an error which changes the results was identified after the decision was rendered;
 - b. If any data used as the basis for a decision, undergoes a modification which impacts results after the decision was rendered (i.e. a landings dataset is adjusted significantly due to a recalibration or application of a control rule adjustment);

- c. If data is incorrectly identified and therefore incorrectly applied, such as a misidentification of landings information as catch information, or incorrectly assigned landings/catch to a jurisdiction;
- d. If information used as the basis for the decision lacked scientific or statistical rigor, thereby calling in to question the sound basis for the decision;
- e. If the historical landings, catch, or abundance time series used as a basis for a decision is found to be incorrect.

Any appeal based on criterion 3 may be verified independently by a technical body appointed by the Chair, as needed.

4. Management actions resulting in unforeseen circumstances/impacts that were not considered by the Board as the management document was developed.

The following issues could not be appealed:

1. Management measures established via emergency action
2. Out-of-compliance findings (this can be appealed but, through a separate, established process)
3. Changes to the ISFMP Charter
4. Allocation (This addresses question #3 above.)

Appeal Initiation – The ISFMP Charter provides that a state aggrieved by a management board action can appeal to the ISFMP Policy Board. Any state can request to initiate an appeal; also a group of states can submit a unified request for an appeal. The states are represented on the Commission by three representatives that have the responsibility of acting on behalf of the states' Executive and Legislative branches of government. Therefore, in order to initiate an appeal all seated Commissioners (not proxies) of a state's caucus must agree that an appeal is warranted and must sign the letter submitted to the Commission. If a multi-state appeal is requested all the Commissioners from the requesting states must sign the letter submitted to the Commission. During meetings where an appeal is discussed proxies will be able to participate in the deliberations. Meeting specific proxies will not be permitted to vote on the final appeal determination, consistent with Commission policy.

A state (or group of states) can request and appeal on behalf of the Potomac River Fisheries Commission, District of Columbia, National Marine Fisheries Service, or the United States Fish and Wildlife Service.

The letter requesting an appeal will be submitted to the Chair of the Commission and include the measure(s) or issue(s) being appealed, the justification for the appeal, and the commitment to comply with the finding of the Policy Board. This letter must also include a demonstration that all other options to gain relief at the management board level have been exhausted. This letter must be submitted via certified mail or email at least **45 days** prior to a scheduled ASMFC Meeting Week. The Commission Chair, Vice-Chair and immediate past Chair will determine if

the appeal meets the qualifying guidelines and notify the Policy Board of their decision. If the immediate past chair is no longer a commissioner the Chair will select an alternate from a state that is not affected by the appeal. Also, if the Chair, Vice-Chair or immediate past Chair is a signatory to the appeal, the Chair will select an alternate from a state that is not affected (or minimally affected) by the appeal.

Convene a “Fact Finding” Committee (optional) – Upon review of the appeal documentation, the Commission Chair, Vice-Chair and immediate past Chair (or alternate if necessary, as described above) may establish a “Fact Finding” Committee to conduct analyses and/or compile additional information if necessary. This group will be made up of individuals with the technical expertise (including legal, administrative, social, economic, or habitat expertise if necessary) and familiarity with the fishery to conduct the necessary analysis. If such a committee is convened the schedule included in the last section of this document may need to be adjusted to provide time for the Committee to conduct analyses. The Commission Chair, Vice-Chair and immediate past Chair (or alternate if necessary, as described above) may set a deadline for the Committee to complete its work to ensure the appeal is addressed in a timely manner.

ISFMP Policy Board Meeting – Following the determination that an appeal has met the qualifying guidelines, a meeting of the Policy Board will be convened at a scheduled ASMFC meeting week. The agenda of this meeting will be set to allow sufficient time for all necessary presentations and discussions. The Chair of the Commission will serve as the facilitator of the meeting. If the Chair is unable to attend the meeting or would like to more fully participate in the deliberations, the Vice-Chair of the Commission will facilitate the meeting. The ISFMP Director will provide the background on the development of the management program as well as a summary of the justification provided in the record for the management board’s action. The ISFMP Director will also present the potential impacts of the appeal on other affected states. The appellant Commissioners will present their rationale for appealing the decision and provide a suggested solution. The Policy Board will then discuss the presentations and ask any necessary questions. The Policy Board will vote to determine if the management board’s action was justified. A simple majority of the Policy Board is required to forward a recommendation to a management board for corrective action. If the Policy Board determines that the existing management program should be modified, it will issue a finding to that effect as well as any guidance regarding corrective action to the appropriate species management board. The referral may be worded to allow the management board flexibility in determining the details of the corrective action.

Upon receipt of the Policy Board’s recommendation the management board will discuss the findings and make the necessary changes to address the appeal. The management board is obligated to make changes that respond to the findings of the Policy Board. A simple majority of the management board will be necessary to approve the changes.

(To address questions #1 and #2 above)

If the Management Board is unable to make the changes necessary to respond to the findings

of the Policy Board, the following options are available:

- The Management Board can request clarification from the Policy Board on the specifics of the findings. A meeting of the Policy Board will be scheduled to ensure the requested clarification is provided to the Management Board to take action at the Commissions next quarterly meeting.
- The Management Board can inform the Policy Board that it is unable to address the findings and the Policy Board will take action to approve changes that will address the appeal.
- The Management Board can request additional analyses from the technical committee or other technical support group (e.g. Management and Science Committee, Assessment Science Committee). A meeting of the appropriate technical group will be scheduled to ensure the requested information is provided to the Management Board to take action at the Commissions next quarterly meeting

Appeal Products and Policy Board Authority – Following the Policy Board meeting a summary of the meeting will be developed. This summary will include a detailed description of the findings and will be forwarded to the appropriate management board and Policy Board upon completion. If the Policy Board determines that changes to the management program are necessary, the summary may include guidance to the management board for corrective action. The report of the Policy Board will be presented to the management board for action at the next scheduled meeting.

Considerations to Prevent Abuse of the Appeals Process – The appeals process is intended to be used only in extraordinary situations and is in no way intended to provide a potential avenue to preempt the established board process. The initiation of an appeal will not delay the Commission process for finding a state out of compliance nor delay or impede the imposition of penalties for delayed compliance.

Limiting Impacts of Appeal Findings – If a state is successful in an appeal and the management program is altered, another state may be negatively impacted by the appeals decision. In order to prevent an appeals “chain reaction,” the Policy Board’s recommendation and the resulting management board’s decision will be binding on all states. All states with an interest in the fishery will be obligated to implement the changes as approved by the management board. Upon completion of the appeals process, a state is not precluded from taking further action beyond the Commission process to seek relief.

If the Policy Board supports the appeal and determines that corrective action is warranted, the potential for management changes to negatively impact other states will be evaluated by the Policy Board and the species management board.

Appeals Process Timeline

1. Within **15 working days** of receipt of a complete appeal request the Commission Chair, Vice-Chair, and immediate past chair (or alternate) will determine if the state has an appeal which

meets the qualifying guidelines.

2. Upon a finding that the appeal meets the qualifying guidelines, the appeal will be included on the agenda of the ISFMP Policy Board meeting scheduled during the next ASMFC Meeting Week (provided an adequate time period is available for preparation of the necessary documentation).
3. Following the finding that an appeal meets the qualifying guidelines, Commission staff and the appellant commissioners will have a minimum of **15 working days** to prepare the necessary background documents.
4. The background documents will be distributed at least **15 days** prior to the Policy Board meeting.

A summary of the Policy Board meeting will be developed and distributed to all Commissioners within **15 working days** of the conclusion of the meeting.

(This timeline can remain unchanged or we can add details about the timing of the management board meeting(s), technical work, and potential additional policy board meeting.)

I know I have been in the minority in objecting to the NY appeal on the grounds that the corrective action the Policy Board imposed on the Management Board was not in the Draft Addendum, but I do think this is a serious issue. Under the ISFMP Charter – Procedures:

(ii) Upon completion of a draft FMP or amendment and its approval by the management board/section, the Commission shall again utilize **the relevant states' established public review process** to elicit public comment on the draft. The Commission shall ensure that a minimum of four public hearings are held, including at least one in each state that specifically requests a hearing.

By referring to the 'states' established public review process', I think the Charter implies that states will use their Administrative Procedures Act (APA) processes, the same processes used for actions such as regulation changes. Delaware is probably typical in that you can't change a document (or create a new management option) after public review unless you take the modified document or option back out for further public review. The selective 'mixing and matching' from the options that the Policy Board imposed on the SF, S, & BSB Management Board resulted in an option that was never presented to the public. I agree that we were on safer ground when doing what we did for CT under Option 1 as increasing the CT baseline by less than 5% could be considered implicit in the option, but that could have made this clearer to the public by a simple rewrite (example below). Adding NY to Draft Addendum Option 1 when NY was not mentioned in the Draft Addendum Option 1 was questionable at best. I don't recall the Board deliberations as to why NY wasn't included in Option 1, but the only option that would increase the NY baseline was the trigger option, which was not chosen. While it was a minor deviation from the Draft Addendum presented to the public to increase NY to 1%, I don't think doing so meets APA rules and could thus open the decision to challenges. The ASMFC process works well enough that appeals are rare and appeals that are remanded to the Management Board are rarer, but the process of having the Policy Board impose a corrective action that was not included in the Public Hearing Draft on a Management Board should not happen in the future. Could something like the following be added to the draft Appeals Policy text:

ISFMP Policy Board Meeting – Following the determination that an appeal has met the qualifying guidelines, a meeting of the Policy Board will be convened at a scheduled ASMFC meeting week. The agenda of this meeting will be set to allow sufficient time for all necessary presentations and discussions. The Chair of the Commission will serve as the facilitator of the meeting. If the Chair is unable to attend the meeting or would like to more fully participate in the deliberations, the Vice-Chair of the Commission will facilitate the meeting. The ISFMP Director will provide the background on the development of the management program as well as a summary of the justification provided in the record for the management board's action. The ISFMP Director will also present the potential impacts of the appeal on other affected states. The appellant Commissioners will present their rationale for appealing the decision and provide a suggested solution. The Policy Board will then discuss the presentations and ask any necessary questions. The Policy Board will vote to determine if the management board's action was justified. A simple majority of the Policy Board is required to forward a recommendation to a

management board for corrective action. If the Policy Board determines that the existing management program should be modified, it will issue a finding to that effect as well as any guidance regarding corrective action to the appropriate species management board. The referral may be worded to allow the management board flexibility in determining the details of the corrective action. **If the Policy Board requires the Management Board to take specific corrective actions, those corrective actions must be limited to the management options as written in the Draft Amendment or Addendum reviewed by the public.**

As to the wording of options that are in Public Hearing Drafts, perhaps we can make it clear to the public that an option includes the entire range of possible changes? Using Draft Addendum Option 1 as an example, instead of presenting the option as: **This option would increase Connecticut's 1% allocation of the coastal quota to 5%**, the text could be written as: **This option would increase Connecticut's allocation of the coastal quota from 1% to a percentage up to and including 5%.**

John H. Clark
Fisheries Section Administrator
Delaware Division of Fish and Wildlife
89 Kings Highway
Dover, DE 19901
(302)739-9914 (Fisheries) or 9108 (Direct)