

**PROCEEDINGS OF THE  
ATLANTIC STATES MARINE FISHERIES COMMISSION  
ATLANTIC HERRING SECTION**

May 9, 2006  
Doubletree Hotel Crystal City  
Arlington, Virginia

**Approved August 14, 2006**

## ATTENDANCE

### Section Members

George Lapointe, ME DMR  
Sen. Dennis Damon, ME Leg. Appte.  
Patten White, ME Gov. Appte.  
John Nelson, NH F&G  
Rep. Dennis Abbott, NH Leg. Appte.  
G. Ritchie White, NH Gov. Appte.  
Dr. David Pierce, MA DMF  
Vito Calomo, proxy, MA Gov. Appte.

William Adler, MA Gov. Appte.  
Mark Gibson, RI DEM  
Everett Petronio, RI Gov. Appte.  
Eric Smith, CHAIR, CT DEP  
Dr. Lance Stewart, CT Leg. Appte.  
Paul Scarlett, NJ F&W  
Erling Berg, NJ Gov. Appte.

### Ex Officio

Matt Cieri, ME DMR (Technical Committee Chair)

### Staff

Ruth Christiansen  
Michael Howard  
Julie Nygard

Bob Beal  
Vince O'Shea

### Guests

Jeff Kaelin, F/V Providian and Atlantic  
Frost Seafood  
Mary Beth Tooley, ECPA  
Dave Ellenton, Cape Seafoods, Inc.

Kelly Place, proxy, VA Leg. Appte.  
Howard King, MD DNR  
Bruno Vasta, MD Gov. Appte.

## TABLE OF CONTENTS

Welcome and Board Consent.....	4
Public Comment.....	4
2005 Compliance Reports and FMP Review.....	5
Days Out 2006.....	5
Amendment 2 Bycatch Information and Monitoring.....	6
Amendment 2 Spawning Restrictions.....	7
Amendment 2 Implementation Proposals.....	26
Other Business and Adjourn.....	27

## SUMMARY OF MOTIONS

- 1. Move to task the staff with development of a technical addendum to reflect the intent of the section vote in January 2006 and as clarified today that there shall be no directed fishing for herring in the closed areas during spawning closures.**

Motion by Rep. Abbott; second by Mr. Gibson. Motion carries three to one with one abstention.

**ATLANTIC STATES MARINE  
FISHERIES COMMISSION**

**ATLANTIC HERRING SECTION**

**Doubletree Hotel Crystal City  
Arlington, Virginia**

**May 9, 2006**

The Atlantic Herring Section of the Atlantic States Marine Fisheries Commission convened in the Washington Room of the Doubletree Hotel Crystal City, Arlington, Virginia, Tuesday morning, May 9, 2006, and was called to order at 8:00 o'clock a.m. by Chairman Eric Smith.

**Welcome**

**CHAIRMAN ERIC SMITH:** Good morning. Please take your seats and we'll get the meeting started. Thank you all for arriving at this early hour for the meeting of the Atlantic Herring Section. You have the agenda that was distributed and I guess I would like to offer a few preliminary comments before we get into the business at hand.

Public comment, as we always do, it will be in two forms. The first item will be for general concerns that are not otherwise on the agenda. The second will be during debate on substantive new issues, as time permits.

In some cases, the issue before us is going to be, and I hesitate to say it this way, because Joe will immortalize it, but I'll do it anyway, but what was the sense of the section at the meeting when we approved the amendment.

In other words, what was the intent of the section in their vote. That's not going to be

debatable. It's not going to be a public comment issue. We're not going to revise or revisit things unless some section member decides they want to reopen an issue and then they have to do it under the burden of the super majority vote. That's the rule.

My intention is not to have public or even a lot of section debate as much as trying to clarify the record of what was intended at that time that we made the decision. Now, if revisions are entertained, obviously section debate is appropriate and public comment will be appropriate and I will use what I will now call the Nelson Rule, which is one pro comment, one con comment, take another pro and take another con.

When the section is comfortable that they've got the sense of the audience on the issue and they're prepared to decide the question, we'll go back to the section and deal with it. It's not an issue where everybody who wants to put their hand up gets to speak. That's a different forum for that.

I will not vote, as in January I described. Ordinarily, I would not vote on these things, preferring to allow you big dogs in the fishery to deal with this. However, we do have a Connecticut section member here, that we did not the last time, and so that, of course, will be a little bit different than how I dealt with it in January.

Normally speaking then, a tie vote will kill an issue, but I do reserve the right to vote on an issue, of course, if I so choose and if the spirit moves me. Section, are you comfortable with the ground rules as I've laid them out and we can proceed? Are there any adjustments to the agenda?

**Public Comment**

Seeing none, public comment on other

herring issues. Does anyone from the audience wish to speak on herring issues of interest that may not be otherwise going to be discussed on the agenda? Seeing none, thank you. Item 3 is Update on Progress of 2005 Compliance Reports and FMP Review by Ruth.

### **2005 Compliance Reports and FMP Review**

**MS. RUTH CHRISTIANSEN:** Thank you, Mr. Chairman. We'll get through the easy stuff first. Compliance reports for the 2005 herring fishing year were due February 1<sup>st</sup>. They have been due February 1<sup>st</sup> since 2001 and so that normally during our spring meeting we do a compliance report review and an FMP review.

Right now, I only have compliance reports from Maine, New Hampshire, Connecticut, and New York and New Jersey. I, unfortunately, am missing landings data from Rhode Island and no report yet has been submitted by Massachusetts, but I'm hoping to get all that necessary information in so that at the August meeting we can do the compliance report review and the FMP review.

**CHAIRMAN SMITH:** Questions?

**DR. DAVID PIERCE:** We did submit our report. That was submitted about three weeks ago.

**MS. CHRISTIANSEN:** I don't have that.

**DR. PIERCE:** It was submitted though. I don't know if I have a copy with me, but I assure you it was submitted, because of the numbers of reminders that you provided. You did a good job with reminders and so I don't understand why you haven't got it in hand, but I'll check to see if I have a copy

with me, but that was done.

**MS. CHRISTIANSEN:** That's fine. We'll get that figured out.

**CHAIRMAN SMITH:** The email dog ate the homework. Just resubmit it. That's the simplest thing to do and if it's lost somewhere in cyberspace, we can just get another copy. Are there other comments on the compliance reports? The next item is the Item 4, Update on the Days Out for 2006, which the principal section members met, and Ruth will report on that.

### **Days Out 2006**

**MS. CHRISTIANSEN:** On April 18<sup>th</sup>, the states of Massachusetts, New Hampshire, and Maine, as well as industry members, met to discuss days out for 2006. The states and industry agreed to maintain the status quo from the 2005 fishing year into 2006 so that two days will be taken out of the fishery, beginning June 1, 2006.

The days out for Maine will begin at 6:00 p.m. Friday through 6:00 p.m. Sunday. For Massachusetts and New Hampshire, the days out will begin at midnight Friday through midnight Sunday and the estimated week of the closure for the herring fishery is December 6<sup>th</sup>. During the days out, the vessels must be at the dock at the start of the days out and offloading of catch will be permitted during this time. If there's any questions on that --

**CHAIRMAN SMITH:** Questions, section members? Seeing none, that will be the plan for 2006. Item 5 is to Review Section Action Taken in January Regarding Bycatch Information and Monitoring and Discussion of Potential Actions for Addressing Framework 43 in the Northeast Multispecies FMP. Ruth, would you like to summarize

where we are on that?

### **Amendment 2 Bycatch Information & Monitoring**

**MS. CHRISTIANSEN:** I would love to summarize. Framework 43 was submitted to the NMFS regional office in February of 2006. Framework 43 addresses the bycatch of regulated groundfish species in the directed herring fishery and it includes the catch cap for haddock, it includes an incidental catch allowance for other regulated multispecies of 200 pounds, and it includes a monitoring program for the catch cap.

The anticipated implementation for Framework 43 is summer of 2006, in conjunction with the expiration of the NMFS emergency rule. Back in January, with the approval of Amendment 2, Amendment 2 recommends that each state develop a bycatch monitoring program for state permitted vessels participating in the directed herring fishery that mirrors federal requirements.

As such, no action is taken to implement more specific requirements for observer coverage in the herring fishery for state waters, but the section agreed, and it was approved, that if the New England Council implements bycatch caps the section may initiate an addendum via adaptive management to modify the interstate management program so that it is complementary to federal regulations. With this action taken by the New England Council to address bycatch, it is up to the section now to decide whether or not they want to initiate an action of some sort.

**CHAIRMAN SMITH:** Let me ask this before we go to a general discussion. David, you're the chairman of the herring

committee for the council.

You're in an ideal position as a member of this section and that committee and do you see a linkage between the two plans that justifies us doing an addendum for 2006, because the season is really just around the corner, or does it seem, based on what the council approved, that we're covered under our plan adequately for now and we should be more methodical in trying to develop a program for 2007? I'm really asking you to have the council hat on and see if there's a problem created by the commission not doing something in the next month or two.

**DR. PIERCE:** Your latter position is the one that I would support, that there is no need for us to move forward at this time and indeed we would need to develop, as you indicated, a more well thought out approach for dealing with the way in which we will assist the New England Council with the implementation of that bycatch cap. No action is needed at this time.

**CHAIRMAN SMITH:** Thank you. You're gauging that both in the sense of from the commission's perspective we don't need to act precipitously and also we aren't going to jeopardize the council plan by not doing something right away?

**DR. PIERCE:** You summarized that quite well, Mr. Chairman.

**CHAIRMAN SMITH:** Comment by the section? Does anyone wish to act otherwise than what David has suggested? Seeing none, Item 6 now is the Review of the Section Action Taken in January 2006 Regarding Spawning Restrictions and Discussion and Clarification Regarding the Spawning Language and Implementation of Amendment 2. Ruth, summarize that again for us. I have a sense in my mind of what

we want to say about this, but you've been doing a good job of characterizing it for us and so let's do that first.

### **Amendment 2 Spawning Restrictions**

**MS. CHRISTIANSEN:** Once again, back in January, with the approval of Amendment 2, the zero tolerance provision of Amendment 2 reads, and this is as it was approved: Any vessel is prohibited to fish for, take, land, or possess spawned herring from or within a restricted spawning area.

After approval of Amendment 2, there has been some recent discussion as to the interpretation of this zero tolerance provision and it has had an effect on states submitting their implementation proposals for Amendment 2 and the like. What the section needs to do is basically solidify and clarify the intent of this zero tolerance provision today.

**CHAIRMAN SMITH:** This is the point in my introductory remarks that I referred to, and I think we all see it coming, but I want to make the careful distinction that we want to clarify the intent of what we voted on in January, not reopen the issue and go at it again, as other management bodies often do, repetitiously.

I know there are two different perspectives on this and I'm going to ask for those two perspectives to be offered by the various section states and then it's really a question that the section needs to clarify its vote.

I may want to just go around the table and ask each state what their intent was with their particular vote. The vote was four to one with one abstention and so it wasn't one of those three to two tiebreaker type of situations.

Out of a five or six-member group, it was about as decisive as you can be. I'm going to ask George and John if they would not mind being put on the spot to lay the issue out as they saw it and then we're going to ask the section to explain where their vote was.

**MR. GEORGE LAPOINTE:** I'm happy to do that, Mr. Chairman, although I think people know other people's views, but how you change the language based on the intent is going to be a difficult issue. That is the issue. The language is what it says and so the idea that we're going to reinterpret intent is going to be a very difficult point and I want to make that clear.

The State of Maine was the one vote, not the abstention, in January, because we have had the 20 percent tolerance provision in place for quite some time. The State of Maine has enforced it. It has sampled catches and it has worked well.

In talking about this issue, and I will ask the Technical Committee for guidance, the issue of harvest on juveniles comes up, as it has for a long time. People know that Maine has a long history of fishing on juveniles and it's my understanding that F in the fishery is low and, as my staff described it, F on juveniles is extremely low.

We have a situation where we've had a practice that has worked for us and, frankly, it has worked for the fishery. The State of Maine has implemented it and it has enforced it and that's why we voted for and favored the 20 percent tolerance. The section elected to go to zero percent tolerance.

We went back and submitted our implementation plan on time, thank you very much, and we looked at the amendment



and the amendment says any vessel is prohibited to fish for, take, land, and possess spawned herring, as identified below, from or within a restricted spawning area. Spawned herring shall be identified as ICNAF gonadal stages V and VI.

I met with our law enforcement folks and said can we enforce this and they said yes and so we have a proposed regulation that's going out to public hearing I think next week to implement that.

In discussing how we do this, other states have interpreted this that the spawning areas should be closed and I would ask the other states how they're going to enforce that and what kind of at-sea enforcement is going to go on.

We don't have VMS on boats and, frankly, until the Magnuson Act changes, there's no nexus between the federal actions and our state actions and so we don't have access to VMS and so I would say that the states should come up with a plan for enforcing those provisions and enforcing the measures as they see fit.

My understanding is that there hasn't been a lot of reporting about at-sea enforcement and other things of that nature because some states -- We got something from Dr. Pierce that said New Hampshire can't enforce at sea and that's fine if they can't do that, because we are an organization of states that modifies our actions to those actions that work for the individual states within the context of an FMP and so that's kind of where I think we are this morning, from my perspective.

**CHAIRMAN SMITH:** Thank you. John or Vince --

**EXECUTIVE DIRECTOR VINCE**

**O'SHEA:** I just had one question. You mentioned a fishery on juvenile herring and what does that have to do with the spawned herring issue?

**MR. LAPOINTE:** It's been raised repeatedly for protection of the herring resource and it was raised in David's memo today about the protection of juvenile herring and so, because we're talking about intent and we're talking about what we meant to do and because this issue has come up, I think it's important to -- My interpretation of the fact that F is extremely low on juveniles is that we're protecting juveniles under the current system.

**MR. JOHN NELSON:** As George said, we had our votes on this and we -- I think we're reflecting what we heard at our public hearings. The public came to us and said you either have a spawning closure, which means nobody is fishing in that area during that time frame, or you don't. Remove it and let them go in where the percent tolerance would be adequate to provide whatever protection is appropriate.

They said you need to do one or the other, because currently every time we have a spawning closure all I do is get telephone calls from boaters saying there's people out here fishing for herring and what are you going to do about it? There's not supposed to be fishing here and it's supposed to be a spawning closure.

That became part of the focal point during the hearings and then afterwards. I think that certainly it was that philosophy that I knew I had when we were discussing it and unfortunately the tape is not available, but I distinctly remember saying that that was the position of New Hampshire, that if we're going to have a spawning closure then let's just have it as a spawning closure.

It's a time frame and it's a known time frame and nobody would fish in those areas for herring. Quite clearly, and maybe it's probably my oversight, but I did not notice the word "spawn" or take it to be that we were only talking about the spawned herring.

Otherwise, we're really back to the same status quo of allowing boats to go into a spawning closure and fish and either dump dead fish or be able to target other non-spawning fish. I don't think that's what was intended. I think there was not supposed to be any fishing in those areas for the five or six weeks, whatever time frame we needed to have in place to protect the overall stock.

I think that we had heard enough about the concerns about overfishing, even though the scientific information said that we could have a certain amount of quota come out of those areas, Area 1A for example, there was a lot of concern from the public that we were allowing overfishing to take place and it was kind of irritating people even more that we were allowing people to fish in a so-called spawning closure and so that was the thought process that we had.

I thought it was fairly well articulated and I, quite frankly, was surprised afterwards when this surfaced as far as being able to go in and avoid the spawned fish, which is really status quo. If that was the case, then I would have voted against it and I would think George would have voted for it and it was just the reverse. I think we do need to have that clarification and I think it would be healthy for the overall industry for the future.

**CHAIRMAN SMITH:** Thank you both. This is obviously delicate on a couple of levels. The immediate previous chairman

and the immediate future chairman both have decidedly different views on this issue and they're both well thought out, reasoned views.

Again, not wanting to reopen the issue as a new management issue, I think now we've seen the issue characterized today very adequately. It's either we intended that there be no fishing in the closed area during the closure period or we did intend there to be fishing under certain circumstances and the circumstance that I see changed was whether it was going to be with a tolerance or no tolerance.

I guess now it really -- For the members of the section who were there and voting that day, I'm going to poll each state and just ask -- I'm jumping ahead. Actually, David, you might want to comment on the memo. It just showed up here and so I haven't even read it.

**MR. LAPOINTE:** This commission prides itself on speaking clearly and it strikes me that if we wanted to speak clearly and have the spawning areas closed, that's what the amendment would have said. None of the options said that. They had the specific discussion on tolerance.

It strikes me that, again, to reinterpret that is not just a function of saying this is what we really meant. We went out to public hearing and we had a PID and these provisions were in there throughout that. We have, in the groundfish fishery, zero tolerance, or in the herring fishery, zero tolerance on groundfish.

We know a couple of years ago we had an issue and we've addressed that since. We didn't close vast areas of the open ocean to enforce zero tolerance. There was reasonable provisions put in the groundfish

plan and so it strikes me that it's not as simple as saying this is a matter of intent.

We went out to public hearing with a specific document with specific options and now to say we really should have had Option 4 or 5 that said complete closures is reinterpreting what we did in the last year.

**CHAIRMAN SMITH:** David, comment on your memo or otherwise?

**DR. PIERCE:** There's no need to comment on my memo, Mr. Chairman. It's just a short explanation regarding my views on the closure of the herring spawning areas to all directed fishing and a reminder to the section members that the Law Enforcement Committee has already spoken on this issue and their input actually had a major influence, I suspect, on the section when we initially decided to include this prohibition in the document to bring it out to public hearing and, of course, it had a major impact on our decision making when we met to eventually decide what we wanted to do in this amendment related to those closed areas, the tolerance specifically.

I have attached to the memo the particular document that was provided to the Sea Herring Section back in January, earlier this year, from the ASMFC Law Enforcement Committee where they make it very clear that the zero tolerance means that we would have an enforceable rule because spawning areas would be closed to fishing by directed herring vessels during the closures.

The enforcement committee knew what it was all about. We've acted, in part, on their guidance. I remember very clearly at our section meeting when we made our decisions about this particular issue and I remember very clearly that the intent was emphasized that there would be no directed

fishing in those areas when they were closed.

John certainly made that very, very clear when the motion was made. He indicated what the intent was and I did the same thing, with, again, the heavy emphasis being on the enforcement committee's recommendation and, of course, I reflected on my own experience with the spawning closure tolerance and the difficulties as provided for enforcement.

I understand George's perspective clearly. It would have far better for the language in the amendment that went to public hearing to have been stated specifically of a direct prohibition on all fishing during the areas when they were closed, but those individuals, the herring industry that has been following this issue very closely, knew what the issue was and they knew what our intent was, especially because, as I said, it was clearly stated when we took this action a few months ago.

**MR. LAPOINTE:** I too share the concern about enforceable regulations and so I would like to ask that Joe Fessenden come up and talk about the enforceability of the tolerance provision for the State of Maine, because that's a valid question for people to ask.

I have asked Joe numerous times about how we enforce that and we have and so with your indulgence, I would like for him to be able to address the issue from Maine's perspective.

**CHAIRMAN SMITH:** That will be fine, if you don't mind. Joe, please come up to that public mic. Mike Howard is also here to report on the enforcement committee's take on this and I think it would be appropriate to get that first and then have Joe also respond on how it's done in Maine.

**MR. MICHAEL HOWARD:** Michael Howard, Law Enforcement Coordinator. The Law Enforcement Committee met via a conference call, reference Amendment 2. The states of Maine, New Hampshire, Massachusetts, and Rhode Island were among the participants.

There was a discussion of all the issues, based on emails that had been circulated, reference the amendment. To summarize the status quo of the Atlantic herring enforcement actions, it was recognized that for years, and we are on record in writing to this committee, to the FMP managers, that the absence of VMS has always been a significant problem in identifying the mobile gear, understanding the fishery is divided into mobile and stationary gear.

The inaccessibility of states to have VMS is a basic problem. It exists no matter what this board does today and it will exist until the Magnuson reauthorization includes the access for states to get that during such things like a potential closure in state waters.

There was a general discussion, as outlined in this document which is before you, that Maine is enforcing the status quo. It takes samples and sends to biologists. It takes biologists to the fishing grounds to determine this 20 percent threshold or when a violation occurs.

All the other states -- There is an amended memo. It includes Massachusetts asks that their name be included with New Hampshire as unenforceable. Jim Hanlon called me and asked me to include that and so I'm sorry you don't have the updated, corrected version of this.

Basically, they have no mechanism or resources currently available to effectively

monitor 20 percent of a hold for spawning tolerance and when they think they do, it becomes extremely labor intensive and draws existing resources they have and so they found it very difficult and that's been stated over years.

In those states, the resources have not been directed towards that fishery and through what all of us do, prioritize, they found it difficult. They also found that a full closure, as they interpreted the Amendment 2, which clearly it was incorrect because Atlantic spawned herring is a defined term, but had it been a complete closure it is more enforceable.

All you would have to do then is locate a boat and if they were fishing for herring or the gear wasn't stowed, then it was easy to detect and these vessels are unique. It's a limited fleet of pair trawlers, mid-water trawl. Those types of things are different than other vessels.

In these near-shore waters if a vessel was engaged during a closure, once that threshold had been met and the dates were set, it would be more enforceable with a full closure. All agreed, Maine through the New England States that were there, agreed that it was more enforceable that the status quo, with the caveat that Maine was getting acceptable enforcement currently with the increased efforts they had placed.

Having said that, I would like to defer to Joe, because we have had several conversations and certainly the colonel of any state is more apt -- I wish all of them were here, but the head state marine patrol officer would certainly have a better take on it than I would.

**CHAIRMAN SMITH:** Thank you. I agree with many of your points and the last two --

Yes, anyone here present -- I would like to hear from Joe and I do wish they were all here also, because I'm sure there's difficulties, depending on how a state deals with things, and we should keep that in mind. Joe, could you comment on how and how effectively it's enforced in Maine now under the current plan?

**MR. JOE FESSENDEN:** Good morning. I'm in the audience today because of my position. I typically probably would have sat up front where Mike is today, but some may have considered me biased and so I decided I would sit in the audience and speak for the State of Maine.

Back a number of years ago, down in Rhode Island I went to a meeting and this 20 percent tolerance came up at a meeting and as I recall, the states of New Hampshire and Massachusetts wanted to close the spawning area, no fishing. Maine wanted to go with the 20 percent closure.

I was asked at that time can you enforce it. I told the commissioner at that time that yes, we can enforce it, but it's going to take a lot of training and time to do that and he says, I want you to take that training and time and I want you to do that. It's important to the State of Maine to have a summer fishery on herring. A lot of these fish are not spawning during that closure and we need the resource.

I went back to the state and we developed rules that allowed a 20 percent spawning closure. We spent -- I don't want to say hundreds of hours, but we certainly have spent fifty or sixty hours on training with our officers training them how to identify Stage V and VI fish and we worked out a sampling protocol.

Because this is a priority -- In the State of

Maine, we're very fortunate, because our marine patrol officers focus on marine resources law enforcement only and so we're a very focused, specialized agency. New Hampshire and Massachusetts, for example, are environmental police, and I think Rhode Island too, and they do it all. They do the inland, the deer and the fish and birds and also the marine resources.

In Maine, we're fortunate that we do just marine resources and so we can specialize. When the commissioner tells me this is a priority and it's important for you to do this and I want you to take the time and focus on this and we did.

We actually go out and there's approximately thirty-five vessels up our way in the summertime. They're usually ninety, ninety-foot vessels, one-hundred-foot vessels, fishing for herring and we will routinely board about sixty to seventy boardings a season and we check for spawned herring.

We keep track of all those boardings, latitude and longitude, location, whether it's dockside or at sea, and we sample for spawn. We've checked a number of boats that have had spawned herring on there, but they weren't Stage V and VI fish. They were legal fish and they were allowed to be landed in Maine. Rockland and Portland are the major ports of entry.

It's been successful. It's very labor intensive, but it's an effective way to keep our fishermen in bait supply and we've committed to it every year. Actually, the commission asked us -- When we decided to do this several years ago, the board asked us to file an enforcement report.

Every year the State of Maine has submitted to the commission an enforcement report of

just exactly what we've done. I challenge the other states to see what they've submitted for an enforcement report on spawned herring. We've submitted a very detailed report and I'm proud of that report. We're doing it and it is enforceable.

It's very labor intensive and that was my comments. As far as the phone call we had, the conference call, the person that initiated that conference call was me. I called Mike Howard and requested that the states get together and discuss this issue, because it was a very important issue.

I was well aware of the issue and how it was going to impact our fishery up in Maine and I'm the one that initiated that phone call and Mike carried it through and we had a good conversation on the phone about this particular issue, but it's an important issue and it is enforceable. It takes time and I would be glad to answer any questions if you have any.

**CHAIRMAN SMITH:** Thank you. I'm torn as a chairman between -- I'm happy we got those additional comments, both Mike and Joe. If we go much farther down the road of getting more comments on how we do things and how we think the world ought to be, as opposed to what we intended it to be in January, we will be back into the mode of sort of inadvertently -- We're backing into reopening this.

As chairman, I'm a little wary of that, but I don't want to stifle section members that might feel otherwise. Jeff, we're not going to take public comment on this. I'm sorry.

My view is much the same. I have been trying particularly to allow Maine as much possible time to make their case on this issue, just because it has the biggest ramifications for Maine and, as George

pointed out, we're always sensitive to that as a commission and I think we should be.

Again, I'm on the horns of the dilemma of not wanting to reopen the entire issue and I would just offer that as guidance, because I have a list of people for additional comments. It's up to the section ultimately how far down the road you want to get towards reopening as opposed to how far we intended to get in terms of clarifying our intent in January. I'm sorry that was long winded.

**EXECUTIVE DIRECTOR O'SHEA:** In the same spirit of what you just said, in front of me this morning was a paper that starts Option 1 through 3 and it goes down to Option 2, Zero Tolerance. I understand this was an analysis by the enforcement committee and under Option 2, Zero Tolerance, there's two phrases that I noticed.

One says spawning areas would be closed to fishing by directed herring vessels during the closures and in the last sentence, it says wording that requires vessels to have gear stowed assists enforcement in identifying violations. My question, Mr. Chairman, was whether this document was presented to the section prior to your last meeting and was there any discussion about this report from the enforcement committee prior to your vote?

**CHAIRMAN SMITH:** It was definitely available to us. Whether or not we had an enforcement committee report on it or not or debate, I honestly couldn't recall, but I know we had it distributed to us prior.

**EXECUTIVE DIRECTOR O'SHEA:** It seems to me to make two points. One, it states that fishing would be closed and the other is if the intent was to have fishing open, why would the gear need to be stowed

and why was that noted and so that was the analysis of the enforcement committee of what Option 2, Zero Tolerance, meant.

**MR. G. RITCHIE WHITE:** It's starting to feel like we are getting back and debating this issue and I guess I would like to state New Hampshire's position on enforcement if we're going to continue to discuss and debate this issue. I will not go on with our position if the chair will end the discussion at this point and ask for the states' positions. Otherwise, I feel an obligation to give another side of the law enforcement issue.

**CHAIRMAN SMITH:** I think that's an appropriate point to ask the question of me and I'm trying not to manage this committee with a broad axe in my hand, but I think you understand my purpose here, that the clean way to deal with this is to clarify our intent from January, in spite of the fact that I know that it upsets George, and I appreciate that and I wish I could get around that.

However, it's will of the section and so I'm going to ask what the sense of the section is. Would you like to debate the pros and the cons further in getting towards a way, perhaps, to solve a major problem in Maine by somewhat revisiting where we were or is the section comfortable with trying to clarify the issue by deciding where we were in January?

Frankly, I can think of ways to try and compromise our way out of this, but I don't want to suggest that at this point. I want to see what the section's intent was and so not asking what your intent was in January when you voted, I'm going to ask for a sense of whether you would like to hear some more pros and cons on the issue before you get comfortable in deciding the issue today. Ritchie has asked a fair question here.

I'm just going to go up the table. I know how New Hampshire feels. Rhode Island, more debate or decide the question? Do you want to decide the question, Massachusetts?

**DR. PIERCE:** Let's decide the question.

**CHAIRMAN SMITH:** New Jersey? Maine, more, right?

**MR. LAPOINTE:** If I may, Mr. Chairman, we don't need more debate, because people know what their positions are. However, if you change from -- We have a plan and we submitted our implementation plan and other states have submitted their implementation plans.

If you do anything other than interpret except what's in the plan, it's opening the plan up where you're asking people to add another option and that's frankly unacceptable from the State of Maine's perspective. I don't see how we can get around that.

We read and we interpreted and we put a regulation in to comply with Amendment 2 and if we change that, we're changing Amendment 2. It's as simple as that and it's as difficult as that and, again, for a commission that prides itself with letting different states use their resources to enforce the plan and the Law Enforcement Committee said we were enforcing the plan, to do anything else strikes me as -- We are doing Amendment 3 and we're changing the plan and that's not acceptable.

We can vote all we want and we can talk all we want, but that's the issue, are we going to change the plan that we just approved.

**CHAIRMAN SMITH:** I understand how strongly you hold that view and I just have to beg to differ that from my vantage point -

- I've tried to stay out of the details of this and I think a number of section members see it differently.

I think not even polling them I think they know what they were voting for at the time and the defect, if any, is we all weren't collectively sharp enough to make sure that the document said what the intent of the vote in January was. I don't think it's revisiting or creating a new amendment to simply call for a clarification of the intent on that motion at the time.

I think we're just going to have to agree to disagree on it. I'm sorry. I'm not going to speak for Connecticut and Dr. Stewart wasn't there at the time. Maryland, I know it's a pretty far removed issue from you, but you weren't at the meeting either and so I guess I would just leave it aside. I think the sense is pretty clear.

However, now that I've calmed down from the interruption from a good friend, Legislator Kaelin, I want to beg your indulgence and allow him to speak from his position as he described and if the section shakes their head at me and says no, don't do that, I will take your view, but I think it's a courtesy and it's appropriate to allow him that brief time, if no one disagrees. Okay, Jeff.

**MR. JEFF KAELIN:** I'm Jeff Kaelin from Winterport, Maine. I'm a state legislator in my second term. I'm the ranking Republican in the Marine Resources Committee of the Maine Legislature. I serve with Dennis Damon, who is the Senate Chair.

As you all know, I've been in the herring business since the mid-1980s and I think my experience in the commercial fishing industry has helped me to develop priorities

in the Maine legislature to make sure that law enforcement has the resources that they need to enforce the laws and regulations that are on the books to support our commercial industries.

I just wanted to simply say that to you and underscore what we had heard a few moments ago from the enforcement committee representative that we do enforce and have enforced this tolerance in Maine for many years. What this means in the context of what you're considering today is we can enforce a zero tolerance.

We have the resources to do it and we've dedicated the funds that we have to the laws that are on our books and I guess I'll just leave it there, but what I've heard so far is we have two states that don't care to dedicate the resources and in our state we do dedicate the resources to support enforcing laws and regulations on the books that are important to this state.

**MR. NELSON:** I just wanted to address one point that I think is totally incorrect and that is about dedicating resources to law enforcement. I think there's a misconception out there as far as how you enforce your various regulations that you have on the books.

We have currently the 20 percent tolerance on our books and our law enforcement was not happy for us to put that on there and the reason they were not happy for us to put it on there was because the Attorney General's Office said no case would stand up in court if you sub-sampled to get a 20 percent tolerance number.

You had to examine the entire catch. Otherwise, how could you be sure whether you had 20 percent tolerance or not? It was just an argument back and forth and so



therefore, their ruling was you had to do the entire catch and that's why we have not had that sense of enforcement out there that we normally would have for all of our regulations.

They just looked at it and said there's no way that somebody is going to do that volume and come up with an accurate number and you cannot sub-sample.

**CHAIRMAN SMITH:** I'm curious now. How do you deal with the groundfish plan tolerances that are embedded in those regulations or do they not end up in state court?

**MR. NELSON:** They usually don't end up in state court, but we enforce it because we are part of the JEA. Obviously the volumes that you're dealing with are much smaller and you're examining totes at that time and they examine the entire catch in order to provide whether there's an overage or in the case of undersized fish, that's much more clear. Overages, they have to go through the entire catch. You can't just say that one tote is over. What if you had another tote that was way under?

**MR. VITO CALOMO:** At the section meeting, Mr. Chairman, you did a great job and you're trying to do another admiral job here today under a difficult situation. As a fishing captain back in 1976, working with the Division of Marine Fisheries on my vessel, the Natalie III, which was about an eighty-seven footer, we volunteered to stop fishing during the spawning time in the Gulf of Maine. It was a volunteer at that time.

Maybe we had the sense to say that we wanted to be everlasting, but as I recall, Mr. Chairman, after the vote that the section took, some of the same people that are speaking here today were very, and I want to

be as gently as I can, very disappointed that I had closed the fishery during that time.

Yet, they speak that we didn't close the fishery, but at that time they said we did close the fishery and they were very upset with me pursuing that. I even had phone calls, Mr. Chairman, and as George Lapointe said, let's speak very frank, as we have done. They were phone calls saying how dare you close the fishery and how are these people going to get lobster bait. I said there's other areas that are open that they can go to.

There's been a great concern, Mr. Chairman, that the Gulf of Maine is fragile and that it's on the verge of collapsing. The scientists don't say that, but that's what I hear from people in different fisheries and how we're trying to eliminate one user group from that area and we're quite worried about that stock.

Yet, we're very worried about the stock and so we want to have the spawning fish reproduce and give them a chance to reproduce. I believe that we've been closing the Gulf of Maine early because the 60,000 metric tons has been caught prematurely.

We've stretched out days and we've taken off days because it can be caught much more prematurely and so with that concern about having a spawning closure with no tolerance, no fishing allowed can only benefit the resource in the Gulf of Maine and therefore, maybe it would last for many more years and that's why I voted the way I did and I appreciate the opportunity to speak this way. Thank you, Mr. Chairman.

**CHAIRMAN SMITH:** My apologies to David Pierce and George Lapointe, because I took you out of turn. I have those two also on the list and I think we ought to allow

them to comment. Then I'm going to overreach as the chairman and try and suggest one thing that maybe can try and get us as a commission to accommodate the various views expressed and if not, then I think we ought to simply ask for the, as we originally said, the sense of the group and take that as it is.

**DR. PIERCE:** I'm now becoming confused as to how you want to proceed. I have another comment to offer up, but I held back on that because I thought you wanted to get on with a specific statement of what each state wanted to do and I thought I had made that clear, that I didn't want to debate this any further until we've clarified our intent.

I should also emphasize as well, now that I have the mic, that this particular strategy, this no directed fishing within those areas when they're closed, is not an action that would affect only one state.

It has impact on New Hampshire and it certainly has a tremendous impact on Massachusetts and in the interest of conservation, sea herring conservation, and in the interest of stopping such practices as dumping fish if when the fish are caught it's determined by the fishermen, as best they can determine it, that there are too many fish with spawn.

Dumping is a practice that we know goes on and it needs to be stopped and this particular strategy does indeed do that. It's an initiative that we as a section adopted at our last meeting as part of this amendment and it will have a great impact on Massachusetts as well as the state of Maine.

We didn't adopt this particular strategy because it would not have impact on us. We knew it would. It will have impact,

considerable impact, as it will in the other states, but in the interest of our having enforceable rules and stopping unacceptable fishing practices, specifically the dumping of fish at sea because they don't meet the spawning tolerance.

**CHAIRMAN SMITH:** George and then a trial balloon and then I think we ought to decide the question or would you like to hear the trial balloon first? It's your pleasure.

**MR. LAPOINTE:** People have said to us they will, Mr. Chairman.

**CHAIRMAN SMITH:** I'm leaning in the direction of trying to find an accommodation, because among the many good points George made, one was the commission tries to find a way to satisfy the needs of its various members.

In that spirit, I'm going to ask the following question to see if it helps people get over the hump of this dissention and if it doesn't satisfy people, then we'll just move on. I just wonder, given the imminence of the start of the 2006 season and the fact that we've been wrestling with this issue for a few months now, can we move towards accommodating the various views by implementing the absolute closure provision in the 2007 year instead of doing it now? I'll look for head nods and head shakes if we want to pursue that. I've got a couple of nos. Let's move on.

Unless the section feels otherwise, I think we just need to poll the states, as I suggested before. I'm going to ask each state that was present at the time what was their intent when they voted and we'll see how that ends up and then see where the section wants to go. I keep looking to my right and so I'll start with New Hampshire and get you first.

It's absolute closure or allow limited fishing, to be clear.

**MR. NELSON:** Our position was that a spawning closure was a spawning closure and there was no directed fishing in that time frame for that species.

**CHAIRMAN SMITH:** Rhode Island?

**MR. MARK GIBSON:** My understanding was the same as written in that Option 2, Zero Tolerance, that Vince O'Shea pointed out.

**CHAIRMAN SMITH:** As in the Law Enforcement Report? What he's referring to is the Law Enforcement Report dated January 4<sup>th</sup>, Option 2. Massachusetts?

**DR. PIERCE:** The absolute closure and my perspective is also shared by my two colleagues. It's not just mine. It's the views of Vito and Bill Adler as well.

**CHAIRMAN SMITH:** Maine?

**MR. LAPOINTE:** I've already said what I think, Mr. Chairman.

**CHAIRMAN SMITH:** New Jersey?

**MR. ERLING BERG:** Thank you, Mr. Chairman. Of course, you know Bruce Freeman left us and we're without his guidance here, but my recollection was that we endorsed the complete closure.

**CHAIRMAN SMITH:** Thank you. Connecticut took no position at the time and I believe it was a four-to-one vote and that's five and so it probably has come out pretty much the way the vote was and I think as painful as it was, it's been useful to go through this, but it doesn't seem like it changed any minds.

I think the issue we have before us now is, and correct me if I'm wrong, but we now have to make the plan reflect what the vote of the section was and that's an edit chore that we can do in a couple of ways. We can simply take the sense of this polling and revise the plan accordingly or we can do it by a technical amendment of some kind.

I'm a little leery about that, simply because it leaves the uncertainty hanging out there and the season -- I'm not sure when the first season closure is. I can't remember them off the top of my head, but the season is just about on us, August.

Theoretically we could approve a technical amendment to make sure that the record is clear at our August meeting, but understanding that the regulations under the plan have to reflect the decision today or the clarification, I should say, today. Does that sound about right to people?

**MR. BILL ADLER:** I don't remember whether the discussion over Option 1 and Option 2 in that paper that we zeroed in just on Option 2. My concern here is that the wording that is in the amendment does not say no fishing and legally, that could end up in a court unless some method is used other than just a simple vote around the table to change words in an amendment, which I don't think you can do, or maybe the technical amendment approach that you mentioned is the way that we would have to change the wording.

As worded in that plan, it allows fishing, regardless of what you intend. In keeping with the process, something would need to be done to change that wording.

**MR. GIBSON:** Your compromise trial balloon seemed to have gotten popped very

quickly and I wasn't keeping up with that. Was that because there was a procedural impediment to that or was the State of Maine opposed to it or what happened there?

**CHAIRMAN SMITH:** I got the sense that no section member that I looked around the table had an idea saying maybe that could work with some further discussion, including Maine. It didn't seem like it was a viable solution and maybe I read body language incorrectly, but that's how I saw it and so I just figured move on. Did I read you folks incorrectly?

**MR. LAPOINTE:** You read us correctly, Mr. Chairman.

**CHAIRMAN SMITH:** Thank you. That's what I thought. I'm going to ask Vince and Bob for guidance on what they feel is the proper process to make the plan comport with the January decision, as clarified today.

Is it a memo to the file that clarifies the vote or is it better to do a technical amendment and change the language in the plan, understanding -- The plan now, the decision document, said the spawning area restrictions would apply as of August 15<sup>th</sup>. That was clear.

The only unclear thing was what did that vote actually mean and we've clarified it the best that we're going to be able to and now the question is, as an operational procedural step, what's the best thing to do to make sure that our record is crystal clear?

**EXECUTIVE DIRECTOR O'SHEA:** One thought is what you all need is the ammunition, if you will, for the states to go back home and implement regulations. In one sense, it's not really what the staff advises, but it's what the standard is that you

all collectively feel you need to implement the regulations.

Right now, you have different states that have expressed different views on that. Certainly if this discussion today was acceptable to the states, that would be all that I think that you would need, but you don't have -- It seems to me there's a difference of opinion on that.

With regard to doing a technical addenda, the requirement for that is for the correction of accidental omissions, erroneous inclusions, and/or to address non-substantive editorial issues and I think the key part there is it's and/or. I think the erroneous inclusion, and that's one of the things that I've heard around the table this morning, is the use of that one word "spawn" was an erroneous inclusion.

That's how some people are viewing that and that could be, I think, a basis for a technical addendum to make it very clear. The other option is to do another addendum and so I guess I'm not going to give you a clear sense, Mr. Chairman.

I would have hoped that the discussion today on the record where we didn't have a record, because of mechanical problems at the meeting, you all would have been able to clarify what your intent was at the previous section meeting and that would have been sufficient.

**CHAIRMAN SMITH:** I would take that a step farther and say we have clarified and reconstructed the record to the best of our ability. We're not going to get any better than this. We have the sense of the section and the vote from January. I would not think we need to do another addendum at all.

We're not reopening an issue. The question is do we need to do a technical amendment or could we do it with simply the record of this meeting as embodied in a memo from me to staff saying this is how the section called it. It's a split vote and that's not going to change. Certainly it's a technical amendment or some other vehicle of lesser time consuming.

**EXECUTIVE DIRECTOR O'SHEA:** Mr. Chairman, I don't know that you need a memo. We have a record now of your discussion and the bottom line here is the states to go home and implement regulations that, if you will, either close that area to fishing during the spawn season or open that area to fishing during the spawn season and that's really where the test is going to be, is when the states draft their regulations and implement their regulations.

**MR. R. WHITE:** I guess I had a question, a follow-up to Bill's question. Can we substantively change the wording in the amendment referencing whether it is a closed area? If so, are we going to take out that sentence that defines what spawning fish are, which substantively changes what is said in the amendment?

**CHAIRMAN SMITH:** I think the issue, as I see it, is once we're clarified on what the decision was in January, the plan should have been edited to reflect that decision and in retrospect, I dropped the ball, we all dropped the ball, and didn't make the edit to the document that reflected the vote and so we're doing that five or six months later. That's unfortunate, but I don't see that as a major change.

I see that as a -- Procedurally, it's nothing more than we do with a hundred other things in a document where the document is revised based on the decisions of the

deciding body.

**MR. R. WHITE:** Which edit are you referring to, Mr. Chairman?

**CHAIRMAN SMITH:** Anything in that paragraph or anything else in the document that had to be changed to comport with all the other decisions we made.

That one didn't get made at that time and that's unfortunate, but if the sense of the section today, which is identical to the way the vote came out and, frankly, the way the debate was in January, it's clear that, as much as a four-to-one vote can be called an overwhelming majority, the clear majority vote was that it was going to be a closure that meant no directed fishing.

The document should have been revised to reflect that and to me, that's a technical change to comport with the vote, not a substantive change. It has substantive impacts. I'm not belittling that a bit, but I'm saying in the procedure of making the plan fit what the decisions were -- In my view, you always go to what were the votes and then make the document fit after the fact. Usually that's done a few weeks later and in this particular instance we missed it.

**MR. LAPOINTE:** It's not a minor adjustment. I beg to differ. The vote was for zero tolerance. The vote was for the language in the plan and so that's not a minor adjustment. This isn't we got the language wrong somewhere. This was a vote on this particular provision that the document didn't talk about closing the areas.

It's not as easy as that. It's not as easy as that to go back and say we really didn't mean it and so, again, we can try to talk our way through it, but it's not going to help and frankly, if we look at, on page 70, those

measures subject to change to addendums, spawning closures and tolerances aren't on there.

This is a big deal and I can't get over that. We can talk from now until five o'clock about that and so this is -- We do have a record of what we voted on and that's called the plan and what's in the plan and so that's -- I can't downplay that.

Again, if we look at what our plans are all about, they're about enforcement, they're about effectiveness, they're about conservation, and this plan embodies that. If you look in our charter, it talks about fairness and changes among states and whatnot and how decisions are made.

It strikes me that what's in the plan is consistent with that and so to say we're going to change it based on our intent -- We all have suffered on the horns of this very dilemma before, but the plan is the plan.

**CHAIRMAN SMITH:** I'm going to start at the end of the table and move forward.

**MR. DENNIS ABBOT:** Thank you, Mr. Chairman. I think this morning we've surely heard enough discussion on this matter and I haven't spoken to this point. At the January meeting, it was very clear to me that when we went from a 20 percent spawning tolerance to zero we were stopping fishing in those areas.

**If it takes additional language at this point to clarify that to everyone else's satisfaction, then I would like to make a motion that we develop a technical addendum to put in the language that the fishing shall be closed in that area, in the spawning closure areas.** I would like to ask staff is that something that we can do here this morning and be finished with when

we leave this meeting?

**CHAIRMAN SMITH:** Is there a second to that motion? Mark Gibson seconds the motion. Staff, is that something that can or should be done between today and the Policy Board meeting, to create a rapid clarification for the record, or is that something that should take a little more time? In other words, between now and either a faxed-out decision or a decision in August.

Is that something we can do or should do between today and Thursday? That's worse than what I was confronted with on lobster yesterday, quite frankly, but it's a fair motion to make and if nothing else, the motion is let's do a technical amendment to clarify the plan and that's an appropriate motion and then the question is the timing.

**MR. ROBERT BEAL:** The technical addenda that the commission has done in the past, the mechanics of the documents are very straightforward. They're a page-and-a-half or two-page documents that just give a couple of paragraphs on background and a description of the corrective action, whatever that is, that's intended by the document.

Putting that together is not that difficult. We could probably pull one together by the Policy Board. It would be somewhat hurried.

The other option is, as you said, putting one together in the next week to ten days and being a little bit more deliberative about that and sending it out for fax poll or some other review by the section.

**CHAIRMAN SMITH:** It's a short document. I'm going to ask the maker of the motion to decide what kind of a timing

he wants to put on it.

**MR. ABBOTT:** Probably expecting that type of an answer, it would have been my further suggestion that we could, I think, procedurally recess this hearing until later in the week or, as it was suggested, if we have to conclude this by fax poll or telephone meeting, that would be sufficient. I think it's very important that we have this addenda to clarify the record, in view of the position of the participants of this section.

**MR. BEAL:** I have just one other comment I meant to say earlier. The practice of the commission usually has not been for the Policy Board to approve documents of sections or management boards. They usually provide oversight and direction to the commission.

It may be cleaner or more consistent with commission processes to either reconvene the section at a later date or approve a technical addenda via fax poll or not approve it, but consider approving the document via fax poll or some other mechanism, rather than having the Policy Board address that document.

**CHAIRMAN SMITH:** Comments on this motion?

**MR. NELSON:** I'm comfortable that we take the time to do this correctly and to address the issues that have been put out here and I think that's unfortunate that we have to do this correction, but I think we ought to make sure that we have the paperwork correct and make sure that we've addressed the issue of no directed fishing during the spawning closure and if it occurs elsewhere in the document, then obviously the staff should locate that too, but I think it is only that one section and I'm comfortable with a fax poll.

**MR. GIBSON:** I supported the concept of the technical addenda because I brought it up, the commission charter, as soon as Vince recited it and that seems to be appropriate mechanism to address this issue.

I certainly would be more comfortable coming out of here if some deference were given to the State of Maine in terms of the timeliness they have to do it. Was it my understanding that you already have regulations in place consistent with your --

**MR. LAPOINTE:** We're going to public hearing next week.

**MR. GIBSON:** You're going to public hearing, that's what it was. If I could follow, Mr. Chairman, I'm still attracted to that idea of the phase-in for the states that are having a big problem with this and I don't know whether that comports with the technical addendum or not, but it sure would be nice to give them some opportunity, given that they're going to hearings on regulations under their interpretation of the plan.

**CHAIRMAN SMITH:** Thank you. That's kind of why I suggested it, to try and find a way to ease into it, and not getting a signal from Maine that that would be helpful, I don't know what else to do, other than we've kicked the sleeping dog a couple of times and I'll ask again, but -- No help? Do you want to take a break? We're going to take a seven-minute break and be back at 9:30.

(Whereupon, a brief recess was taken.)

**CHAIRMAN SMITH:** Take your seats, please, and we'll get back to it. With some discussion during the break, I think the agreement is that the motion on the board is

really -- John Nelson is going to add a little bit more language, but the sense of the motion should be changed to say delete or add the words that they'll talk about, but also give the staff the latitude to develop the technical amendment so that it comports with the vote of the section.

I don't think we want to limit ourselves to a few words here and there and then find out a week from now that there was another word and so with your indulgence, that's how I will ask the maker of the motion to revise it to have it in the record.

**MR. ABBOTT:** That really was my intent, although I didn't state it, and I don't think I used the words deleting the word "spawn" when I made the motion specifically, but it was to ensure that closed was closed.

**CHAIRMAN SMITH:** John, do you want to add words to the motion to reflect what I just said? We need to get a motion up there and I would rather not crane my neck and try and do it as the chairman and so I'm going to ask New Hampshire to try and put that in there.

**MR. NELSON:** Usually when we do these type of things it gives the staff the flexibility to address what the board has come up with as a concern or to make the document wherever it needs to be corrected to be in the same intent throughout the document and I think that leeway is the intent of what we're trying to do here and I don't know if you need to have language in there to reflect that, other than to say that the board gives the staff the authority to review the entire document to make sure that it comports with what the intent of the motion is.

I would also just point out, as Dennis has said, when you talk about the spawn, I think our overall discussion has been that we were

looking at no directed fishing for herring in the spawning closure and so that's the intent of what removing the word "spawn" means, but the staff can phrase that in a way that captures the no directed fishing for herring during a spawning closure. Does that help, Mr. Chairman?

**CHAIRMAN SMITH:** Let me read again as I heard you.

**MR. NELSON:** I guess after the word "spawn" I would put in parentheses "closed to fishing by directed herring vessels."

**CHAIRMAN SMITH:** If I may, that's making this a complicated motion. **I think the motion needs to be to task the staff to develop a technical amendment to reflect the vote of the section in January as clarified today, May 9<sup>th</sup>, that there shall be no directed fishing for herring in the closed areas during the closure period.** Dennis is comfortable with that language?

**MR. ABBOTT:** Yes, Mr. Chairman. Wearing my legislative hat, if I was going to legislative services in my state to have an amendment done, this is exactly what I would tell them to do and they would ensure that all the things were covered that satisfied my intent for the purpose intended.

**CHAIRMAN SMITH:** Section members comments on the motion?

**MR. LAPOINTE:** I'm not going to talk about the language, but I think what we're discussing here doesn't fit within the definition of a technical amendment for this commission. Going from a tolerance provision in the spawning closure areas to no fishing is not a technical correction. It's substantive and I'm going to oppose it for that reason.



**CHAIRMAN SMITH:** Thank you. Allow me, with as much respect for you as I can muster and everybody in Maine, the issue as voted in January and as clarified today is that it was an issue of whether there would be directed fishing in those areas or not.

As much as you strongly disagree with that, and I respect that, we concluded that question. Now the question is what do we do to make the world fit what our active motions were, our actions in January. Now it's a question of making our document reflect that. We'll disagree until the cows come home, but we're going to move on.

**EXECUTIVE DIRECTOR O'SHEA:** First, when Mr. Abbott made his first motion, we attempted to capture what his intent was and there has now been some addition wordsmithing and so I just want to clarify, Mr. Chairman, from you that we've accurately now captured what the original motion was intended to do and that it would be the maker's intent and the seconder's that we would delete that first motion and accept the second one as a perfection of that first motion.

**CHAIRMAN SMITH:** Dennis, the suggestion Vince is making is that we strike the upper half of the language on the screen and, as you had accurately pointed out, the lower half was more consistent with your intent.

**MR. ABBOTT:** Mr. Chairman, again, maybe refining it a little further, the "necessary" at the very end to "herring fishing in the closed areas during spawning," put "spawning closures" in there and that further --

**CHAIRMAN SMITH:** That's fine. The other question is whether the top half of the panel --

**MR. ABBOTT:** Yes, that's correct.

**MR. ADLER:** A lot of this is process. I know we run by amendments and addendums rather than just votes and if you're going to change something that's in a document, you do need to do one of these type of amendments or addendums.

The question, and I don't have it in front of me, is whether or not any changes in this amendment allows this type of a change by way of addendum or a technical amendment. I would like to -- Maybe the staff can look at the ground rules, because does it allow for a change in this particular section of the amendment, and whether that change has to be done by an addendum or an amendment.

Also, I want to reiterate the legal wording as it is in the document does allow fishing and so if you're going to change it, you've got to change it right and I didn't know what the comment period is for doing a technical amendment or a technical addendum. Is there a public comment period supposed to be held before you move ahead? A lot of it is process.

**CHAIRMAN SMITH:** No, that would be the process if we were doing a formal addendum. This is simply technical changes to reflect the vote. The comment period, if you will, is going to be the section getting a hold of the document and commenting back to staff that yes, that's what they want it to say or no, they don't.

Then there's going to be some type of a decision that we have yet to decide, whether we reconvene the section or we do it by a fax. It's not a public hearing type of an issue, as I understand it.

**MR. ADLER:** I just didn't know if the

amendment as written allows a change to one section or a section in there by simply doing an addendum or do you have to do a technical amendment, that whole process. I don't know. It's just something they could look at.

**CHAIRMAN SMITH:** My understanding is all of the kinds of things we're talking about now normally would have been done after our January section meeting and were done for all the other things that we voted on. This one escaped us until it was brought to our attention, which is why we needed the clarification which we have now gotten.

This all spills back to making the document fit what the votes of the section were in January. I have to say now we have to be a little concerned about time management. We're not horrendously behind on the agenda, but I want the section to focus on the motion.

Is there comment on the motion? We should dispense with it as quickly as possible. We still have the compliance implementation proposals to discuss, other business, and adjourn by ten, because we've got a full agenda for other sections and boards today. Is there comment on the motion? Seeing none, I'll take a one and one. Jeff Kaelin, for or against?

**MR. KAELIN:** I just have a question, Mr. Chairman. Does this mean that the sections are going to allow the continued access of say the raised footrope whiting trawl with the 2,000 pounds of herring a day towing in the areas closed to spawning and allow them to take 2,000 pounds of herring a day with no restrictions on the amount of spawned herring that they land while the directed herring fishermen are not allowed in the same area? That's the way the plan reads.

**CHAIRMAN SMITH:** As I understand it, it read that way anyway in January, that other fisheries that have a bycatch were limited to the 2,000-pound limit. There were no sideboards on that. It's unintentional catch when you're involved in another fishery.

**MR. KAELIN:** That was precisely why we never believed that the section intended to completely eliminate fishing in the area, because you've created a very unfair situation with the so-called directed herring fishermen.

We know that the whiting industry intentionally takes herring and that's why they wanted the 2,000-pound a day trip limit. They're going to be in the bait market now with as much spawned fish as they want to catch and we haven't seen any analysis of how much fish is either taken in that fishery, how much fish is taken during the spawned closures over time.

We have no analysis here, but I just want to raise the issue that now you're going to allow one fleet to go into these areas and drag on bottom. These are bottom-spawning fish and take up to 2,000 pounds a day of ripe and running herring, if that's what they happen to be working on, at the same time you're closing out the directed herring fishery, which has a record of fishing on large, spent herring and a very small amount of juvenile fish, which, of course, don't spawn. Otherwise they wouldn't be juvenile fish.

I just think that you're creating an extremely unfair arbitrary and capricious relationship between the directed herring fishery and the other people that are in the bait market, the whiting fishery. They're in the bait market. That's why they take 2,000 pounds of herring a day and I just wondered if that's

your intent.

**CHAIRMAN SMITH:** Thank you for raising the issue. That would take a new addendum, because it's something that should have been contemplated in the run up to the section vote and we aren't going to resolve that today. The plan on that point reads as it reads. That was more of a question than an answer. David Ellenton, speak to the motion, please, for or against.

**MR. DAVID ELLENTON:** David Ellenton of Cape Seafoods in Gloucester and also of Western Sea Fishing Company that owns three mid-water trawlers. This is an extremely important fishery for the State of Massachusetts and an extremely important fishery for my company and I'm totally opposed to this motion.

This is not the way that we understood the zero tolerance was going to be applied in January. This season started in January and it's not about to start. It's been going for now four months and a few days. Commitments have been made to customers to supply fish, assuming that we're going to have access to these areas, as well as the other areas that we normally fish in and this is extremely detrimental to our operations.

I don't have with me the amount of fish that normally comes out of these areas during the spawning closures. I don't know whether this interpretation of what happened in January was taken into account when we went along with two days out of the fishery.

We as an industry work very hard to ensure that the Area 1 resource lasts until the end of November or the beginning of December to supply the lobster bait fishery, to supply the canneries, and to supply the other important markets that have been developed.

This is just not what we understood as an industry and it's obviously a motion that will hopefully reduce the number of telephone calls that people get from folks who are not even affected in our industry, who imply that we're dumping thousands of tons of fish on the ocean bottom and that's just not true. I'm just totally against this motion, Mr. Chairman.

**CHAIRMAN SMITH:** Given the time, section, we need to deal with this. Caucus for a moment. **Let me read the motion into the record: Move to task the staff with development of a technical addendum to reflect the intent of the section vote in January 2006 and as clarified today that there shall be no directed fishing for herring in the closed areas during spawning closures.** The motion was made by Mr. Abbott and seconded by Mr. Gibson.

**All in favor of the motion raise your hand; all those opposed; abstentions; null. The motion carries three to one with one abstention.** That concludes Item 6 of the agenda. Item 7 is a Review of Amendment 2 Implementation Proposals from the States.

### **Amendment 2 Implementation Proposals**

**MS. CHRISTIANSEN:** Given the motion that was just passed, implementation proposals are a little bit of a moot point at this stage in the game. I had received some implementation proposals from a few of the states for Amendment 2.

Like I said, given the motion that was just passed, we're going to put implementation proposals on hold for a little bit until the technical addendum is approved by the section and then we can pick a new date for implementation proposals and go from there.

### **Other Business/Adjourn**

**CHAIRMAN SMITH:** The other item -- Now that we've caught up again, we're right on target with Other Business. Are there other herring issues that people wanted to bring before the section? Seeing none, I will adjourn the meeting.

(Whereupon, the meeting adjourned at 9:50 o'clock a.m., May 9, 2006.)

- - -