

PROCEEDINGS OF THE
ATLANTIC STATES MARINE FISHERIES COMMISSION
SHAD AND RIVER HERRING MANAGEMENT BOARD

Crowne Plaza Hotel - Old Town
Alexandria, Virginia
August 7, 2012

Approved October 2012

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2. **Approval of Proceedings of May 1, 2012** by Consent (Page 1)
3. **Move to adjourn by Consent** (Page 5).

ATTENDANCE

Board Members

Terry Stockwell, ME, proxy for P. Keliher (AA)
Steve Train, ME (GA)
Doug Grout, NH (AA)
Rep. David Watters, NH (LA)
G. Ritchie White, NH (GA)
Mike Armstrong, MA, proxy for P. Diodati (AA)
Bill Adler, MA (GA)
Jocelyn Cary, MA, proxy for Rep. Peake (LA)
Bob Ballou, RI (AA)
Rep. Peter Martin, RI (LA)
Bill McElroy, RI (GA)
David Simpson, CT (AA)
Lance Stewart, CT (GA)
James Gilmore, NY (AA)
Brian Culhane, NY, proxy for Sen. Johnson (LA)
Pat Augustine, NY (GA)
Russ Allen, NJ, proxy for D. Chanda (AA)
Adam Nowalsky, NJ, proxy for Asm. Albano (LA)
Loren Lustig, PA (GA)
Mitch Feigenbaum, PA, proxy for Rep. Schroder (LA)

Leroy Young, PA, proxy for J. Arway (AA)
John Clark, DE, proxy for D. Saveikis (AA)
Bernie Pankowski, DE, proxy for Sen. Venables (LA)
Roy Miller, DE (GA)
Tom O'Connell, MD (AA)
Russell Dize, MD, proxy for Sen. Colburn (LA)
Bill Goldsborough, MD (GA)
Jack Travelstead, VA (AA)
Kyle Schick, VA, proxy for Sen. Stuart (LA)
Cathy Davenport, VA (GA)
Michelle Duval, NC, proxy for L. Daniel (AA)
Mike Johnson, NC, proxy for Rep. Wainwright (LA)
Bill Cole, NC (GA)
Ross Self, SC, proxy for R. Boyles (LA)
Spud Woodward, GA (AA)
Aaron Podey, FL (AA)
Daniel Ryan, D.C.
Jaime Geiger, USFWS
A.C. Carpenter, PRFC
Steve Meyers, NMFS

(AA = Administrative Appointee; GA = Governor Appointee; LA = Legislative Appointee)

Ex-Officio Members

Pam Lyons Gromen, Advisory Panel Chair

Staff

Bob Beal
Kate Taylor

Danielle Chesky
Toni Kerns

Guests

Jeff Kaelin, Lund's Fisheries
Raymond Kane, CHOIR
Amy Roe, Sierra Club
Lindsey Fullencamp, NOAA
Theresa Labriola, Pew Environ. Group

Jud Crawford, Pew Charitable Trusts
Fred Akers, Great Egg Harbor River Council
Kristin Cevoli, Herring Alliance/PEG
Patrick Paquette, Hyannis, MA

The Shad and River Herring Management Board of the Atlantic States Marine Fisheries Commission convened in the Presidential Ballroom of the Crowne Plaza Hotel, Alexandria, Virginia, August 7, 2012, and was called to order at 4:30 o'clock p.m. by Chairman Michelle Duval.

CALL TO ORDER

CHAIRMAN MICHELLE DUVAL: All right, if members of the Shad and River Herring Board could please take their seats, the first item is approval of the agenda.

APPROVAL OF AGENDA

CHAIRMAN DUVAL: I am not aware of any additions to the agenda at this point. Are there any additions to the agenda from board members? Seeing none, the agenda stands approved.

APPROVAL OF PROCEEDINGS

CHAIRMAN DUVAL: The next item is approval of our proceedings from May 1, 2012. Are there any changes to the proceedings? Seeing none, those proceedings stand approved.

PUBLIC COMMENT

CHAIRMAN DUVAL: This is the point in our agenda where we accept public comment for items that are not on the agenda. I think Kate checked the public comment and there was nobody signed up speak, but at this time are there any members of the public who wish to address the board with regard to items that are not on the agenda? Seeing none, we will continue moving forward.

UPDATE ON NEFMC AMENDMENT 5 AND MAFMC AMENDMENT 14

CHAIRMAN DUVAL: The first thing we're going to do is have Kate give us an update on both the New England and Mid-Atlantic Council amendments that we had previously submitted comments on.

MS. KATE TAYLOR: The Herring Section was briefed this morning on the New England Council update. For the remainder of the board members, in June the New England Council met to determine the final recommendations in Amendment 5. In the category of FMP adjustments, the council recommended expanded possession limits so that all vessels working cooperatively are subject to the most restricted possession limit.

There were requirements for pre-trip and pre-landing notifications and a requirement for federal dealers to accurately weigh all fish and document how composition of mixed catches are estimated. Under the catch monitoring program in Amendment 5, 100 percent at-sea observer coverage for Category A and B vessels was required, and this would be supported by funding from federal and industry and also with the use of state service providers.

There were also recommendations for approval of the trip termination after ten slippage events for all limited access vessels. When considering river herring bycatch, the recommendations were for the two-phased bycatch avoidance approach as recommended by the SMAST, DMF, Sustainable Fisheries Coalition Project; and also that bycatch limits or catch caps could be approved for consideration in future actions. With regard to the midwater access to the groundfish closed areas, there is 100 percent observer coverage on all trips in the groundfish year round closed areas.

The New England Council staff is currently working with NMFS and the final EIS is expect to be submitted in mid-September for consideration for approval by the National Marine Fisheries Service.

With regards to the Mid-Atlantic Fishery Management Council's Amendment 14 to the Squid, Mackerel and Butterfish FMP, the council recommended – this amendment dealt specifically with really shad and river herring bycatch and minimizing and monitoring bycatch in the fishery. They recommended approval of a catch cap for river herring and shad beginning in 2014.

There are also recommendations for increased vessel and dealer reporting requirements; to require 100 percent coverage on midwater trawlers; and then additional reporting and monitoring requirements. Also at the council meeting they initiated the development of Amendment 15, which would consider adding shad and river herring as a stock in the fishery.

The final EIS is expected to be submitted to NMFS in September. Just for the board's information, the timeline for Amendment 15 which would consider adding shad and river herring as a stock in the fishery has been included with the Mid-Atlantic Council's August briefing material. They are expecting a scoping document to occur some time in November 2012 with the FMAT developing alternatives and council and AP input during 2013; a public comment

period in early 2014; and potentially a final rule effective for 2015.

Also discussed this morning and along the lines of a council update was the lawsuit decision that just came down. For those board members that weren't here this morning, there was a lawsuit filed in April 2011. The claim by the defendants was that Amendment 4 to the Atlantic Herring Plan was in violation of the MSA and the EPA by failing to include shad and river herring as a stock in the fishery and to create catch limits for them.

It also failed to set adequate ACLs and AMs for Atlantic herring. The ruling came down and declared Amendment 4 as null effective one year from now. The court found that the disruptive consequences of replacing a vacated Amendment 4 with its predecessor could be profound, so it decided to make the effective date one year from now.

The court will retain oversight of the agency's action in this matter until NMFS fully complies with the order. The ruling will require NMFS and the New England Council to review the most recent science and consider a full suite of protections for shad and herring. It gives NMFS one year to take action to minimize the bycatch of shad and river herring.

It orders NMFS to consider new approaches for setting the allowable catch for sea herring that accounts for its role as a forage species. Specifically it gives NMFS one month to provide the court with an explanation of whether the Amendment 4 definition of stock in the fishery complies with the MSA with regard to shad and river herring.

NMFS will send a letter to the New England Council recommending the council consider shad and river herring as a stock in the fishery based upon the results of the river herring and shad stock assessments and the recent petition to list river herring as threatened on the ESA. In six months the Service shall file a report with the court describing the progress on the actions that they've had underneath the ruling, and in one year NMFS will provide the court with an explanation setting forth its consideration of whether the Atlantic Herring FMP minimizes the bycatch to the extent practicable of shad and river herring.

It will describe all actions taken, including a NEPA analysis for the 2013/2015 specifications and management of the Atlantic herring fishery. In talking with the Mid-Atlantic Council staff they have commented that this ruling may push the

development of Amendment 15 along a little faster and hopefully there will be increased coordination between the New England Council and the Mid-Atlantic Council and ASMFC with respect to the stock in the fishery question as this moves forward. Thank you, Madam Chair.

CHAIRMAN DUVAL: Thanks for the update, Kate. Are there any questions for Kate with regard to either the New England or Mid-Atlantic Council actions regarding Amendments 5 and 14 or the recent federal court ruling? Doug.

MR. DOUGLAS GROUT: I don't know if you can answer this because you weren't the judge that wrote it down and maybe I just save this for the council when we get this. It suddenly struck me that it said – the line that said in a year it is going to declare Amendment 4 null and void, which is the amendment that we put in ACLs and AMs.

I would think that a full new amendment would have to be in place by that time. That is what you're reading, that it would include ACLs, AMs and potentially additional measures to address river herring.

CHAIRMAN DUVAL: Well, I'm not an attorney, but I would think that would be the homework assignment which is not an inconsiderable homework assignment for the New England Council given that you did have ACLs and AMs in that amendment. Anyone else? Okay, we will move on to the next exciting topic, which is an update on the Proposed Endangered Species Listing for river herring. Kate.

REVIEW OF NOAA FISHERIES PROPOSED ENDANGERED SPECIES LISTING FOR RIVER HERRING

MS. TAYLOR: As the board is aware, the initial petition to list river herring as threatened under the ESA was submitted by the NRDC August 1st of last year. NMFS came out with their 90-day finding on November 1st. We were expecting the proposed rule to come down on August 1st. However, NMFS has delayed in doing that because they're currently – in June and July they held three workshops to collect information.

The first was on stock structure. There was an extinction risk workshop and a workshop on climate change. Many of the state technical committee and stock assessment members along with ASMFC staff were involved in these workshops. The workshop reports are still being finalized. They have been sent

to the workshop participants for comments. These reports will be peer reviewed. These reports, in addition to what NMFS already has, will help inform the proposed listing determination. The best available information I have is that this proposed listing determination will be available as soon as possible. Thank you, Madam Chair.

CHAIRMAN DUVAL: Are there any questions for Kate? Mr. Meyers.

MR. STEVE MEYERS: Madam Chair, not a question, just some information. The workshops were audio taped and also the presentations are available at a website which I will share with staff for distribution to the board.

CHAIRMAN DUVAL: Thanks, Steve. Is there anyone else with any comments or questions with regard to the proposed ESA listing? Presumably, we would hear something prior to the annual meeting in October; maybe not.

DISCUSSION OF RHODE ISLAND REQUEST FOR RIVER HERRING BYCATCH FISHERY

CHAIRMAN DUVAL: The next item on our agenda is a request by Rhode Island or really I think this is more of a heads up, and I'm going to turn things over to Bob Ballou to discuss this with regard to some information that the state of Rhode Island is going to be submitting to the technical committee I believe with regard to a bycatch fishery.

MR. ROBERT BALLOU: Yes, the intent of this agenda item is just to give the board a heads up as to the state's intent to submit a plan for technical committee review with the hope and expectation that review would be conducted between now and the annual meeting; and that at the annual meeting this board would be able to take up the matter and vote on it.

The context is that Rhode Island has a very brief and at least the past year quite intense Atlantic herring fishery that runs from around Christmastime through January. It is usually about a four-week fishery. It is in state waters, Rhode Island's state waters. We had to come to terms with the issue that there is some minimal amount of river herring bycatch associated with that fishery.

We know that because of the monitoring reports from last year. The point is obviously that we've got a conundrum. We've got a moratorium on river

herring in Rhode Island waters as other states do, and we have this sea herring fishery that we would like to support and maintain. The Rhode Island plan is to essentially look to the Amendment 5 protocols that have been considered by the New England Council and are now in the process of being reviewed by the National Marine Fisheries Service and look to essentially adopt those as part of our state waters program.

So that has to do with the SMAST Avoidance Protocols, the monitoring requirements, observer coverage, that sort of thing. Ultimately what we would be looking for is a program whereby we would be ensuring that river herring bycatch is avoided; certainly minimized, avoided and perhaps zeroed out if at all possible via these protocols that we would be implementing.

That is really the essence of it. Now, the Chair and I have exchanged e-mails and I am reminded that this board has already wrestled with this issue as to what is considered bycatch, what rises to the level of the need for a sustainable fishery plan, and I'm harking back to some discussions over the past couple of years.

It is my understanding, having reviewed those documents, that while first our thought was we did not need to follow the sustainable fishery management route because we weren't looking to target – we're not looking to target river herring; we're looking to avoid them, so we're really looking to just see if we could get a bycatch avoidance plan approved, but now that I read the minutes and reviewed the record – David Simpson among others was very active on this issue.

I don't mean to single out David; I just happened to see the maker of the motion calling it what it is, and that is if a state water fishery has any river herring bycatch, the state needs to submit a sustainable fishery plan in order to uphold that or continue that. At first that brought on a lot of fear on our part, thinking that is a huge undertaking, and I'm now led to believe that it might not necessarily be that heavy a lift. We're going to do whatever we need to do because we want to make sure that this program is appropriate and defensible. Right now we're in a bind because we've got a very good run of sea herring that occurs every year.

Luckily it occurs at a time of the year when there are very few river herring around, so the timing is awesome. We think almost without doing anything we could probably get away with it. Come to think

of it, that's exactly what we have been doing, but I don't think that is appropriate and I think we need to come to terms with the fact that there is some modest amount of bycatch.

I think what we can do is actually if we could put forward for technical committee review and subsequent board consideration a program that by no means suggests that we're targeting river herring – in fact a program that is showing how we are going to avoid that bycatch, consistent with the Amendment 5 protocols that the New England Council is adopting and working with SMAST.

We're envisioning a letter of authorization for anyone who wishes to fish; and pursuant thereto they would have to adopt the SMAST protocols, get the Yahoo account, understand that if there is any river herring hotspots, those are going to have to be avoided, and we would certainly be in the position of being able to shut the fishery down if that occurred.

So, I'll end there unless there is any feedback that the board wishes to provide us. As we embark on our journey here, we again thought it was best to just give the board a heads up as to where we are and obviously see if there are any insights that you want to provide at this early stage and then look to take up this issue more definitively at the meeting. Madam Chair, that is I think my best summary of where we are and I'll be happy to just leave it there or entertain any questions or comments anyone may have. Thank you.

CHAIRMAN DUVAL: Thank you very much for that, Bob, and I think everybody around the board appreciates the heads up in that regard and it is in your characterization of what is actually happening in your state waters, and I think it is a question that the board has wrestled with before.

Just to kind of bring everybody up to speed, it was two years ago at the annual meeting in 2010 that we had this discussion and deliberation. There had been a discussion with regard to what is a bycatch fishery non-targeted versus a directed fishery and when do you need to submit a sustainable fishery management plan. We asked the policy board for some clarification on that.

The policy board made a motion and unfortunately there was still some confusion around the table after the policy board told the technical committee to direct states that had directed fisheries to submit sustainable fishery plans.

Bob Beal had put together a memo to try to clarify this, which we addressed at the November annual meeting in 2010, and that was where Mr. Simpson had made a motion that any state or jurisdiction that wishes to retain river herring from state waters submit a sustainable fisheries management plan. This sounds like it is really more a bycatch characterization as opposed to retention, but I appreciate what Bob has had to say. I know Dave had his hand up wanting to ask Bob a question, so, Dave, I'll turn it over to you.

MR. DAVID SIMPSON: I appreciate all the effort and thought that Rhode Island is giving to this. Frankly, the type of fishery that they're talking about wasn't what any of us – certainly, I'll speak for myself – I envisioned when we were discussing this. I was thinking about existing small-mesh fisheries for this or that.

This is actually a large pair trawl vessel operation occurring in state waters. I would just ask Rhode Island, as they go forward in their planning, to give consideration to the potential impacts for runs in neighboring states, sort of the intercept concept of where the river herring that are taken as bycatch may have been headed. Since Block Island Sound is part of the migratory route to Connecticut, we would just want to follow this work that Rhode Island plans to do.

MR. PATRICK AUGUSTINE: Excellent report, Bob. The concern was how different is this pair trawling effort in your state waters than the intercept fishery that we literally eliminated I think some folks in North Carolina or someone experienced years ago. Is it completely different or am I misconstruing in comparing one versus the other?

There used to be an intercept fishery for herring. Whether it was Atlantic herring or river herring only; can you clarify that for me? I'm getting old and decrepit and can't keep all these compartments squared in my head. What is the difference other than one is now occurring in state waters versus the other was occurring in federal waters, and we eliminated that several years ago.

CHAIRMAN DUVAL: Pat, I think you may be referring to the ocean intercept fishery for shad, actually for American shad.

MR. AUGUSTINE: It was only shad; it didn't include any river herring that happened to be as a bycatch?

CHAIRMAN DUVAL: No, and I believe all states and jurisdictions were required to eliminate that by 2005, if I'm correct.

MR. AUGUSTINE: Well, shad and river herring, they all run together and they're all in trouble, so I am concerned with the pair trawling effort as Mr. Simpson mentioned. I hope we keep a close handle on that. Again, some of the rivers are showing some improvement in that stock but only a limited amount. If this thing continues to – let's hope it doesn't get larger and that the harvest is controlled more and more as time goes on so we can see the resurgence of these animals. Thank you.

MR. TERRY STOCKWELL: Bob, as part of Maine's development of our sustainable harvest plan, we implemented a new pelagic license and a fairly rigorous monitoring program. One of the questions I'm going to have for you when this comes back before the board is going to be the nature of your monitoring program.

MR. BALLOU: Thank you for that.

CHAIRMAN DUVAL: Are there any other questions for Bob or questions around the table in regard to this matter? Tom Fote.

MR. THOMAS FOTE: When we were discussing this about shad and river herring and we talked about the recreational fisheries and the amount that we closed down – certain fisheries like we closed down almost all of New Jersey, except I'm not sure if the Delaware River is completely closed now or not. River herring is closed.

So if we're not allowing any recreational, which is small numbers of fish, I find it very difficult to allow even this amount of fish because that amount of fish would cover a whole bunch of recreational anglers. It is a tough call and I am going to have to justify that before I can vote for it. It's going to put me in a very difficult situation and it will put New Jersey in a difficult situation, and I would imagine it would put other states that have completely closed down their fisheries to allow for a bycatch in those numbers.

CHAIRMAN DUVAL: I very appreciate those remarks, Tom, and I think we should give Rhode Island the opportunity to put together all the information that it has and go through the technical committee review before we make any remarks about the level of river herring bycatch in state waters. Based on what Bob has said, I think it is Rhode

Island's intent to try to avoid as much as possible interaction with river herring.

MR. FOTE: I'll go back to the history of there was allowed a bycatch of striped bass in New Jersey in the net fishery, and we brought it to a head in the fifties because of what went on, and they basically brought all these shad and river herring that is in Tom's River to catch. They wound up catching tons of striped bass.

I asked the commercial fishermen that had done it, and I said how many river herring and shad did you catch in the two years that you basically took out tractor/trailer loads of striped bass. He said we tried like hell, but we never landed one. It is always my concern when we talk about bycatch.

I know this is not the situation, but it raises such a red flag in my head when we talk about this because bycatch fisheries wind up sometimes being direct fisheries. I can basically mention two or three that started out striped bass as a bycatch in this fishery and now it is striped bass and the other fishery is the bycatch in that fishery. I always have those concerns.

ADJOURNMENT

CHAIRMAN DUVAL: Duly noted and thanks for that. Anybody else? Are there any other items or any other business to come before the board before we adjourn? Seeing none and if there is no objection, we stand adjourned.

(Whereupon, the meeting was adjourned at 4:55 o'clock p.m., August 7, 2012.)