

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

**SOUTHERN MARYLAND RECREATIONAL
FISHING ORGANIZATION**)

Appellant,)

v.)

MARINE RESOURCES COMMISSION)

Appellee.)

CIVIL ACTION - LAW

No.: CL 23002246

**APPELLANT’S RESPONSE TO VIRGINIA MARINE RESOURCES COMMISSION’S
DEMURRER AND MOTION TO DISMISS**

In response to the Petition for Judicial Review (the “Petition”) filed by the Southern Maryland Recreational Fishing Organization (“Petitioner” or “The Fishermen”), the Virginia Marine Resources Commission (“Virginia Commission” or “VMRC” or “Respondent”) has filed a Demurrer and Motion to Dismiss (“Demurrer”) under Virginia’s Administrative Process Act (“VAPA”), Va. Code § 2.2-4000 et seq., and Va. Code § 28.2-201 for failure to state a cause of action upon which the requested relief may be granted. For the reasons set forth below, Petitioner respectfully requests that this Court deny Respondent’s motion.

FACTUAL AND PROCEDURAL BACKGROUND

Atlantic menhaden are central to the Chesapeake Bay ecosystem. These small, nutrient-packed fish are critical forage food for predatory fish such as striped bass (stripers or rockfish), weakfish, and bluefish, predatory birds such as ospreys, and marine mammals. Menhaden also act as a filter feeder, with each fish filtering up to seven gallons of water each

minute. The Bay is one of the most important nurseries for menhaden, helping to sustain the population along the Atlantic coast.

Because Atlantic menhaden are so vitally important to the Commonwealth, including its waters and the entire Chesapeake Bay region, the General Assembly gave jurisdiction to protect the menhaden fishery to the Virginia Commission. Virginia marine fisheries law gives the Virginia Commission “jurisdiction over all commercial fishing and all marine fish...” and defines “marine fish” to include finfish, like menhaden. Va. Code Ann. § 28.2-101. The General Assembly charged the Virginia Commission with conservation of the fishery, including “to manage Atlantic menhaden and ... adopt regulations necessary for its management.” Va. Code Ann. §§ 28.2-103; 28.2-201. Further, the enabling statute, Va. Code Ann. § 28.2-203 establishes the required fishery standards and conservation measures that the Virginia Commission must apply to the menhaden fishery management and regulations. Because the Virginia Commission’s responsibility to manage the Commonwealth’s fisheries is so important to preserving the state’s rich ecology and supplementing its economy, these standards and conservation measures are extensive and prescriptive. They require that “*any regulation promulgated to implement the [menhaden management] plan, shall be consistent with the following standards for fishery conservation and management.*” (emphasis added). These standards include:

1. Conservation and management measures shall prevent overfishing while achieving the optimum yield from each fishery. The “*optimum yield*” of a fishery means the amount of fish or shellfish which will provide the greatest overall benefit to the Commonwealth, with particular reference to commercial fishing for food production and to recreational fishing;
2. Conservation and management measures shall be based upon the *best scientific, economic, biological and sociological information* available;
3. To the extent practicable, an individual stock of fish shall be *managed as a unit* throughout the territorial waters of the Commonwealth, *and interrelated stocks of fish shall be managed as a unit or in close coordination*;
4. Conservation and management measures shall not discriminate among user groups. If it becomes necessary to allocate or assign fishing privileges among

various user groups, such allocation shall be (i) *fair and equitable* to all fishermen; (ii) reasonably calculated to *promote conservation*; and (iii) carried out in such manner that *no person acquires an excessive share of such privileges*;

5. Conservation and management shall, where practicable, *promote efficiency* in the utilization of fishery resources, except that *no such measure shall have economic allocation as its sole purpose*;

6. Conservation and management measures shall take into account *variations among, and contingencies in, fisheries, fishery resources, and catches*;

7. Conservation and management measures shall, where practicable, *minimize regulatory burdens* which inhibit innovation, expansion, and normal business operations.” [emphasis added].

The extent of these conservation and management standards underscores the intent of the General Assembly: that promulgating any new regulation requires robust analysis, contemplating a diverse range of scientific, economic, biological, and sociological information available to the Virginia Commission. These regulations promulgated by the Virginia Commission pertaining to menhaden are codified under Title 4, Chapter 1270 of the Virginia Administrative Code. Like the enabling statute, the Chapter’s stated purpose is “to establish management measures for a sustainable Atlantic menhaden fishery and to provide fair and equitable allocation to the sectors.” Va. Admin. Code tit. 4 § 20-1270-10 et seq.

The geographical reach of the Virginia Commission’s regulatory responsibility is massive. Under Va. Code Ann. §§ 28.2-100 & 101, the Virginia Commission manages the Virginia portion of the Chesapeake Bay and shoreline, stretching from Smith Island to approximately eight miles east of the Chesapeake Bay Bridge Tunnel, and also includes the Commonwealth’s territorial seas up to three miles seaward from Virginia’s Atlantic shoreline.

Va. Code Ann. § 28.2-201 gives exclusive authority and responsibility to the Virginia Commission “to manage Atlantic menhaden and adopt regulations necessary for its management,” and additionally requires that regulations “comply with the Atlantic States Marine Fisheries Commission Interstate Fishery Management Plan for Atlantic Menhaden.” Each year

the Atlantic States Marine Fisheries Commission (the “Interstate Commission” or “ASMFC”) sets the Atlantic coast’s total allowable catch (or “maximum interstate harvest”) for menhaden for all member states based on its menhaden stock assessments and fertility estimates. This represents the bare minimum protections for the coastwide fishery in order to prevent catastrophic fishery declines. 16 U.S.C.S. § 5104.¹ The Interstate Commission then allocates the total allowable menhaden catch that each member state (including Virginia) may harvest. This state-by-state allocation is based on *historic commercial landings, and not state or regional conservation concerns*. See Addendum I to Amendment 3 of the Interstate Commission’s Atlantic Menhaden Interstate Fishery Management Plan. That is, the Interstate Commission does not follow Virginia law or the required conservation and management standards in determining state-by-state allocations, and instead looks only to historic commercial landings.

Currently, the Interstate Commission sets the state allocation for Virginia at a maximum of 175,630 metric tons or 387,197,937 pounds of Atlantic menhaden which constitutes approximately 75% of the Atlantic’s coastwide total harvest, dwarfing the allocations to other states (the next highest allocations go to New Jersey (11%) and Maine (4.8%)). See Petition Attachment D, at 40 (Memo to Atlantic Menhaden Management Board: Revised Preliminary 2023 Atlantic Menhaden Quota Allocations, Accounting for Technical Addendum I to Addendum I - February 3, 2023). As described above, the Virginia Commission must establish a management and conservation plan by promulgating regulations that establish a harvest limit for menhaden. In addition, such a plan also may not exceed the maximum allocation set by the Interstate Commission for Virginia. It is crucial to recognize that the Virginia Commission is

¹ For 2021-2022, the Interstate Commission set the maximum interstate harvest at 428,578,711 pounds or 194,400 metric tons. Then, in November 2022, the Interstate Commission increased the 2023-2025 maximum interstate harvest by about 20%, to 514,884,330 pounds or 233,550 metric tons. See Addendum I to Amendment 3 of the Interstate Commission’s Atlantic Menhaden Interstate Fishery Management Plan. The Interstate Commission’s maximum interstate harvest allocation to Virginia went from 334,781,533 pounds or 151,854 metric tons in 2021-2022, to 387,197,937 pounds or 175,630 metric tons in 2023-2025.

authorized to set allowable harvest limits below the maximum harvest limits set by the Interstate Commission (i.e. more protective than the minimum fishery protections set by the Interstate Commission). Va. Ann. Code § 28.2-1000; 16 U.S.C. § 5104.

Va. Code Ann. § 28.2-201 further provides that “[the Virginia Commission] shall only promulgate regulations for the management of menhaden between October 1 and December 31 unless regulatory action is necessary to ... ensure compliance with the Atlantic States Marine Fisheries Commission Interstate Fishery Management Plan for Atlantic Menhaden.” On February 28, 2023, the Virginia Commission promulgated amendments to Title 4 of the Virginia Administrative Code, 4VAC20-1270 *et seq.*, which *increased* the total menhaden catch by more than 21,000 metric tons, or *well over 46 million pounds* of menhaden (the “Regulation” or “4VAC20-1270-10 *et seq.*”), and on March 13, 2023, the Regulation was finally adopted by the VMRC on publication in the Virginia Register, Vol. 39 Iss. 15. The Virginia Commission declined the call of thousands of Virginians to amend the Regulation to decrease the allowable harvest of menhaden in Virginia waters and the Chesapeake Bay.

These amendments to the Regulation were promulgated three months beyond the statutorily required rulemaking period of October 1 and December 31. Although the Interstate Commission published its new harvest limits in November of 2022, providing the Virginia Commission ample time to promulgate a regulation before the December 31, 2022 deadline, the Virginia Commission justified this out-of-time rulemaking by claiming that it was to *ensure compliance* with the Interstate Commission’s maximum harvest limit, by increasing Virginia’s industrial menhaden harvest by *over 46 million pounds of fish* to mirror the Interstate Commission’s maximum. *See* Demurrer, at 2. However, as discussed in Appellant’s Petition for Review, the Virginia Commission’s Regulation was not issued to *comply* with the Interstate

Commission’s new maximum allowable catch. Instead, it substantially *raised* Virginia’s harvest limit. It did this via regulatory language drafted to *automatically match the new maximum* allowable catch set by the Interstate Commission. This was not “compliance.” Virginia harvest limits at or *below* the Interstate Fishery Management Plan for Atlantic Menhaden comply with the Interstate Commission’s maximum limits. Instead, the Virginia Commission removed any reference to maximum harvest amounts or tonnage, and included only a percentage, effectively obscuring the enormous increase the Virginia Commission gave to the industry. *See* Petition Attachment C. Moreover, raising the total allowable catch of menhaden in the state by more than 21,000 metric tons constituted both a *significant increase* to the industrial menhaden harvest and also a substantive regulatory change *made outside the statutorily required rulemaking period*, all without considering the compelling evidence that the industrial menhaden harvest in the Chesapeake Bay *should instead have been reduced* in order to protect Virginia’s menhaden fishery.

The Petitioner timely filed a Petition for Judicial Review with the Circuit Court for the City of Richmond on May 10, 2023. On May 25, 2023, Respondent filed its Demurrer and Motion to Dismiss, and on July 17, 2023, Respondent filed its Brief in Support of its Demurrer and Motion to Dismiss. Service of these papers was made by email to counsel for Petitioner.

STANDARD OF REVIEW

Respondent moves to dismiss Appellant’s Petition for Judicial Review under Virginia’s Administrative Process Act (“VAPA”), Va. Code § 2.2-4000 et seq., and Va. Code § 28.2-201 for failure to state a cause of action upon which the requested relief may be granted.

The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted, and to test the legal sufficiency of facts

alleged in pleadings, not the strength of proof. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 356-57, 699 S.E.2d 483, 486-87 (2010). Accordingly, when reviewing a pleading of demurrer, the Court “accept[s] as true all factual allegations expressly pleaded in the complaint and interpret[s] those allegations in the light most favorable to the plaintiff.” *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358, 812 S.E.2d 766 (2018). Furthermore, the Court draws any reasonable inferences arising from the express factual allegations of the complaint in the plaintiff’s favor. *Id.*

“Factual allegations contradicted by the terms of authentic, unambiguous documents that are a part of the pleading may be disregarded by a court in considering a demurrer.” *Smith v. Chesterfield Meadows Shopping Ctr. Assocs., L.P.*, 259 Va. 82, 85, 523 S.E.2d 834, 836 (2000) (citing *Ward’s Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997)). A document that is attached to a pleading as an exhibit and mentioned in the pleading is a part of the pleading. Va. Sup. Ct. R. 1:4(i).

Finally, as cited by Respondent in its Motion to Dismiss, Va. Code § 2.2-4029 states “[u]nless an error of law as defined in § 2.2-4027 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency.” However, in claiming that the court may not invalidate the Regulation, Respondent conspicuously omitted the second half of Va. Code § 2.2-4029, which states “[w]here a regulation or case decision is found by the court not to be in accordance with the law under § 2.2-4027, the court shall suspend it or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.”

ARGUMENT

I. The Relief Requested Does Not Cause Virginia to Violate Federal Law

Respondent argues that it did not significantly increase Virginia's menhaden harvest but merely amended the percent of the Virginia harvest to match the new percent allocated to Virginia by the Interstate Commission, and therefore its regulatory action represents neither a procedural error nor an error of law. *See* Demurrer, at 4. Respondent further argues that vacating the Regulation would result in a moratorium on the fishery. *See* Demurrer, at 2 and 6. These arguments misstate both the regulatory history and its effect.

a. Respondent made a substantive change (increase) to the menhaden harvest

Respondent abdicated its duty to implement and follow Virginia law when it improperly made a substantive regulatory change (increase) while ignoring the fishery conservation and management requirements under Va. Code § 28.2-203. Respondent attempts to justify this error by claiming that it did not raise the Virginia harvest, but instead that the Interstate Commission was responsible for the increase, and that Respondent merely adhered to the percent allocated to Virginia, in order to match the Interstate Commission's allocation.

The Regulation, as promulgated by Respondent, sets the maximum harvest for the menhaden fishery to match the absolute maximum (the ceiling) allowed by the Interstate Commission: 383,377,514 pounds per year. This is also equivalent to approximately 75% of the total allowable catch ("maximum interstate harvest") of the entire East Coast, based on the Interstate Commission's allocation to each state. It is critically important to recognize that the allocations to other states, and their associated percentages, are irrelevant to Virginia's statutory analysis. The percent is used by the Interstate Commission merely to represent the proportional distribution to the member states of the coastwide total maximum menhaden harvest. *See*

Addendum I to Amendment 3 of the Interstate Commission's Atlantic Menhaden Interstate Fishery Management Plan. The Interstate Commission's proportional allocation to Virginia does not regulate Virginia's menhaden fishery. Instead, the menhaden fishery is regulated by the Virginia Commission, pursuant to Va. Code Ann. § 28.2-203, and, as described above, is also subject to an absolute maximum interstate harvest set by the Interstate Commission - set as a ceiling, not a floor.

Furthermore, this maximum industrial menhaden harvest set by the Interstate Commission is in pounds and metric tons. The Interstate Commission set Virginia's maximum to 334,781,533 pounds per year through 2022, and increased it to 383,377,514 pounds per year for 2023. Respondent then matched, identically, each increase via its own regulations, up to the maximum allowed by the Interstate Commission. Va. Admin. Code tit. 4 § 20-1270-10 et seq. None of these increases were necessary to comply with the Interstate Commission.

Respondent argues that it did not increase Virginia's harvest, but that the Interstate Commission did, and Respondent merely matched the percent change. *See Demurrer*, at 4. Respondent goes to great lengths to deny and obscure its decision to *increase* the industrial menhaden harvest, by omitting the pounds and metric tons, and including only a percentage - a percentage that simply represents the Interstate Commission's state-by-state allocation, based only on historical commercial landings by the industry. *See Petition Attachment C*.

As described above, the role of the Interstate Commission is not to study or monitor the health of fisheries in the Chesapeake Bay, or even the Mid-Atlantic region, but rather to provide minimum protections for the entire Atlantic coast's menhaden fishery in order to prevent catastrophic overreach. This is why the total maximum coastwide catch is adjusted based on *coastwide* stock assessments and its state percent allocations are based on *historic commercial*

*landings.*² See Addendum I to Amendment 3 of the Atlantic Menhaden Interstate Fishery Management Plan. This is also why it is improper for the Virginia Commission to promulgate regulations that merely match the Interstate Commission’s harvest limits without conducting its own assessments. Evidence regarding localized depletion in the Chesapeake Bay and Virginia waters is absent in the Interstate Commission’s periodic stock assessments. In fact, there are authentic, unambiguous documents included in the record, including Interstate Commission’s own agency documents, that state that “area-specific surveys could provide substantial improvements over the indices currently used in [its] assessment,” and cite to a recent Congressional program that encouraged the Interstate Commission and Virginia to begin collecting Atlantic menhaden abundance data in the Chesapeake Bay - yet such studies remain unfunded and unimplemented. That is, there is no assessment for any portion of the entire 4,500 square miles of the Chesapeake Bay.³ Further, the Interstate Commission acknowledges that its current stock assessment methodology leaves substantial room for improvement, reporting in its

² In its 2022 Atlantic Menhaden Stock Assessment Update Overview, the Interstate Commission states that “[d]ata collected from several different surveys were used to develop indices of relative abundance for juvenile and adult Atlantic menhaden. Data used to develop an index for juvenile menhaden...were collected from 16 surveys conducted in Rhode Island to South Carolina. Data from the surveys were *statistically combined into one coastwide index*” (emphasis added). The Atlantic Menhaden Stock Assessment Update also states that three coastwide indices of adult abundance were developed from eight fishery-independent survey data sets: northern, Mid-Atlantic, and southern. The Mid-Atlantic survey data set was developed from surveys in the Chesapeake Bay and “showed high abundance in the late 1980s and then variable abundance with peaks in 2014 and 2015.” See ASMFC Stock Assessment Overview: Atlantic Menhaden at 3.

³ “A long-standing research recommendation for Atlantic menhaden is to develop and implement a multi-year coastwide fishery-independent survey. It was noted in SEDAR 2020a that even area-specific surveys could provide substantial improvements over the indices currently used in the assessment. With that in mind, Congress included a Chesapeake Bay Atlantic Menhaden Abundance provision in the Fiscal Year 2022 Consolidated Appropriations Act (Public Law No: 117-103) encouraging NOAA Fisheries, in partnership with ASMFC and relevant states, to collect Atlantic menhaden abundance data in the Chesapeake Bay. Progress to address this research recommendation was made in 2020 when Wilberg et al. completed a project to evaluate survey designs for a combined aerial-hydroacoustic survey for Atlantic menhaden biomass in the Chesapeake Bay which was reviewed and endorsed by the TC. Regardless, no funding has been attached to the project and it remains unimplemented.” See 2022 Atlantic Menhaden Stock Assessment Update at 7.

latest Atlantic Menhaden Stock Assessment Update Overview that “single-species assessment identified a number of data and research needs for future Atlantic menhaden stock assessments.”⁴

The Virginia Commission must regulate pursuant to Virginia law. With the Interstate Commission’s increase in the maximum interstate harvest, the change in the percentage allocated to each state, when isolated from the number of pounds or metric tons it is based on, is meaningless for Respondent’s proper monitoring and managing of Virginia’s menhaden fishery, pursuant to Va. Code Ann. § 28.2-203. Again, the coastwide maximum interstate harvest is an absolute maximum, below which member states are free to regulate in their jurisdictional waters. 16 U.S.C. § 5104. To avoid a moratorium, the agency must simply choose a number that is at or below the assigned maximum interstate harvest, which is far less onerous when the number has increased by tens of millions of pounds, as it did in November 2022.

Respondent plays a semantic game by claiming it decreased its share of the maximum interstate harvest from 78% to 75%. In order to avoid demonstrating a dramatic increase in the Virginia harvest, Respondent has removed any reference to amounts in pounds or metric tons, which would clearly demonstrate an increase in the Virginia harvest by more than 46 million pounds or 21,000 metric tons. This dramatic increase in the Virginia harvest represents a significant substantive change to the menhaden fishery. Virginia law requires that Respondent

⁴ “In particular, the Atlantic menhaden stock assessment would be substantially improved by the development of a coastwide fishery-independent survey to replace or supplement the existing indices. There are several research recommendations specific to model diagnostics and data inputs to the existing model. The ERP Workgroup identified a number of research recommendations dealing with data collection and modeling. The ERP Workgroup recommended expanding the collection of diet and condition data along the Atlantic coast to provide annual, seasonally- and regionally-stratified year-round monitoring of key predator diets, as well as improving the collection of diet data and monitoring of population trends for non-fish predators (e.g., birds, marine mammals) and data-poor prey species (e.g., bay anchovies, sand eels, benthic invertebrates) to better parameterize the full ecosystem models. In addition, the ERP Workgroup recommended further development of the multispecies statistical catch-at-age and the NWACS models to improve the spatial and seasonal dynamics of the models and to incorporate additional predator feedback and environmental recruitment drivers.” *See* ASMFC Stock Assessment Overview: Atlantic Menhaden at 6.

make substantive changes to the Virginia harvest based on the *best scientific, economic, biological and sociological information* available. Va. Ann. Code § 28.2-1000; 16 U.S.C. § 5104.

Where a statute requires greater protections, agencies may, and in circumstances such as the instant case, *must* set harvest limits below total maximum catch limits. *See North Carolina Fisheries Association, Inc. v. Daley*, 27 F.Supp.2d 650 (E.D. Va. Norfolk Div. Sept. 28, 1998) (“In any case, the Secretary is mistaken in the belief that his own regulatory requirements override the statutory provisions Legal constraints on the Secretary’s decision making emanate from the statute, not from the agency’s own regulations.”); *see also Lovgren v. Locke*, 701 F.3d 5, 18 (1st Cir. 2012) (managers may set harvest limits below maximum stock assessment limits). Notwithstanding Respondent’s statutory requirements, when the Interstate Commission increased the maximum interstate harvest, Respondent justified a substantive and substantial increase in the Virginia harvest by claiming it was to comply with the Interstate Commission’s changes. As discussed above, matching the increase in the Interstate Commission’s maximum interstate harvest was not required to comply with the Interstate Commission’s changes. All that is required pursuant to Va. Ann. Code § 28.2-1000 and 16 U.S.C. § 5104, is staying at or below the Interstate Commission’s maximum interstate harvest. As a result of the Virginia Commission’s decision to blindly match the Interstate Commission’s allocation, Respondent failed to properly manage Virginia’s menhaden fishery, pursuant to Va. Code Ann. § 28.2-203, because it failed to consider or follow the explicit conservation and management requirements for regulating the menhaden fishery. Thus Respondent improperly promulgated the Regulation by failing to follow Virginia law, and its Demurrer and Motion to Dismiss should be denied.

b. Respondent substantively increased the Virginia harvest out of time

Respondent improperly made an out of time, substantive regulatory change (increase) that is not required or necessary to comply with the Interstate Commission maximum limits, pursuant to Va. Code § 28.2-201. In addition to the conservation and management requirements, Virginia law further requires that any substantive changes, particularly increases to the industry harvest, must be done during the rulemaking period (October through December), as prescribed by Virginia law. Va. Code § 28.2-201. It states that the Virginia Commission “shall only adopt regulations for the management of menhaden between October 1 and December 31 unless regulatory action is necessary to ... *ensure compliance* with the [Interstate Commission]” (emphasis added). *Id.* As described more fully below, this increase was not necessary to comply with the Interstate Commission.

Respondent promulgated the Regulation on February 28, 2023, which was finally adopted on March 13, 2023, outside the statutorily required rulemaking period for menhaden management (October through December). *Id.* As discussed above, Respondent may not adopt regulations outside of this rulemaking period, except to *ensure compliance* with the Interstate Commission. *Id.* And as described more fully above, Respondent dramatically increased the Virginia harvest, which constitutes a significant and substantive change. Such a change must be made pursuant to the conservation and management standards, Va. Code Ann. § 28.2-203, and must be adopted during the October through December rulemaking period. Va. Code Ann. § 28.2-201.

This increase was not necessary to comply with the Interstate Commission. On the contrary, as described above, the Virginia harvest merely must not exceed the maximum interstate harvest in order to comply. Here, the previous regulation set a Virginia harvest of

334,781,533 pounds for 2022. In November 2022, the Interstate Commission raised the ceiling for Virginia to 383,377,514 pounds. The 2022 Virginia harvest already complied with the new, higher, 2023-2025 ceiling set by the Interstate Commission. Despite already being in compliance with the Interstate Commission, Respondent decided to unnecessarily increase the Virginia harvest up to the maximum ceiling set by the Interstate Commission for 2023-2025. Compliance with the Interstate Commission would have required no change to the Virginia harvest because the Interstate Commission *raised*, not lowered, the ceiling, and therefore Respondent was not compelled to raise the Virginia harvest. And because it was not compelled to raise the Virginia harvest to ensure compliance, it abused its discretion when it raised the Virginia harvest outside of the rulemaking period. As a result, Respondent's Demurrer and Motion to Dismiss should be denied because it promulgated the Regulation out of time and in violation of Virginia law.

c. Respondent is both obligated and able to write effective regulations

As described above, Respondent erred when it promulgated the Regulation because it removed data - amounts in pounds and metric tons - and relied on only percentages, thereby dramatically increasing the Virginia harvest and creating an out of time regulatory change that is impermissible under Virginia law. In its 2022 regulation, Respondent included both the amount of the Virginia harvest in pounds, and the percent set by the Interstate Commission, stating “[t]otal allowable commercial landings for menhaden in 2022 shall be equivalent to 334,781,533 pounds or 78.66% of the annual total allowable catch [or “maximum interstate harvest”] set by the [Interstate Commission].” Respondent argues that *either* the total pounds *or* the percentage of the Interstate Commission's annual allowable catch would be permissible under the regulation because the use of the disjunctive word ‘or’ rather than the conjunctive ‘and’ signifies the availability of alternative choices. *See* Demurrer, at 4. Respondent then cites that in 2023, “[the

Interstate Commission] set the ‘total allowable catch [or “maximum interstate harvest”]’ at 514,889,608 pounds, set aside 1% of that amount, and then gave Virginia 75.21% of the [maximum interstate harvest] minus the 1% set aside, which equaled 383,377,514 pounds.” *See* Petition Attachment D, at 38 (Draft Proceedings of the ASMFC Atlantic Menhaden Management Board - August 3, 2022). With these numbers in mind, Respondent points out that “there was an increase in the total allowable menhaden harvest, but that the increase came from the [Interstate Commission].” *See* Demurrer, at 4-5. This is not disputed by the Petitioner.

As described above, the Interstate Commission produced a new coastwide maximum menhaden harvest in November of 2022. It then allocated 75% of that maximum interstate harvest to Virginia. Respondent erroneously claims that they are bound by the increase in the Interstate Commission’s maximum interstate harvest. In reality, Respondent violated Virginia law when it supplanted the decision making by the Interstate Commission with its own. Respondent did so by automatically deferring to the Interstate Commission’s decision making to *increase* the coastwide maximum interstate harvest, and ignoring its duties under Va. Code Ann. § 28.2-203 to manage the fishery and implement the conservation and management requirements under Virginia law. Blindly increasing the Virginia harvest to match the Interstate Commission’s increase to the maximum interstate harvest is an abdication of its duty under Virginia law.

In abdicating its duties, Respondent pretends that they are bound by the heavy burden of percentages, and locked into regulatory language that can list only a single percentage, and little more. Respondent cites “regulatory efficiency” for its purported reason to remove pounds and tons, and include only percentages. *See* Petition Attachment D, at 28. Respondent further claims, as a consequence of adhering to percentages, it was bound to make an out of time regulatory change because the percentage *decreased* from 78% to 75%, potentially putting Virginia’s sole

industrial menhaden harvester in violation of federal law. In contorting its rulemaking language, Respondent fabricates its own artificial constraints for regulatory action. As a result, Respondent therefore claims, it must act to implement a decrease in percentage. But this represents nothing more than an abuse of discretion and an error of law and procedure.

Respondent must write a regulation that is clear and effective in carrying out the statutory intent. *Kavanaugh v. Va. Birth-Related Neurological Injury Comp. Program*, 60 Va. App. 440, 447, 728 S.E.2d 527, 531 (2012) (“Administrative rules and regulations ‘may not conflict with the authorizing statute,’ or in any material way be ‘inconsistent with the authority of the statutes that govern it.’”) (quoting *Manassas Autocars v. Couch*, 274 Va. 82, 87, 645 S.E.2d 443, 446 (2007)); *Judicial Inquiry & Review Comm’n v. Elliott*, 272 Va. 97, 115, 630 S.E.2d 485, 494 (2006). The Virginia Commission cannot abdicate its responsibility to promulgate regulations that implement the law, nor may it rely on historical harvest data and industry interests at the expense of the statutory requirements. Virginia law is clear on the duty of a commission to affirmatively implement the statute:

A commission created by the legislature to administer a statute is wholly limited in its power and authority by the law of its creation. Its authority must affirmatively appear from the statute under which it claims to act. It is not vested with discretion to ignore or transgress statutory limitations, even to accomplish what it may deem to be desirable ends, nor does the acquiescence in, or the failure to object, on the part of others lend validity to any such departure.” *Safeway Stores, Inc. v. Milk Com.*, 197 Va. 69, 87 S.E.2d 769 (1955).

After citing to these percentages (and removing the actual amounts), Respondent incorrectly argues that had the Regulation not been promulgated the total allowable landing “would arguably cease to apply entirely in 2023, since the regulation specifies the landings only for 2022.” *See* Demurrer, at 5. This argument is spurious for two reasons. For one, Respondent suggests that if any agency specifies the current year in its regulation, then that regulation

becomes unchallengeable in years following. Second, as with many regulations, years must be identified for effective rulemaking. Respondent then states that even if the total allowable landings did apply in 2023, “they would have allowed *either* the pounds listed *or* 78.66% of the current, higher [maximum interstate harvest] ,” *see* Demurrer, at 5, and that “[b]ecause the language is in the disjunctive and states that either shall constitute the total allowable commercial landings, VMRC could not arbitrarily choose to punish those who exceeded the poundage but complied with the percentage.” *Id.* This argument fails on its face because, as discussed above. The maximum interstate harvest is based on an amount, in pounds and tons. Respondent chose to remove the actual amount and instead rely on percentages. Respondent’s conclusion is that - now trapped within a change represented solely by percentage from 78% to 75% - by reverting the regulation to the previous version, the Virginia menhaden fishery would necessarily ignore the actual amount, and default to an irrelevant percentage, thereby resulting in a violation of federal law. *See* Demurrer, at 5-6.

Promulgating harvest limits using pounds or metric tons is standard practice among the states governed by the Interstate Commission. Promulgating harvest limits using pounds or metric tons is standard practice among the states governed by the Interstate Commission. The menhaden fishery in New Jersey, regulated by the Marine Resources Administration, receives the second largest harvest allocation among the Atlantic coastal states. In its 2023 Commercial Regulations, the agency clearly states that “[t]he New Jersey Atlantic menhaden commercial quota is currently 25,480 metric tons, equivalent to approximately 56,173,937 million pounds.” It then allocates that number to different commercial sectors using *both* percentages and approximate poundage. Similarly, in Maine, the state allotted the third largest menhaden harvest, the state’s menhaden fishery is regulated by its Department of Marine Resources. Here again, the

agency clearly states that “Maine’s allocation of Atlantic menhaden quota is 4.80% of the available 233,550 metric tons, or 24,510,314 pounds” and sets weekly landing limits for different commercial and noncommercial harvesters using both pounds and barrels measurements.⁵ Indeed, publishing numeric harvest limits either in metric tons or pounds is the standard practice among the member states governed by the Interstate Commission.⁶

This Court has the authority to remand the Regulation and direct the Virginia Commission to correct its errors. Respondent misleadingly cautions this Court that vacatur and remand of the Regulation would “immediately put the Virginia menhaden fishery in violation of federal law.” *See* Demurrer, at 6. Respondent’s dire theory relies on the presumption that remanding the Regulation with instructions is an impossibility, and that the only outcome could be that the sole industrial menhaden harvester would automatically revert to the 78% allocation figure in the 2022 rule, and then decide to use that 78% and apply it to the new 2023 maximum interstate harvest limit of 514,884,330 pounds or 233,550 metric tons. Not only is this an unlikely outcome, but Respondent would have to direct the sole industrial menhaden harvesting company to do so for such a dire outcome to materialize.

Respondent further states that this would be the outcome because the only remedy this Court can give is to “suspend or set [the Regulation] aside and remand the matter,” and that the Court cannot rewrite the regulation to suit Appellant (as discussed above, Respondent only partially cites Va. Code § 2.2-4029, ending its citation of the statute with “the court shall not itself undertake to supply agency action committed by the basic law to the agency.” *Id.*). This too

⁵ State of Maine Department of Marine Resources, *Atlantic Menhaden Management*, [maine.gov/dmr/home](https://www.maine.gov/dmr/home), <https://www.maine.gov/dmr/fisheries/commercial/fisheries-by-species/menhaden-atlantic/menhaden-management> (last visited Aug. 2, 2023).

⁶ Maryland’s Department of Natural Resources published its 2023 total allowable landings of Atlantic menhaden in pounds (5,947, 968 pounds); North Carolina’s Department of Environmental Quality published its 2023 total allowable landings of Atlantic menhaden in metric tons and pounds (1,840 MT or 4,056,588 pounds); New York’s Department of Environmental Conservation limits permit holders to daily catch totals according to poundage (6,000 pounds per day).

is misleading because Respondent fails to cite the last half of the statute, which states, “[w]here a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027,⁷ *the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.*” Va. Code § 2.2-4029 (emphasis added). Accordingly, while a Court cannot rewrite an illegal regulation on an agency’s behalf, it does have express statutory authority to “suspend it,” or “set it aside and remand” the regulation back to the agency to draft in accordance with the law. *See Va. Bd. of Med. v. Fetta*, 244 Va. 276, 421 S.E.2d 410 (1992) (“‘The statute is equally explicit, however, in granting to the circuit court, when it remands the case for such further proceedings, if any, as the court may permit or direct,’ the discretion to specify exactly what shall be done on remand”).

Finally, if the Virginia Commission was bound by the federal statute to simply adopt the Interstate Commission’s maximum harvest without fulfilling its statutory obligations, there would be no basis for the Virginia law that sets out the standards by which the Virginia Commission must protect the fishery. This would run counter to all of the environmental laws that Congress has adopted, in which states may be more restrictive, but not less restrictive.⁸ *See Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (stating that a state law may be more restrictive

⁷ “The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein.” Va. Code § 2.2-4027.

⁸ The Clean Water Act, Clean Air Act, Endangered Species Act, and Resource Conservation and Recovery Act are just a few examples of the environmental laws that Congress has adopted which allow states to be more restrictive, but not less restrictive.

than the provisions of the [Endangered Species Act], but not less). Additionally, this is not a scenario where federal law preempts state law.⁹

As discussed above, and provided under Va. Code § 2.2-4029, this Court should “suspend [the Regulation] or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.” Based on the above, Respondent’s Demurrer and Motion to Dismiss should be denied.

II. The Records Attached to the Petition and the Transcripts Filed from the October 2022 and December 2022 VMRC Hearings Should Not Be Excluded From the Agency Record

Under Va. Code § 8.01-273, “[a]ll demurrers...shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court.” Accordingly, it is inappropriate that Respondent makes this substantive argument in its demurrer. Notwithstanding the erroneous basis for the pleading, Respondent moves to exclude from the agency record the records attached to the Petition and transcripts filed from the October 2022 and December 2022 VMRC hearings because it claims that during these meetings the Regulation being challenged was neither promulgated nor considered. *See* Demurrer, at 6. For the reasons set forth below, the Petitioner argues that these records and transcripts must be included in the agency record, because they make up the whole administrative record and an agency may not skew the record for review in its favor by excluding information in its own files which has great pertinence to the proceeding in question.

⁹ Preemption generally occurs in one of three circumstances. First, a federal law preempts a state law when Congress expressly declares its intention that state law be preempted. Second, a federal law impliedly preempts state law when Congress has occupied the field by “regulating so pervasively that there is no room left for the states to supplement federal law.” Third, federal law preempts state law when the federal and state laws actually conflict. *Wash. Gas Light Co. v. Prince George's Cty. Council*, 711 F.3d 412, 419-20 (4th Cir. 2013).

“The ‘whole’ administrative record...consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.” *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 793-94 (ED Va. 2008), *quoting Thompson v. United States Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (noting that a complete record must include any materials that were “referred to, considered by, or used by [the agency] before it issued its final rule”); *see also Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978) (“The agency may not...skew the ‘record’ for review in its favor by excluding from that ‘record’ information in its own files which has great pertinence to the proceeding in question.”). Here, Respondent is attempting to do exactly that: skew the record in its favor by excluding public comments and transcripts with great pertinence to this proceeding.

The records attached to the Petition and transcripts filed from the October 2022 and December 2022 Virginia Commission hearings are part of the *whole* administrative record because they are documents and materials that were either *directly or indirectly considered* by agency decision-makers or *should have been considered* when promulgating the Regulation being challenged. These public comments and transcripts clearly and vehemently communicate the public’s concerns over the diminution of menhaden in the Chesapeake Bay, the decrease of predatory fish, marine mammals, and osprey in the Bay, and the correlation between the overharvesting of menhaden in the Chesapeake Bay and the disappearance of these species that rely on the bait fish. *See* Petition Attachments B and D. In fact, Respondent both cites and alludes to data, agency decision-making, and the prior regulation that all were contained in the records pertaining to the fall of 2022.

Additionally, the attached records and transcripts filed contain not just the public’s concerns, but scientific evidence illustrating the causal connection between the overharvesting of

menhaden in the Bay, which results in localized depletion, and the diminution of various types of sport fish and osprey that rely on menhaden as a primary source of food. *See* Petition Attachment B and Attachment D, at 6-7 (Public Comment Transcripts: Michael Academia). Because the enabling statute, Va. Code Ann. § 28.2-203, mandates that the Virginia Commission must apply certain fishery standards and conservation measures “based on the *best scientific, economic, biological and sociological information* available,” (emphasis added), the Virginia Commission not only *should have considered* the records attached to the Petition and transcripts of VRMC hearings held only months before promulgating the Regulation, but *would be in violation of the enabling statute if it did not consider this evidence* warning against increasing the state’s menhaden harvest limit, which was readily available to the Virginia Commission at the time it promulgated the new regulation.

Respondent claims that these inclusions go against “long-established principles of what can be considered by this Court in an appeal under the VAPA” because “[t]he reviewing court is not free to take additional evidence, even at the request of one of the parties.” *See* Demurrer, at 7 (citing *Commonwealth v. Mathesius*, No. 0285-12-3, 2012 Va. App. LEXIS 367 (Ct. App. Nov. 20, 2012))¹⁰ (quoting *School Bd. of County of York v. Nicely*, 12 Va. App. 1051, 1062 (1991)). Respondent further cites that to “allow parties to freely supplement the agency record after the agency has rendered a decision would authorize trial of the merits of the case *de novo*, resulting in the trial court making, not reviewing, the administrative decision,” *see* Demurrer, at 7 (citing *Crutchfield v. State Water Control Bd.*, 45 Va. App. 546, 556 (2005)),¹¹ and that “[t]he agency...should not be subjected to court review of matters it had no opportunity to consider.”

¹⁰ In the case that Respondent cites to, the “additional evidence” in question was a letter that was not made available to the Commonwealth of Virginia’s Board of Contractors, nor was the Board aware of its existence when it made its initial decision to deny a recovery fund claim.

¹¹ In the case that Respondent cites to, “Appellants produced before the trial court and [] argued before th[e] Court items of evidence not laid before the [State Water Control Board]. Indeed, *much of [the] evidence postdates the issuance of the permit*” (emphasis added).

Id. (citing *State Bd. of Health of Commonwealth v. Godfrey*, 223 Va. 423, 433 (1982)).¹² In this case, the Petitioner is not requesting that the reviewing court take on additional evidence or subject the VMRC to court review of matters it had no opportunity to consider. On the contrary, the Petitioner is working to ensure that records and transcripts readily available and within the agency's possession when it promulgated the regulation being challenged, and that are *already essential elements of the whole administrative record*, are not excluded from judicial review. See *Tafas v. Dudas*, 530 F. Supp. 2d 786, 793 (ED Va. 2008) ("The whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not "rely" on that information in its final decision").

Specifically, Respondent argues that the records attached to the Petition and transcripts filed from the October 2022 and December 2022 VMRC hearings were matters that the VMRC "had no opportunity to consider" because at the October 2022 VMRC hearing, there was no issue related to menhaden on the agenda, all comments were made in the open comment period, and no regulations could have been promulgated at that time because none had been properly noticed as required by Va. Code § 28.2-209. Accordingly, "VMRC had no regulation in front of it to act on and could not consider passage of any new regulations at that hearing." See Demurrer, at 7. This is a gross misstatement of the record and regulatory process. During the period before and also during the October 2022 meeting, thousands of interested members of the public (many of whom, if not most, are residents of the Commonwealth), represented by an array of fishing and similar organizations, petitioned the Commonwealth to drastically improve protections of the menhaden fishery, which necessarily included regulation under Va. Code § 28.2-203. The Virginia Commission simply refused to put these items on the agenda. See Petition at 15-16. In

¹² In the case that Respondent cites to, the matters that the agency objects being subjected to because it had no opportunity to consider them involve new allegations that an agency personnel acted arbitrarily and capriciously which was not an issue of fact before State Board of Health when the agency made its initial decision.

fact, the agenda for the October 25, 2022 meeting has listed “5. **Petition** Menhaden Petition for the Governor’s Consideration.”¹³ Similarly, VMRC argues that at the December 2022 hearing, a specific regulation that considered creating a prohibition on menhaden purse seine fishing within a certain distance from shorelines in the Chesapeake Bay had been noticed and was under consideration, and that this regulation does not relate to the current subject for appeal: an alteration to the fishing quota for menhaden. *See* Demurrer, at 6-7. Here, again, the record is replete with public comments by concerned citizens - including fishermen, charter boat captains and other members of the public - that include petitions and other pleas for improved regulation of the menhaden fishery. *See* Petition at 15-18.

As stated above, the records attached to the Petition and transcripts filed from October 2022 and December 2022 are a part of the whole administrative record because they include direct and indirect public concerns and scientific warnings related to the current overharvesting of menhaden in the Chesapeake Bay. These records and transcripts outline the detrimental effects of maintaining the current menhaden harvest numbers within the Chesapeake Bay, and imply that raising menhaden harvest numbers in the Bay would lead to further ecological and economic damage, which the Virginia Commission admits is “the current subject for appeal...an alteration to the fishing quota for menhaden.” *See* Demurrer, at 7. Furthermore, because Va. Code § 28.2-201 mandates that the Virginia Commission “shall only adopt regulations for the management of menhaden between October 1 and December 31 unless regulatory action is necessary to address an emergency situation pursuant to § 28.2-210 or to ensure compliance with the [Interstate Commission] Interstate Fishery Plan for Atlantic Menhaden,” the public could not

¹³Virginia Marine Resources Commission, *Commission Agendas*, mrc.virginia.gov, https://mrc.virginia.gov/Commission_Agendas/ca20221025.shtm#PAGE3ITEMS (last visited Aug. 2, 2023).

reasonably expect that an Amendment would be promulgated during the February hearing or that they would need to voice the same concerns submitted orally and in writing only months prior.

Accordingly, this Court should not exclude the records attached to the Petition and transcripts filed from the October 2022 and December 2022 VMRC hearings from the agency record.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court deny Respondent's Demurrer and Motion to Dismiss in its entirety.

Respectfully submitted,



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Dated: August 4, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 4th day of August 2023, an electronic copy of the
filing was sent via email to the following parties:

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David Reed