

March 24, 2017

Mr. Douglas E. Grout, Chair  
Atlantic States Marine Fisheries Commission  
1050 N. Highland Street, Suite 200 A-N  
Arlington, Virginia 22201

Dear Mr. Grout:

The New Jersey Commissioners of the Atlantic States Marine Fisheries Commission (ASMFC) hereby formally appeal the February 2, 2017 approval by the Summer Flounder, Scup and Black Sea Bass Management Board (Board) of Addendum XXVIII (Addendum) to the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan (FMP). More specifically, New Jersey is appealing the Board's approval of Option 5 under regional management in the Addendum and the specific management measures set forth under Option 5. This decision mandates a one-inch size increase to New Jersey's current recreational summer flounder minimum size limit and decreases the possession limit from five fish to three fish. New Jersey brings this appeal pursuant to the Appeals Process approved by the Interstate Fisheries Management Program (ISFMP) Policy Board (Appeals Process).

New Jersey has previously and repeatedly expressed concerns regarding the Addendum and exhausted all options to gain relief at the Board level. During the drafting of the Addendum and prior to the ASMFC meeting of February 2, 2017, New Jersey's ASMFC Commissioners contacted Commissioners from other member states to discuss our concerns with the options set forth in the Addendum. The Commissioner of New Jersey's Department of Environmental Protection testified before the Board at the ASMFC meeting of February 2, 2017 to express New Jersey's apprehension about the science and the impact these decisions would have on the economic health of the recreational fishing industry in New Jersey and on the health of the summer flounder fishery. At that same meeting, New Jersey voted against Option 5 of the Addendum and unsuccessfully moved to postpone the Addendum.

Since the ASMFC approved Option 5 from the Addendum, and with New Jersey's administrative options exhausted, New Jersey now files this appeal based on the criteria in the Appeals Process

and the ISFMP Charter. First, this appeal demonstrates that the Board’s current decision, as well as previous quota limits to the commercial sector, will result in specific adverse impacts to New Jersey’s recreational summer flounder industry and the overall summer flounder fishery industry that ASMFC is charged with protecting. Second, this appeal shows that the Board did not properly apply technical information in using Marine Recreational Statistical Program (MRIP) harvest estimates and failed to consider the biological impact of increased size limits on the fishery. Finally, this appeal outlines how the Board failed to follow proper process in reaching its decision on the Addendum.

Specifically, this appeal addresses the following criteria:

- Criteria 5: Management actions resulting in unforeseen circumstances/impacts
  - Increase in Fishery Resource Waste
  - Disproportionate Removal of Larger Breeding Females
  - Unfairness & Inequity Among Member States
  - Failure to Consider Economic and Social Impacts
  - Compliance and Data Collection Issues
- Criteria 3: Insufficient/inaccurate/incorrect application of technical information
  - Variability and Untimeliness of MRIP Data Not Appropriate for Yearly Management Approach
- Criteria 2: “Failure to follow process”
  - Inaccuracies in Draft Addendum XXVIII Subject to Public Comment
  - Failure to Include Enhanced Opportunity Shore Fishing Program in Draft Addendum XXVIII
  - Failure to Properly Consider Public Comments\

### **Criteria 5: Management actions resulting in unforeseen circumstances/impacts**

The Board’s recent management actions will likely cause a number of unforeseen adverse impacts to the State of New Jersey. The most critical is the increase in discard mortality, which when coupled with the decrease in harvest, will result in more dead discards than actual harvest. Moreover, the increased minimum size limit has the effect of targeting larger female breeding

stock, which may have a negative impact on the flounder fishery recruitment. The Addendum's minimum size requirements also unfairly affect New Jersey compared to other states because the summer flounder in New Jersey waters are smaller than that of our northern counterparts. Thus, the management measures selected in the Addendum will have more damaging economic and social impacts upon New Jersey's coastal communities. Finally, the Addendum will create additional compliance and enforcement difficulties and data collection problems by continuing to erode anglers' trust in regulatory entities.

#### *Increase in Fishery Resource Waste*

Section 6(a)(4) of the ISFMP Charter states that "management measures shall be designed to minimize waste of fishery resources." The Charter's requirement is consistent with National Standard 9 of the Magnuson-Stevens Act (Act), which requires that "[c]onservation and management measures shall, (a) to the extent practicable, minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." [16 U.S.C. 1851(a)(9).] Contrary to these mandates, the Addendum requires New Jersey to increase the minimum size to 19 inches in the recreational fishery which, based upon the 10 percent mortality rate for discards used by ASFMC and MAFMC, will increase recreational discard mortality to such an extent that the discard mortality will actually be higher than the harvest mortality.

These findings are based on New Jersey's analysis of MRIP data and New Jersey Volunteer Angler Survey (VAS) data. A brief description of the calculations is provided below. Data and a full analysis will be presented to the Policy Board if warranted.

In 2008, the New Jersey VAS was implemented to supplement and complement data collected by the MRIP survey. The VAS is open access and conducted entirely online on a volunteer basis. Data collected include information on the fishing trip (*e.g.* wave, mode, area, number of anglers), catch (species, number caught, number released), and lengths of both harvested and released fish. The VAS collects specific information from anglers on the lengths of harvested and discarded fish from all modes, while discard lengths are not as broadly sampled by the MRIP. Accordingly, New Jersey analyzed the length data provided by VAS participants to determine the overall length frequency of reported summer flounder catch (harvest plus

discards). The data was then used to estimate statistics relative to the proposed 19-inch minimum sizes.

The data shows that by increasing the minimum catch size from 18 inches to 19 inches, more flounder will not meet the minimum harvest size requirements. Those fish that do not meet the minimum harvest size cannot be kept and must be discarded. Since there will be more fish discarded, and applying a 10 percent mortality rate of discards, more fish will die after being returned to the water. Indeed, the VAS length frequency data show that increasing the summer flounder minimum catch size from 18 inches to 19 inches would result in discard mortality that is 16.6 percent greater than harvest mortality using 2016 data. **In other words, at a 19-inch minimum size, the number of undersized (discarded) fish that die after being returned to the water will be greater than the number of fish that will be harvested. This will be the first time in New Jersey history that more summer flounder will die as a result of being discarded than will be harvested by anglers. This is not sound fishery management.**

The results of the VAS analysis carry enormous implications, so a similar analysis was conducted using MRIP data to test the veracity of the results. A query of summer flounder catch and length frequency in New Jersey shows that dead discards exceed harvest by nearly 20 percent under a 19-inch minimum size limit using 2016 data. The percentage by which dead discards exceeds harvest using 2016 MRIP data is consistent with the analysis of 2016 New Jersey VAS data.

These analyses assume no changes to fishing effort with the increased size limit. However, common sense dictates, and our initial discussions with members of the private boat and shore angler communities, along with boat captains, indicate that an increased minimum size limit will result in increased fishing effort due to private boat and shore anglers taking more and/or longer trips in an attempt to harvest legal-sized fish. Increased fishing effort, in turn, equates to additional discards, resulting in even higher discard mortality than projected.

These results have severe negative implications for recreational summer flounder management in New Jersey. Discard mortality that exceeds harvest is not acceptable from a fishery management standpoint and will not be well received by the recreational fishing sector. In addition, increasing the minimum size limit of summer flounder to 19-inches is inconsistent not only with the

ISFMP's standard of minimizing fishery waste, but also with the mandate of National Standard 9 of the Act to minimize bycatch. Under the proposed quota, for anglers to catch a legal-sized fish, they will need to throw back more fish. Since the size limit was increased to 18-inches in 2014, the discard rate in New Jersey has been at least 89 percent.

New Jersey is actively exploring how it can reduce the mortality rate for discards through a combination of education, encouraging the use of hooks that cause less damage to the fish, and other methods that would help to ensure that those fish that do not meet the minimum size have a better chance of survival when returned to the water. By reducing the mortality rate, New Jersey aims to achieve compliance by reducing the overall take of summer flounder.

The issue of regulatory discards has been discussed at length at the Technical Committee and at the Management Board for several years. It was originally included in the Comprehensive Summer Flounder Amendment that was initiated in December 2013 and went out to Scoping Hearings in September 2014. Recreational regulatory discards was one of the most frequently raised issues during the scoping process and at the 14 scoping hearings held along the Atlantic coast. Two hearings were held in New Jersey with as many as 100 members of the public in attendance.

Since that time, however, the Board determined that the comprehensive amendment was too burdensome to decide all at once, and projected that final action and implementation on such an undertaking would not occur until 2020. Therefore, in order to set a more realistic date for action, the Council and Board voted to reduce the scope of the comprehensive amendment and limit the focus to commercial issues.

New Jersey's Mid-Atlantic Fishery Management Council (MAFMC) members and NJ ASMFC Commissioners opposed this decision. In fact, at the February 15, 2017 joint meeting of the Council and Board, New Jersey's Commissioners moved to initiate an Addendum to address summer flounder recreational issues. Our motion, however, did not receive the support of the Board. The Board's inaction signaled to stakeholders that these recreational issues, especially high regulatory discards, are not one of the Board's priorities, contrary to the public's interest.

### *Disproportionate Removal of Larger Breeding Females*

Section 6(a)(1) of the ISFMP Charter states that “management measures shall be designed to . . . maintain over time, abundant, self-sustaining stocks of coastal fishery resources.” But the increased minimum size limits could have the opposite effect because the larger size limits promote the harvest of female summer flounder. New Jersey has documented the fact that the larger summer flounder tend to be females, that 90 percent of the summer flounder that are at least 19 inches in length are breeding females, and that the larger the female the more eggs she carries. Thus, the Board’s decision to increase the minimum size limit for New Jersey waters will likely have the unintended consequence of removing the most productive egg-bearing females from the fishery. Indeed, removing breeding females from the fishery may very well explain the lack of recruitment in recent years.

Over the past several years, at every summer flounder public hearing and in numerous written public comments that have been submitted to ASMFC during the Addendum process, anglers have voiced grave concerns regarding high size limits and their impact on the increased harvest of larger females. The consequences of this measure to the breeding females in the fishery should not be disregarded.

### *Unfairness & Inequity Among Member States*

Second, New Jersey is unfairly and inequitably impacted by the current management measures. Section 6(a)(7) of the ISFMP Charter states that an FMP should “allow internal flexibility within states to achieve its objectives while implemented and administered by the states” and that “[f]ishery resources shall be fairly and equitably allocated or assigned among the states.” This section is consistent with National Standard 4 of the Act, which requires that fishing privileges be allocated in a way that is “fair and equitable to all . . . fishermen.” [16 U.S.C. 1851(a)(4)]

The Board has generally recognized that fish size in state waters varies from north to south and has established minimum size limits accordingly. For example, North Carolina generally has always had a smaller minimum size limit than Massachusetts. Length frequency data from several sources, including MRIP and the NMFS Trawl Survey, show that summer flounder off

the coast of New Jersey are smaller than summer flounder in New York and Connecticut waters, our regional counterparts. Yet despite these differences, New Jersey has been forced by the ASMFC to manage summer flounder as part of a region with New York and Connecticut, thus preventing New Jersey from proceeding with conservation equivalency on terms specific to New Jersey. Instead, New Jersey is forced to abide by whatever management measures New York and Connecticut have determined is best for their anglers without any consideration of the impact on New Jersey anglers. The inequity to New Jersey is a violation of ISFMP standards and National Standard 4.

#### *Failure to Consider Economic and Social Impacts*

The Addendum will result in serious and lasting impacts on New Jersey's economy. The fishing industry in New Jersey supports 65,000 jobs and creates \$2.5 billion in economic activity. Of that, the recreational fishing industry accounts for 20,000 jobs and contributes \$1.5 billion to New Jersey's economy. Given the size of New Jersey's fishing industries, it is surprising that neither analysis nor consideration of economic or social impacts was considered in the Addendum, particularly because Section 6(a) and Section 6(b)(1)(v)D of the ISFMP Charter clearly state that social and economic impacts must be taken into account in fishery management programs.

New Jersey has serious concerns about the severe impact that the approved measures could cause to a fishery that is a mainstay for our shore economy during the summer months. The increasingly stringent summer flounder management measures have resulted in a continued economic slowdown. Already reeling from the devastating effects of Superstorm Sandy, each year after the 2012 and 2014 restrictions, recreational fishing trips for summer flounder dropped by 19 percent and 20 percent respectively. Overall, from 2012 through 2015, recreational fishing trips for summer flounder in New Jersey are down 24 percent. Closures of bait and tackle shops, boat rentals, marinas, and for-hire boats have already put these communities in jeopardy as a result of previous management measures since at least 2014. This subject, while raised numerous times by our constituents and staff during public comment, was not properly considered by the Board or ASMFC staff. Not only is the Addendum inconsistent with the ISFMP Charter, it is also inconsistent with National Standard 8 because it does not take into

account the importance of fishery resources to fishing communities using economic and social data.

### *Compliance and Data Collection Issues*

Another unforeseen impact will be compliance difficulties. New Jersey anglers continue to struggle with ever-changing regulations that make it more difficult for them to comply and more difficult for the state to enforce these increasingly stringent regulations. One of the fundamental principles in enacting laws or promulgating regulations is that they be reasonable and that those being regulated can be reasonably expected to follow them. New Jersey's anglers are already suffering the effects of earlier reductions, and our many discussions with those in the recreational fishing industry indicate that they feel the reduction called for in 2017 are unjust and that New Jersey is being singled out unfairly. This recent Board decision will only increase the likelihood that the new regulations will encourage non-compliance so as to avoid what the industry sees as unjust, unfair, and punitive quotas.

A bias that continues to corrupt MRIP data collection must also be taken into account when considering this data. More and more anglers and for-hire captains are deliberately avoiding New Jersey's Access Point Angler Intercept Survey (APAIS) field interviewers. Their avoidance arises from their distrust that ASMFC, MAFMC, and NMFS will use this data against them to continue to destroy their industry. As discussed above, the economic impacts of the ASMFC decision could devastate our fishing and tourism communities this upcoming fishing season. The social impacts will be long-term and make trusting the process very difficult for the State of New Jersey.

### **Criteria 3: Insufficient/inaccurate/incorrect application of technical information**

New Jersey appeals under Criteria 3 based on the Board's improper use of MRIP on a year-to-year basis to set the Recreational Harvest Limit (RHL). MRIP data is unsuitable as a year-to-year management tool for summer flounder because of its variability and untimely collection.

### *Variability and Untimeliness of MRIP Data Not Appropriate for Yearly Management Approach*

The major technical flaw in setting the RHL relates to the use of MRIP data on a year-to-year basis. As explained below, MRIP data was not intended to serve as the basis for yearly quota

management decisions or as the basis for yearly changes to particular management measures. Indeed, MRIP annual harvest estimates, in numbers of fish, are not used on a year-to-year basis for most species under the Commission's management.

The recreational fishery for summer flounder is managed on a "target quota" basis. The commercial sector is allocated 60 percent of the overall coastwide Acceptable Biological Catch (ABC) for summer flounder while the remaining 40 percent is allocated to the recreational sector. Council staff calculates the RHL by factoring in management uncertainty and discards from previous years. The summer flounder management regions, as identified in Addenda XXV and XXVIII, then develop management measures that can "reasonably be expected" to constrain recreational harvest to the RHL.

To establish these measures, MRIP data is used in two ways. The first is to determine the projected harvest estimate for the previous year to measure the effectiveness of management measures in that year. The second is to project forward into the future to set the RHLs for the coming year. However, the use of MRIP data both to set the RHL and to select management measures has historically been deemed impractical by managers and technical experts. This view reflects the limitations of producing timely landing estimates in an attempt to manage the recreational fishery based on a real-time quota and due to the variability from year to year. Data from the MRIP recreational fishery survey are known to be highly variable from year to year due to extremely small (i.e. statistically insignificant) sample sizes. This can produce estimates of harvest that fluctuate despite unchanged management measures.

The variability and timeliness of MRIP data undermine both the accuracy of the data and the confidence anglers put in it. This variability is apparent on a coastwide basis where harvest varies by as much as 50 percent on an annual basis with no change in management measures. In New Jersey, fluctuations in estimated harvest were apparent during the 2014, 2015, and 2016 fishing years. Even though the size and bag limit remained the same for those three years, the recreational harvest limit and the landing estimates varied significantly, both increasing and decreasing for no apparent reason other than gross variability.

To illustrate, from 2012 to 2016 in New Jersey, the recreational expanded harvest estimate ranged from a minimum of 497,482 in 2015 to a maximum of 1,244,432 in 2013. By simply

utilizing a yearly MRIP estimate, the variability associated with this estimate is being ignored. If instead a mean was calculated over the five-year period, the expanded harvest estimate would be 927,090, with a 95% Confidence Interval (CI) from 526,840 to 1,237,527. The 95% CI over the five-year period was very large, ranging from close to the minimum yearly estimate to close to the maximum yearly estimate. When the 95% CI has this wide a range, this suggests that the variability of the estimate was high between years and that there is low confidence in yearly estimates.

In addition to its high variability, MRIP data is not appropriate to use as a yearly measure in setting the RHL because it is not collected in a timely manner. The current timeline of summer flounder management dictates that the Technical Committee (TC) and the MAFMC Monitoring Committee (MC) must begin crafting measures for the following year's fishing season during November of the current year, using preliminary MRIP data for the months January through August and projected harvest of data for the months September through December. The projections are an average of data from the last three years for the months missing when the process begins.

Usually in February of the year for which fishery managers are trying to implement management measures, the TC and MC will receive a preliminary estimate for September and October. The TC will then revise the measures that have been crafted in reaction to the new "preliminary estimates." The ASMFC Board will also meet in February to make a management decision based on preliminary estimates and direct each state to implement the agreed upon measures.

The next feed of data, which is called "final" is usually delivered to the TC in April. Depending on the result of the final data feed, states will need to make adjustments yet again. The issues caused are obvious. Most, if not all states, including New Jersey, require several months to get regulatory changes made to fisheries regulations. The delay in the availability of these data does not allow the required time to make a thorough analysis, therefore management measures are often pushed through without possessing a complete understanding of past performance of measures from previous years.

As the ASMFC Technical Committee presented to the Board at the February 2, 2017 meeting, changing the management measures from year-to-year makes it very difficult to predict the

reliability and effectiveness of management measures put in place on an annual basis. Developing management measures that extend over a period of time, (for example three to five years or until a new benchmark assessment is developed) would result in a more efficient and accurate management structure than the current process and would allow for the anomalous variability of the MRIP estimates to be smoothed over time. Maintaining management measures over multiple years is the best way to react to the trends developed from the MRIP data. The fact that these data are used on an annual basis and not as a multi-year mean is misuse of the data that undermines decision-making.

## **Criteria 2: “Failure to follow process”**

As explained below, the Board failed to follow the proper process to reach its decision in at least three ways. First, the revised Addendum released for public comment on December 23, 2016 differed from that presented to the Board for a vote on February 2, 2017. Second, the Addendum failed to include the Enhanced Opportunity Shore Fishing Program (Program) in the Addendum for public comment. These issues are substantive and go beyond technical corrections to the Addendum. Third, ASMFC failed to properly consider public opposition to the Addendum.

ASMFC’s ISFMP Charter Section 6(c)(9) (iv), states, “Public comments will be evaluated and considered prior to deciding what modifications will be made to the draft FMP or amendment, or draft final FMP or amendment, and prior to approval of the FMP or amendment consistent with the public comment guidelines.” Section 6(b)(3) also requires that the public have an opportunity to review and comment on addenda. The failure to fully and accurately present the Addendum for public comment prior to Board approval hampered the public’s ability to assess and comment upon the recreational summer flounder options.

### *Inaccuracies in Draft Addendum XXVIII Subject to Public Comment*

The Addendum was first released for public comment on December 22, 2016. A revised version of the Addendum was issued on December 23, 2016 with a public comment period open until January 19, 2017. Around January 17, 2017, ASMFC staff determined that there were significant errors in the Addendum. In light of these errors, the ASMFC Summer Flounder, Scup, Black Sea Bass Technical Committee (Technical Committee) met via conference call on January 19,

2017. The Technical Committee decided that three of the five options in the Addendum incorrectly explained the methods used to calculate the tables within the Addendum.

Specifically, the methods described for calculating Options 2-4 differed from the results presented in tables 2-4. Once the Technical Committee had identified these errors, the narrative text was altered to capture the intent of the Addendum and correspond to the tables in the Addendum. Additionally, certain percent reductions in the tables were adjusted at this time due to the mathematical errors found within the original calculations.

Because of the errors in the Addendum, ASMFC should have released, but did not release, an updated version for public comment so that the public would not be misled during the comment period. Instead, on the evening of January 27, 2017, ASMFC staff sent an e-mail to the Board, just five days before the Board meeting where final action was to occur, highlighting the discrepancies in the methods and tables of Options 2-4. ASMFC staff then presented the options with the adjusted language and tables for the first time to the public at the ASMFC Board meeting on February 2, 2017. Since this substantive revision took place well after the public comment period ended on January 19, 2017, the public had no meaningful opportunity to comment on the correct version of these options in violation of Section 6(b)(3) of the ISFMP Charter.

*Failure to Include Enhanced Opportunity Shore Fishing Program in Draft Addendum XXVIII*

Neither the draft nor the final Addendum contained any reference to the Program for the New York, Connecticut, New Jersey Region (Region). The Program allows specific shore-based access sites a smaller minimum size limit than the rest of the Region. However, this issue was not discussed at the February 2, 2017 Board meeting or during the deliberations to the motions that were eventually approved. Moreover, the status of the Program was not confirmed until receipt of a February 28, 2017 email from the ASMFC Plan Coordinator where he clarified that the size limit for the Program would be 17 inches. The failure to establish criteria for public comment on this subject prior to a final approval is contrary to proper public comment procedures established in ASMFC's ISFMP Charter Section 6(c)(9) (iv).

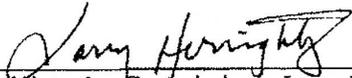
### *Failure to Properly Consider Public Comments*

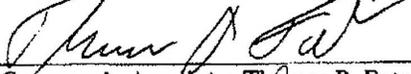
ASMFC held eight public hearings on the proposed addendum from Virginia through Massachusetts. ASMFC held a Public Hearing on the Addendum on January 5, 2017 in Galloway Township, New Jersey with at least 120 members of the public in attendance. A combined total of 103 members of the public attended the other seven hearings held in the other states. At the February 2, 2017 Board meeting, ASMFC staff provided a summary of the comments received during the public comment period. The summary from the New Jersey public hearing included only the following statement: “All in attendance were against all options offered in the draft addendum.” The summary table of all written public comments from all the states (ASMFC Winter Meeting, page 69 of the Board Supplemental materials), which staff presented at the Board meeting, showed overwhelming support to continue the 2016 measures and remain at status quo – far more support than was expressed for any of the five options presented in the Addendum. Based on the overwhelming public support for status quo expressed during the public comment period, and at the February 2, 2017 Board meeting, ASMFC did not adequately consider public comment in selecting their position which is contrary to the ISFMP Charter as outlined above.

### **CONCLUSION**

The issues raised in this appeal demonstrate that the Board should reconsider the Addendum and immediately address the problems associated with the matter at hand before moving forward. In light of the high discard mortality and associated detrimental effects of increasing the minimum size limitation, and the threat to the jobs of thousands of New Jerseyans and to the multi-million-dollar contribution recreational summer flounder fishing provides to the state’s economy, the Board should consider applying the 2016 management measures for New Jersey. The State of New Jersey appreciates the opportunity to appeal this decision. New Jersey reserves its rights under the provision of the Appeals Process document which states that “upon completion of the appeals process, a state is not precluded from taking further action beyond the Commission process to seek relief.” Thank you for your consideration of this appeal.

Sincerely,  
The ASMFC Commissioners of New Jersey

  
Administrative Commissioner Larry Herrighty

  
Governor's Appointee Thomas P. Fote

  
Legislative Commissioner Assemblyman Sgt. Robert Andrzejczak