

Circuit Court

OF THE

City of Richmond

RICHARD BARTON CAMPBELL
JUDGE
13TH JUDICIAL CIRCUIT

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET, SUITE 303
RICHMOND, VIRGINIA 23219
(804) 646-0550

October 6, 2023

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**RE: *Southern Maryland Recreational Fishing Organization v. Marine Resources Commission*
CL23-2246**

Letter Opinion

Dear Counsel:

On September 7, 2023, the parties appeared on the Virginia Marine Resource Commission's ("Appellee") Demurrer and Motion to Dismiss. At the conclusion of the hearing, the Court took the matter under advisement. Having considered the parties' oral and written arguments, and for the reasons outlined below, the Court sustains in part and overrules in part, Appellee's Demurrer, and the Court grants in part and denies in part, Appellee's Motion to Dismiss. The Court sustains Appellee's Demurrer and grants Appellee's Motion to Dismiss, with respect to Appellant's claim that Appellee erred when it amended Virginia's menhaden regulations, 4VAC20-1270-10 *et seq.*, in February 2023, outside of what Appellant argues is the required period for promulgating regulations for the management of menhaden. (Appellant's

"Claim 1"). The Court overrules Appellee's demurrer and denies Appellee's Motion to Dismiss, with respect to Appellant's claim that Appellee erred when it failed to follow rulemaking requirements set forth in Virginia Code § 28.2-203 (Appellant's "Claim 2").

Factual and Procedural Background

Menhaden serve critical functions in the Atlantic Ocean ecosystem. Menhaden act as filter fish, meaning they filter and convert excessive amounts of algae into fish protein, and they also serve as a food source for many other animals in the Atlantic Ocean. The Chesapeake Bay acts as a nursery for young menhaden before they move into the Atlantic Ocean. Historically, menhaden have been a significant economic factor in the Commonwealth of Virginia. Menhaden are used in the production of supplements containing the Omega-3 Fatty Acid. The Omega-3 Fatty Acid is derived in Virginia at the sole remaining menhaden reduction facility on the East Coast and because of this, the Commonwealth is responsible for the overwhelming majority of menhaden fishing on the Atlantic Coast.

Due to the importance of the menhaden, the Virginia General Assembly granted jurisdiction to regulate the menhaden fishing practices to Appellee. Appellee's regulations governing the fishing of menhaden must comply with the total allowable catch ("TAC") granted by the Atlantic States Marine Fisheries Commission ("ASMFC") by not exceeding the TAC granted.¹ The ASMFC publishes management plans for the various species of fish found along the Atlantic Coast, which sets the TAC and allocates percentages of the TAC among the states on the eastern

¹ The ASMFC is a commission of U.S. states formed to coordinate and manage fishery resources along the Atlantic coast.

seaboard. *See* 16 USCS § 5104(a)(1) (“The Commission shall prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources...” and “the Commission shall identify each State that is required to implement and enforce that plan.”).

Appellee has “the exclusive authority to manage menhaden and shall adopt regulations necessary for its management, including those necessary to comply with the [ASMFC] Interstate Fishery Management Plan for menhaden.” Va. Code § 28.2-201. There are two restrictions at issue that Appellee faces when passing regulations regarding the fishing of menhaden. First, that Appellee “shall only adopt regulations for the management of menhaden between October 1 and December 31 (the “Promulgation Period”) unless regulatory action is necessary to address an emergency situation pursuant to § 28.2-210... or to ensure compliance with the [ASMFC].” *Id.* Second, that Appellee must promulgate regulations for the management of menhaden in accordance with the following standards, pursuant to Virginia Code § 28.2-203, (the “Standards”):

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.

Va. Code § 28.2-203.²

For the year 2022, the ASMFC set Virginia's TAC at 334,781,533 pounds per year. In 2023, the ASMFC increased this number by permitting 383,377,514 pounds per year as Virginia's TAC. On March 3, 2023, Appellee amended 4VAC20-1270-30 (2022) to reflect the increase in TAC that the ASMFC had afforded it. On May 10, 2023, Appellant filed a Petition for Judicial Review with the Circuit Court for the City of Richmond pursuant to the Administrative Process Act and under the authority granted by Virginia Code § 28.2-219. That statute provides, "[a]ny person aggrieved by a final decision in a contested case is entitled to judicial review in accordance with the Administrative Process Act (§ 2.2-4000 et seq.)." Va. Code § 28.2-219; Va. Code § 2.2-4027. On May 25, 2023, Appellee filed a Demurrer and Motion to Dismiss and filed a brief supporting their arguments on July 17, 2023. Appellant filed a Response to Appellee's Demurrer and Motion to Dismiss on August 4, 2023.

Appellant asserts two errors in its Petition for Judicial Review. First, Appellant claims that Appellee failed to promulgate regulations within the Promulgation Period. App. Pet. For Jud. Rev., 21. Appellant argues that Appellee only has statutory authority to promulgate regulations within the Promulgation Period unless the promulgation of a regulation is to ensure compliance with the ASMFC Fishery Management Plan. Appellant urges the court to find that acting outside the statutory period was unnecessary because Virginia was already in compliance with the ASMFC's Fishery Management Plan for 2023. *Id.* Second, Appellant claims that Appellee failed to follow

² Standards for fishery and conservation management adopted by the Virginia General Assembly in 1992.

the Standards by not conducting an independent analysis pursuant to Virginia Code § 28.2-203. App. Pet. For Jud. Rev., 22.

In its Demurrer and Motion to Dismiss, Appellee first argues that it took the necessary action to amend the regulation outside of the Promulgation Period to ensure compliance with the ASMFC Fishery Management Plan. Appellee contends this is based on the previous regulation which mandated, “[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...” See Attachment C. The 2023 regulation at issue states, “Total allowable commercial landings for menhaden shall be equivalent to 75.21% of the annual total allowable catch...” *Id.* Appellee insists that amending the regulation’s commercial landings percentage of the TAC was required to maintain compliance with the ASMFC Fishery Management Plan. Appellee maintains this is the case because while the ASMFC increased the total TAC nationwide in 2023, the ASMFC decreased Virginia’s percentage of the TAC to 75.21%. Thus, although the 334,781,533 pounds listed in the 2022 regulation would have been compliant with the current ASMFC Fishery Management Plan, the 78.66% promulgated in the same regulation would have not complied with the ASMFC. Appellee maintains that it was authorized to promulgate rules for the management of menhaden outside the Promulgation Period because doing so was necessary to ensure compliance with the ASMFC’s Fishery Management Plan for 2023.

Additionally, Appellee argues that if the Court were to suspend the current regulation and remand it to the VMRC for correction, the remand would immediately cause Virginia to be non-compliant with federal law. Ultimately, Appellee contends that any action to suspend the current regulation would result in a moratorium placed on the Virginia Atlantic Menhaden Fishery. See

16 USCS § 5106(c)(1) (“The Secretary [of Commerce] shall declare a moratorium on fishing in the fishery in questions within the waters of the noncomplying State.”).

Analysis

I. Standard of Review

a. Demurrer

Demurrers test the legal sufficiency of the pleadings. *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993). The issue on demurrer is whether the Complaint sets forth sufficient facts, not merely conclusions of law, to constitute a foundation in law for the judgment sought. *See Moore v. Jefferson Hospital, Inc.*, 208 Va. 438, 440 (1967). To survive a challenge by demurrer, “a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.” *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011). “The function of a demurrer is to test whether a bill of complaint states a cause of action upon which relief can be granted, and a demurrer admits as true all allegations of material facts which are well pleaded.” *Penick v. Dekker*, 228 Va. 161, 166 (1984) (citing *Bellamy v. Gates and Gill*, 214 Va. 314, 315-16 (1973)). When ruling on a demurrer, “the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant.” *Pendleton v. Newsome*, 290 Va. 162, 171 (2015). “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 (2000) (citing *Ward’s Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997)). A document that is attached to a pleading as an exhibit and mentioned in that pleading makes such exhibit a part of the pleading. Va. Sup. Ct. R. 1:4(i).

Additionally, Appellee argues that the Court should exclude the records attached to the Petition and the transcripts filed from the October 2022 and December 2022 VMRC hearings. The Court at this junction is only concerned with whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant. *Pendleton*, 290 Va. At 171. Therefore, the Court will not consider Appellee's arguments regarding the scope of the agency record at this time.

b. VMRC Appeals

Pursuant to Virginia Code § 28.2-219, “[a]ny person aggrieved by a final decision in a contested case is entitled to judicial review per the Administrative Process Act (§ 2.2-4000 et seq.).” The Administrative Process Act burdens the complaining party to “designate and demonstrate an error of law subject to review by the court.” Va. Code § 2.2-4027. Errors 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.

Id.

Additionally,

Where a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027, 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.

II. Claim 1: Appellee Failed to Promulgate Rules Within The Promulgation Period

Under Virginia Code § 2.2-4027, a party complaining of agency action may demonstrate an error of law by showing that “observance of required procedure where any failure therein is not mere harmless error...” In this case, Appellant argues that the failure of Appellee to promulgate regulations during the Promulgation Period constituted actionable error because it was not “mere harmless error.” This Court disagrees with Appellant’s characterization of Appellee’s action as procedural error, or that Appellee’s promulgation of the 2023 regulation was a procedural error at all. It is undisputed that Appellee promulgated the 2023 regulation outside of the mandatory Promulgation Period. There is, however, an exception to the mandatory Promulgation Period—“to ensure compliance with the Atlantic States Marine Fisheries Commission Interstate Fishery Management Plan for Atlantic menhaden.” Va. Code § 28.2-201. Compliance with the ASMFC’s Fishery Management Plan requires that “[e]ach state identified...implement and enforce the measures of such plan.” 16 USCS § 5104(b)(1).

Appellee advances the argument that the 2022 regulation ceased to apply once 2022 ended, and consequently, promulgating the 2023 regulation outside of the Promulgation Period ensured federal compliance. The 2022 regulation stated, “Total allowable commercial landings for menhaden **in 2022** shall be equivalent to...” Attachment C (emphasis added). Under a plain meaning interpretation, the language in the 2022 regulation evinces the intent that the total allowable commercial landings for Atlantic menhaden listed in the regulation only apply in the year 2022. *See Avalon Assisted Living Facilities v. Zager*, 39 Va. App. 484, 503 (2002) (principles of statutory construction apply with equal force “to the interpretation of regulations adopted by an administrative agency”). Virginia is mandated to ensure compliance with the ASMFC’s Fishery Management Plan, and the Virginia General Assembly delegated that duty to Appellee.” 16 USCS

§ 5104(b)(1); Va. Code § 28.2-201. Thus, Appellee acted within its authority when promulgating the 2023 regulation that decreased the percentage listed, ultimately ensuring compliance, and stating instead, “commercial landings for menhaden shall be equivalent to 75.21% of the annual [TAC] set by the [ASMFC]...” Attachment C. Therefore, Appellee did not fail to observe the required procedure, and Appellant has failed to set forth sufficient facts upon which relief can be granted under Appellant’s first claim.

III. Claim 2: Appellee Failed To Promulgate In Accordance With The Standards

Under Virginia Code § 2.2-4027, a party complaining about agency action may demonstrate an error of law by showing that the agency failed to comply with its statutory authority. Virginia Code § 28.2-203 requires Appellee to consider the Standards when promulgating any regulations to implement the Fishery Management Plan. Among other considerations, the Appellee must base conservation and management measures “upon the best scientific, economic, biological and sociological information available.” Va. Code § 28.2-203(2).

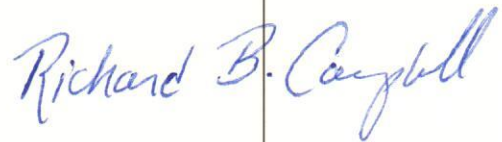
Here, Appellant contends Appellee erred when it failed to apply the Standards to its regulatory action. Specifically, Appellant claims that Appellee did not consider the best information available when formulating its management plan as required by Virginia Code § 28.2-203. Failure to promulgate in accordance with the Standards constitutes an error of law—violation of statutory authority—under Virginia Code § 2.2-4027. Accordingly, Appellant sufficiently pleaded facts upon which relief can be granted.

IV. Conclusion

For the foregoing reasons, the Court **SUSTAINS** Appellee's Demurrer, and **GRANTS** Appellee's Motion to Dismiss, with respect to Appellant's Claim 1; and **OVERRULES** Appellee's

demurrer, and **DENIES** Appellee's Motion to Dismiss, with respect to Appellant's Claim 2. The Court will enter an appropriate order to memorialize its ruling as outlined herein.

Very truly yours,

A handwritten signature in blue ink that reads "Richard B. Campbell". The signature is written in a cursive style with a large, stylized "R" and "C".

Richard B. Campbell, Judge