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FISHERIES SECTION

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To: ASMFC Executive Committee
From: John Clark
Date: July 20, 2018
Re: Appeal Criterion 1. Decision not consistent with FMP

Addendum XXX to the Black Sea Bass FMP was approved by the Summer Flounder, Scup, and Black Sea Bass Board at the Winter 2018 meeting, appealed by the Northern Region states in March, then revised by the Board at the Spring 2018 meeting. The action taken at the Spring 2018 meeting by the Black Sea Bass Board on the Addendum in response to the updated 2017 recreational landings and the appeal by the Northern Region states resulted in better management. However, as long as the Executive Committee is reexamining the Appeals criteria, it should take another look at one of the criteria that the Appeals Fact Finding Committee agreed was appropriate for accepting the Northern Region appeal, namely Criterion 1. Decision not consistent with FMP. I think the acceptance of appeal under this criterion by the Appeals Committee could set a troubling precedent for future appeals.

We need to clarify the definition of Criterion 1, Decision not consistent with FMP, because it would seem that many decisions made by ASMFC Boards could be appealed on this criterion if the precedent-setting acceptance of this criterion for Addendum XXX becomes part of the ASMFC management record. This decision is troubling because it is hard to understand how the Board's Addendum XXX decision was not consistent with the FMP. While the Northern Region appeal states that 'The primary objective of Addendum XXX is to address inequities in recreational black sea bass management that resulted from the ad hoc regional management approach in the preceding six years', this was not the primary objective of Addendum XXX, but is instead a selective rewording of Addendum XXX Section 2.1 Statement of the Problem. The Board motion to develop Addendum XXX stated "move to initiate an addendum for 2018 recreational black sea bass management with **options as recommended by the Working Group and Plan Development Team**. Options for regional allocations shall include approaches with uniform regulations (e.g. number of days) and other alternatives to the current North/South regional delineation (MA-NJ/DE-NC) such as those applied for summer flounder, i.e., one – state regions". The

Addendum XXX development process followed the Board motion to the letter. Draft Addendum XXX had management options proposed by the Working Group and Plan Development Team, which were vetted by the Technical Committee. It must be noted that several members of the Working Group were from the Northern Region. These options were approved by the Board for public hearings and the Addendum went through the public hearing process. In my view this Addendum development process was entirely consistent with the FMP. At the Winter 2018 Board Meeting, the Board developed and approved a new management option that was an average of the two of the approved options, which was again consistent with the FMP as the new option fit between the approved options. I certainly understand that, for the Northern Region, these options were not desirable, but that doesn't make them 'not consistent with the FMP'. As a member of the Working Group, I find it disconcerting that the Appeals Committee accepted this appeal under this criterion as the Working Group spent long hours coming up with management options that met the Board's directive for Addendum XXX.

While the resolution of the Addendum XXX appeal situation at the Spring 2018 Board Meeting allowed management to proceed, it wasn't clear whether the ISFMP Policy Board was endorsing the Appeals Committee findings or the appeal was one of several factors in reconsidering the Addendum XXX management options. In the face of this uncertainty, I urge ASMFC to take the following actions:

1. The ISFMP Policy Board need to make clear that Addendum XXX was revised due to the new information received and analyzed between the Winter and Spring 2018 Board Meetings, which fits under Criterion 3: Insufficient/Inaccurate/Incorrect Application of Technical Information, not because the Board accepts the Appeals Committee finding that the appeal was justified under Criterion 1. The version of Addendum XXX approved at the Winter 2018 Board meeting was consistent with the FMP and I think the Policy Board must state that it was consistent. What does seem inconsistent is that just months after ASMFC expressed dismay bordering on outrage over the acceptance by the Secretary of Commerce of the New Jersey summer flounder appeal, we have an ASMFC Appeals Committee accepting an appeal based in part on the grounds that the action taken was not consistent with the FMP, which seems to be a much more ambiguous standard than that used by the Secretary of Commerce to find in New Jersey's favor.
2. As long as we are clarifying other appeal criteria, we need to clarify Criterion 1, if that is possible. My concern and frustration about the Appeals Committee acceptance of the Northern States Addendum XXX appeal on this Criterion is based on recent history. I remind you that Delaware appealed Addendum IV of the Striped Bass Plan on Criterion 1 and was rejected, despite having what I still consider a much stronger case to make on Criterion 1. To refresh the collective memory, Delaware's argument against Addendum IV was that Amendment 6 stated, "*Stock Rebuilding Schedules (2.6.2) If at anytime the Atlantic striped bass population is*

declared overfished and rebuilding needs to occur, the Management Board will determine the rebuilding schedule at that time.”, but Addendum IV required a 25% reduction in harvest despite the stock not being declared overfished. If that management decision was consistent with the FMP, yet Addendum XXX was not consistent, then we have a capricious appeal system that will not only increase public skepticism of ASMFC’s decision making process, but will further increase the pressure on states to appeal management decisions they find unfavorable. If we keep Criterion 1, we will need to more clearly define conditions that meet this criterion. For example:

‘Criterion 1. Decision not consistent with FMP. A decision may be inconsistent with the FMP if it meets any of these conditions:

- Contradicts at least one objective of the FMP
- Contradicts management triggers in the FMP
- Further conditions should be added’

Thank you for your consideration of this request.