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March 28, 2023

Dr. Chris Moore, Executive Director
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE, 19901

Re: Illex Permit Action Follow Up

Dear Chris,

We wanted to take the opportunity to provide public comment to the Council on the agency's March 8, 2023 response to the Council regarding its disapproval of Illex Amendment 22 and concerns over public process to the Council. While we understand that the agency will not reconsider the Amendment, we believe it is important to raise important issues which may inform future Council decision making.

The "stark contrast" of criteria alleged by the agency of a 10,000 lb qualifier for the Longfin Amendment 20 from 1997-2013 compared to a 500,000 lb qualifier in the Illex Amendment 22 from 1997-2013 is not a stark contrast at all. In the longfin squid fishery, 10,000 lbs can be a single trip. In the illex squid fishery, 500,000 lbs can be a single trip. In each case, one single trip from 1997-2013 could qualify a vessel for a Tier 1 permit. While differences in vessels exist, the illex fishery is a high tonnage fishery, and regulatory actions should reflect this fact. Rationally, differences in fisheries should account for differences in regulation or management. For this reason, we support moving forward with the proposed vessel fish hold measurement Framework.

However, what is most concerning regarding the Illex Amendment 22 process was agency departure from the established Administrative Procedure Act federal rulemaking process. Rather than publish a Proposed Rule in the Federal Register with a public comment period, followed by a Final Rule published in the Federal Register that either approves, partially approves, or disapproves the action, the agency sent the Council a letter on September 6, 2022 stating that "By this letter" the agency was "disapproving the majority of the provisions in Amendment 22", while also stating that the agency was "willing to work with the Council should it wish to reconsider this action." However, it is clear from the agency letter dated March 8, 2023 that it will not in fact work to reconsider the action; rather that the September 6, 2022 letter was the agency determination of disapproval of most of the illex measures which will not be reconsidered.

The September letter states that both the updated FMP goals and objectives, as well as the requirement for daily VMS reporting for illex vessels, two sections of Amendment 22, would be published in a future Federal Register notice and future agency action, respectively. The question is why did parts of Amendment 22 follow the Administrative Procedure Act process, and some did not? Why

were these particular provisions tacked on to other actions regarding other topics, rather than included in a full, single, decision on the Amendment itself?

The fact is that Amendment 22 was approved by an overwhelming Council vote of 18-2.[1] Allegations that the action was controversial fail to recognize that after years of development, staff work by both Council and agency staff, significant public comment, analysis and stakeholder engagement, the Mid Atlantic Fishery Management Council voted overwhelmingly to approve the Amendment. It was not a controversial vote.

Yet in this instance the agency departed from all established federal procedure, which has never occurred before in our experience with the fishery management process, and issued a partial disapproval of Amendment 22 through a letter rather than the federal rulemaking process, but at the same time approved a handful of measures of the same Amendment in accordance with the federal rulemaking process. Although it was mentioned that this "letter" partial disapproval method was used with regards to another Council, and may be technically legal, that does not make arbitrary agency departure from a legislatively prescribed federal rulemaking process appropriate. According to the Administrative Procedure Act process, no official federal action has taken place regarding Amendment disapproval.

While stakeholders are not guaranteed any particular outcome in Council decisions or in federal governmental agency decisions, what stakeholders should be guaranteed is the process. This is why the federal rulemaking process exists. The Administrative Procedure Act exists to establish a standard public process, as well as standards for judicial review should a person be adversely affected by an agency decision. Removing the certainty of process without notice, removing the element of legislatively prescribed official agency action, with the additional resulting affect that stakeholders are disenfranchised from any further recourse, is inappropriate, in this case as well as any future Council actions. Regardless of public or individual perspective on any particular issue, all stakeholders should be able to expect the same Council and agency process and afforded the same opportunity to contest federal decisions through the judicial process as appropriate. Popularity of an action, perceptions of an action, whether or not an action is perceived as controversial, or any other characteristic of an action itself should not affect the certainty of due process. It is for this very reason that standard federal process exists. Departure from standard procedure does not provide certainty of procedure for stakeholders.

We therefore request that the Council consider writing a letter to the agency requesting that all future agency decisions on Council Amendments and Frameworks be conducted according to the standard Administrative Procedure Act federal rulemaking process, including the publication of Proposed Rules and Final Rules. Thank you for your consideration.

Sincerely,

Meghan Lapp
Fisheries Liaison
Seafreeze Shoreside, Seafreeze Ltd.

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[1] See https://static1.squarespace.com/static/511cdc7fe4b00307a2628ac6/t/5f1b2a448ea5955eecbad3d4/1595615812574/Council+Motions+2020-07-16.pdf.