

Atlantic States Marine Fisheries Commission

Executive Committee

January 26, 2022

8:00 – 9:30 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/Call to Order (*S. Woodward*)
2. Committee Consent
 - Approval of Agenda
 - Approval of Proceedings from October 2021
3. Public Comment
4. Discuss the Commission's Role in Coordinating the Member States' Efforts in Offshore Wind Energy Development
5. Discuss Appeals Process (*R. Beal*)
6. Discuss CARES Act State Distributions (*R. Beal*)
7. Discuss the Use of Alternates for Advisory Panel Members (*P. Keliher*)
8. Other Business/Adjourn

Atlantic States Marine Fisheries Commission

APPEALS PROCESS

[Draft revisions for consideration by the Executive Committee on January 26, 2022](#)

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process is to provide a mechanism for a state/jurisdiction to petition for a management decision to be reconsidered, repealed or altered.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

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. If the Policy Board requires the management board to take specific corrective actions, those corrective actions must:

Option 1.be limited to the management options as written in the Draft Amendment or Addendum reviewed by the public.

Option 2.be within the range of management options included in the Draft Amendment or Addendum reviewed by the public.

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.

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 (Any or all of these options can be selected):

1. 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.
2. 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.
3. 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.

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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.