

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

**SOUTHERN MARYLAND RECREATIONAL
FISHING ORGANIZATION**

Appellant,
v.

MARINE RESOURCES COMMISSION

Appellee,

Serve: Joseph Grist,
Commissioner
Marine Resources Commission
380 Fenwick Road, Building 96
Fort Monroe, Virginia 23651

and

Benjamin Foster
Regulatory Coordinator
Marine Resources Commission
380 Fenwick Road, Building 96
Fort Monroe, Virginia 23651

Counsel to Appellee,

Jay Jones,
Attorney General of Virginia
202 North 9th Street
Richmond, Virginia 23219.

CIVIL ACTION - LAW

No.: _____

PETITION FOR APPEAL

1. Appellant, the Southern Maryland Recreational Fishing Organization (“Appellant” or “the Fishermen”), is a 501(c)(4) corporation organized under the laws of Maryland devoted to promoting and protecting recreational fishing in the Chesapeake Bay. Appellant and its members hereby petition this Court for appeal of the Virginia Marine

Resources Commission's ("State Agency") January 30, 2026, secret and procedurally improper issuance of a regulation under 4 VAC 20-1270-30 for the quota allocation of Atlantic menhaden (*Brevoortia tyrannus*) ("Menhaden") or, in the alternative, the State Agency's failure to take agency action required to regulate the Menhaden fishery in Virginia waters, pursuant to Va. Code Ann. §§ 28.2-201 and 28.2-203.

INTRODUCTION

2. The State Agency is legally authorized to establish quotas for the quantity of the fish species Menhaden commercially harvested in Virginia waters. *See* Va. Code Ann. §§ 28.2-201 and 28.2-203.

3. Menhaden are small, oily fish that make up the foundation of the food chain in Chesapeake Bay. The Chesapeake Bay is a critical nursery for Menhaden, and hundreds of millions of the species enter the Bay through Virginia waters every year. Those Menhaden provide the primary forage for the region, and support an array of predator fish, osprey, whales, and dolphins. Species such as striped bass (also known as "rockfish") and a handful of other fish species, which are the focus of much of the Chesapeake Bay's recreational fishing and its multimillion-dollar supporting businesses, rely on Menhaden as their primary food source in the Chesapeake Bay region. Osprey, a symbol to many of the Chesapeake Bay, also rely on Menhaden as their main food source.

4. The State Agency was established by the General Assembly to "manage Atlantic menhaden and ... adopt regulations necessary for its management..." Va. Code Ann. Code Ann. 28.2-201. It has totally failed to do so in any lawful way.

5. In recent years, the State Agency has unlawfully allowed 90% of Menhaden entering Virginia waters annually to be captured for a single company's commercial interest,

processing it into pet food and fish oil products. That amounts to 276 million pounds of Menhaden, all allowed for taking within Virginia waters, every year. Since the State Agency was given authority to manage Menhaden, it has never issued a single restriction to stop this practice. Further, no restrictions currently exist to preclude the reduction industry from taking all 276 million pounds of its harvest allocation from the Menhaden's primary Atlantic nursery area at the mouth of the Chesapeake Bay and adjacent Virginia waters off of Virginia Beach and Virginia's eastern shore.

6. The cumulative effects of the State Agency's decisions over the past several years have been devastating. They have been a principal reason for a substantial decline in recreational landings of species that rely on Menhaden as a primary food source, such as striped bass, as well as osprey. These impacts extend to significant declines in recreational harvests of striped bass and lack of Menhaden in the Chesapeake Bay is causing the alarming increase in fledgling mortality in the Chesapeake Bay region's osprey population. Current osprey reproductive failure levels have not been seen since the DDT-era levels in the 1970s.

7. The Commonwealth of Virginia is a member of the Atlantic States Marine Fisheries Commission (the "Interstate Commission"), a multistate organization responsible for setting maximum coastwide limits on fishing in the Atlantic Ocean. *See* Va. Code Ann. § 28.2-1000, *et seq.* The Interstate Commission provides the Atlantic State members a coastwide maximum allocation, and assigns each member state a proportion of that maximum coastwide allocation. Virginia receives approximately 75% of that coastwide allocation.

8. The numbers for the coastwide allocation are astronomical. In December 2025, the Interstate Commission set the annual coastwide harvest at approximately 412 million pounds. Virginia in turn received 307 million pounds, annually. The State Agency is charged with

managing the fishery by promulgating regulations that, *inter alia*, equitably allocate the resource and apply conservation management principles. *See* Va. Code Ann. § 28.2-203. For over six years, the State Agency has given 90% of Virginia’s allocation to a single reduction-fishing company, with no restrictions within Virginia waters. The December 2025 coastwide harvest allocation from the Interstate Commission represented a 20% decrease from the past three years.

9. In response, in January 2026, the State Agency secretly issued private letters to commercial entities that allocated to each recipient specific tonnages of Menhaden harvest in the 2026 fishing season (hereinafter, “Quota Letters”). The private Quota Letters automatically defaulted to the maximum allocation designated by the Interstate Commission, once again with no restrictions within Virginia waters. But the State Agency gave no public notice of those allocations; nor were they published in the Virginia Register of Regulations. The State Agency did not even mention the Quota Letters in April 2026, despite holding a hearing on a citizen’s petition specifically addressing industrial purse-seine Menhaden fishing in the Chesapeake Bay—a petition that sought to temporarily restrict that activity and to reopen or amend the existing regulation that allows it, 4 VAC 20-1270-35. The State Agency responded to, and voted to wholly reject this petition, yet made no mention of the Quota Letters, which were directly relevant to the substance of the petition.

10. The public and Fishermen only became aware of the letters when the State Agency responded to a Virginia Freedom of Information Act (“VFOIA”) request from the Appellant on September 1, 2026 (although the State Agency’s July 20, 2026 response to Appellant’s VFOIA Request (#841) should have encompassed these materials).¹

¹ There was neither public notice nor a formal “adoption” date under Rule 2A:2(a) and therefore, no 30-day appeal period.

11. The result of these secret allocations was to substantially injure the Appellant and its members, including at least nine of its individual members who reside in Virginia. This suit challenges the State Agency's secret and improper issuance of those letters and its failure to take appropriate agency action (public rulemaking) to establish any allocations. The Fishermen seek, *inter alia*, to have the allocations vacated and to require that the State Agency follow the appropriate rulemaking procedures.

12. The State Agency issued the Quota Letters without undertaking the legally required administrative action necessary to adopt an appropriate harvest level under Virginia law as to Virginia waters by (a) failing to provide for notice and comment; (b) failing to conduct the required analysis under Va. Code Ann. § 28.2-203 and, (c) failing to exercise its authority to regulate the portion of Virginia waters to the East of the Chesapeake Bay Bridge-Tunnel. The State Agency took this action, which was arbitrary and capricious, unsupported by substantial evidence, and without complying with applicable Virginia law, including the fishery-management standards prescribed by Va. Code Ann. § 28.2-203.

13. In the alternative, if the Court does not find that these Quota Letters constitute a regulation, the Fishermen hereby petition this Court for review of the State Agency's failure to undertake mandatory rulemaking and regulatory action to establish maximum Menhaden harvest caps for Virginia, which it was required to do following the Interstate Commission's October 31, 2025, maximum recommended Menhaden harvest amount to alter the applicable total allowable catch for Menhaden. The State Agency failed to undertake the legally required administrative action necessary to implement the Interstate Commission decision as to the factors found at Va. Code Ann. § 28.2-203 and, separately, failed to exercise its authority to regulate that portion of Virginia waters to the East of the Chesapeake Bay Bridge-Tunnel. The State Agency's failure to

act constitutes agency action unlawfully, without substantial evidence, and arbitrarily and capriciously withheld or unreasonably delayed under VAPA.

14. This Petition challenges the State Agency's failure to perform mandatory duties imposed by Virginia law and VAPA concerning the management of Menhaden in Virginia waters. This failure has resulted in a deprivation of Virginia citizens' rights to participate in the required administrative process and the degradation of the Menhaden fishery within the Chesapeake Bay and Virginia waters, and will further degrade the Chesapeake Bay and Virginia coastal ecosystems.

15. Upon information presently available to the Appellant, the State Agency selected a harvest level presumably intended to match the maximum recommended Menhaden harvest amount adopted by the Interstate Commission on October 31, 2025, with no restrictions within Virginia waters. As described above, the State Agency issued the January 30, 2026, Quota Letters without providing the public, including the Fishermen, notice of the letters or the agency action reflected in them.

16. The State Agency continues to operate in the shadows, depriving the public, including the Fishermen, of both their statutorily required opportunity for comment, and a clear and transparent understanding of the State Agency's decision making process with regard to the industrial Menhaden extraction limit. This lack of transparency on the part of the State Agency has real and tangible effects not only on the Fishermen, but on the entire Chesapeake Bay ecosystem.

17. The Fishermen timely and properly filed a Notice of Appeal with Joseph Grist, Commissioner of the State Agency, and Benjamin Foster, Regulatory Coordinator of the State Agency, on September 22, 2026, within 30 days of learning of the State Agency's action in

issuing the Quota Letters. The Fishermen also served copies of their Notice of Appeal via certified first-class mail on the Office of the Attorney General (counsel to the State Agency). A copy of the Notice of Appeal is included with this Petition as **Attachment A**.

18. In the alternative, the Fishermen appeal the State Agency's failure to take the official agency action required to implement into Virginia law the Interstate Commission's October 31, 2025, maximum recommended Menhaden harvest amount and to alter the applicable total allowable catch under Virginia law. To the extent this Court finds that the January 30, 2026, Quota Letters do not constitute a regulation, then the State Agency has failed to follow mandatory rulemaking on Menhaden quota allocations by mechanically following the Interstate Commission's October 2025 reduction.

19. The Fishermen's interest in this matter is established in the administrative record before the State Agency, and in the affidavit of Phil Zalesak, President of The Fishermen. The affidavit is included with this Petition as **Attachment B**.

20. The Interstate Commission's news release of October 31, 2025, announcing a final recommendation that Interstate Commission members reduce the 2026 Total Allowable Catch in state waters by 20%, and initiate an Addendum for a separate Chesapeake Bay Cap, is included as **Attachment C**.

21. The Quota Letters sent privately to individual licensed reduction fishers are attached as **Attachment D**.

22. Appellant properly files this Petition for Appeal within thirty days of filing the Notice of Appeal.

PARTIES

Appellant

23. Appellant, the Fishermen, and each of its members hereby petition this Court to appeal the State Agency's January 30, 2026, improper issuance of a regulation under 4 VAC 20-1270-30 for the quota allocation of Menhaden.

24. In the alternative, the Fishermen and each of its members hereby petition this Court to appeal the State Agency's unlawful and arbitrarily withheld and unreasonably delayed agency action.

25. Appellant is a 501(c)(4) nonprofit organization incorporated in Maryland with an address of 17725 Whitestone Drive, Tall Timbers, Maryland 20690. The Fishermen and the Appellant's members are committed to preserving and protecting fisheries, including the rights of recreational fishermen; supporting research in the sustainability of fisheries; and serving the local community by supporting recreational fishing events.

26. The Fishermen participate in fishing and fisheries-related activities in both Maryland and Virginia, in and near the Chesapeake Bay. Members regularly use and enjoy the natural resources of the Chesapeake Bay, including both Maryland and Virginia tidal waters and Maryland and Virginia portions of the Chesapeake Bay for both recreational and commercial fishing, wildlife viewing, recreation, and other purposes. The Fishermen's activities also include frequent participation in fisheries management and policy proceedings and actions for the purpose of protecting fishery resources in both Virginia and Maryland, because fish do not respect state boundaries, and because the Fishermen regularly fish in and across Maryland and Virginia waters.

27. The Fishermen rely on an active membership that regularly engages in fishing in and around the Chesapeake Bay. The Appellant has 120 members in Maryland and Virginia, including at least nine dues-paying members who reside in Virginia. Appellant's memberships

offer options for family, individual, and lifetime membership. Dues from members provide revenue to the organization. *See* Attachment B ¶¶ 10, 12 (Phil Zalesak Affidavit).

28. The Fishermen also hold a variety of activities, based in part on a robust and active membership, including fishing camps for children and a veterans' fishing event. The Appellant and its members are harmed by the failure of the State Agency to regulate lawfully the Menhaden fishery because that failure not only harms the Menhaden fishery, dependent fisheries such as striped bass for which Menhaden are an essential food supply or "forage" fish, and the Chesapeake Bay ecosystem, but also results in diminished interest, attendance, and revenue by and for events the Fishermen sponsor. *See* Attachment B ¶ 10 (Phil Zalesak Affidavit).

29. Phil Zalesak is the President of Appellant, the Southern Maryland Recreational Fishing Organization. Over the last decade, he and other members of the organization have observed declines in the number and size of Menhaden schools and a correlating steep decline in sport fish populations that prey on Menhaden, such as striped bass. This increases costs of sport fishing and degrades sport fishing and related activities. With each fishing trip, the Fishermen have noticed their yields declining, which then requires more effort and cost for their personal enjoyment and businesses. *See* Attachment B ¶ 11 (Phil Zalesak Affidavit).

30. The Fishermen are harmed by the State Agency's failure to act because the State Agency's unlawful and arbitrary withholding and unreasonable delay of agency action results in the gross mismanagement of the Menhaden fishery. This includes, but is not limited to, the State Agency's failure to appropriately reduce the total allowable catch of Menhaden in the Chesapeake Bay to protect the sustainability of Menhaden. This failure to manage has directly resulted and will continue to result in degradation of the Chesapeake Bay ecosystem, including a diminution of Menhaden populations, predator fish populations, and other ecosystem services. It

has also negatively impacted the recreational fishing and related activities of the organization. *See Attachment B ¶¶ 4, 6, 10, 11 (Phil Zalesak Affidavit).*

31. The Fishermen have suffered a recent downturn in membership because of the damage to Virginia waters and the Chesapeake Bay, resulting in diminished recreational fishing. On January 1, 2022, the Fishermen had 158 members, but as of July 1, 2026, the Fishermen now has 120 members. They are deeply concerned about their ability to attract new members and renewals. As sport fish populations decline, the interest and ability of individuals to fish in the Chesapeake Bay diminishes, which in turn results in lower membership numbers. With membership declining, the organization loses revenue. As that revenue diminishes, the organization must reduce the number of programs and activities that it sponsors, further undercutting the organization's ability to meet its goals. *See Attachment B ¶¶ 10, 13 (Phil Zalesak Affidavit).*

32. As described above, Appellant's members include residents of the Commonwealth of Virginia who use Virginia and Maryland waters in and around the Chesapeake Bay for recreational fishing and enjoyment. The dramatic reductions in ecosystem health and fish populations in and around the Chesapeake Bay diminish their use and enjoyment of these waters. *See Attachment B ¶ 12 (Phil Zalesak Affidavit).* Appellant's members also include residents of Virginia who are charter boat captains who rely on Virginia waters and the Chesapeake Bay for charter boat fishing, and have seen declines in Menhaden schools.

33. The State Agency's actions and its failure to act harms the Appellant and its organizational members because it allows overfishing, including industrial reduction harvesting that degrades the fisheries in Virginia waters and the Chesapeake Bay. This degradation includes harm to predator fish species, as well as harms to their ecosystem, all of which affect the

Fishermen's use and enjoyment of those waters. *See* Attachment B ¶¶ 6-7 (Phil Zalesak Affidavit).

34. The State Agency has damaged and will continue to damage fisheries in Maryland and Virginia waters and the Chesapeake Bay through its lack of necessary and conservation-focused Menhaden management and regulation. The State Agency's actions and its failure to act does this by allowing for over harvesting of Menhaden and harvesting techniques that further damage habitat from a lack of science based and Virginia-specific analysis on appropriate Menhaden catch. This results in harm to predator species, as well as harms to their habitat, all diminishing fisheries and affecting the ability of charter boat businesses to operate, including a diminution in their operations and incomes.

Appellee

35. The Virginia Marine Resources Commission is the promulgating agency.

36. Under Va. Code Ann. § 28.2-201, the General Assembly has given the State Agency the responsibility to "manage Atlantic menhaden and ... adopt regulations necessary for its management, including those necessary to comply with the [the Interstate Commission] Interstate Fishery Management Plan for Atlantic Menhaden." The Interstate Commission was created by interstate compact and includes every state bordering on the Atlantic Ocean. 16 U.S.C. § 5102. Though coordination of interstate management of the Atlantic Coastal fisheries rests with the Interstate Commission, Congress has expressly stated that responsibility for managing Atlantic coastal fisheries "rests with the States." 16 U.S.C. § 5101(a)(4).

JURISDICTION AND VENUE

37. This proceeding is proper pursuant to Va. Code Ann. § 28.2-200, *et seq.*

38. Pursuant to Va. Code Ann. § 28.2-201, “[a]ny regulation for the management of Atlantic menhaden shall be subject to judicial review in accordance with the provisions of 28.2-215.”

39. Pursuant to Va. Code Ann. § 28.2-215, “[j]udicial review of any regulation shall be in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 *et seq.*).”

40. This Court has jurisdiction to review the challenged agency action and failure to act under VAPA.

41. Pursuant to Va. Code Ann. § 2.2-4026, “[a]ny person affected by and claiming the unlawfulness of any regulation . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents . . . in any court of competent jurisdiction as provided in § 2.2-4003[.]” Va. Code Ann. § 2.2-4026(A).

42. Va. Code Ann. § 2.2-4026 further provides “[a]ctions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003... .”

43. Under VAPA, a court may review an agency’s failure to act pursuant to Va. Code Ann. §§ 2.2-4026 and 2.2-4027. Section § 2.2-4027 sets forth the scope of judicial review and empowers the reviewing court to determine whether the agency acted in accordance with constitutional and statutory requirements. *See* Va. Code Ann. § 2.2-4027.

44. Under VAPA, a reviewing court may “compel agency action unlawfully and arbitrarily withheld or unreasonably delayed.” Va. Code § 2.2-4029. Judicial review is available where an agency fails to perform an action that is statutorily mandated.

45. Under VAPA, “the circuit court’s role in an appeal from an agency decision is equivalent to an appellate court’s role in an appeal from a trial court.” *Va. Marine Res. Comm’n*

v. Insley, 64 Va. App. 569, 573, 770 S.E.2d 209, 211 (2015) (citing *Sch. Bd. of Cnty. of York v. Nicely*, 12 Va. App. 1051, 1062, 408 S.E.2d 545, 551, 8 Va. Law Rep. 367 (1991)).

46. Court review “with respect to the issues of law shall be to review the agency decision *de novo*.” Va. Code Ann. § 2.2-4027.

47. The Appellant and its members meet the standard for obtaining judicial review pursuant to Va. Code Ann. § 2.2-4026 because: (i) the Appellant and its members have been or are being affected by the State Agency’s improper issuance of a regulation or, in the alternative, the State Agency’s failure to act, and, because of the degradation of Virginia waters and the Menhaden fishery, and the Chesapeake Bay ecosystem, have suffered or will suffer actual and imminent injuries, as detailed in the affidavit of Mr. Phil Zalesak; (ii) these injuries are fairly traceable to the State Agency’s unlawful and arbitrary and capricious issuance of private letters to individual licensees on Menhaden quota allocations without following proper procedure or, in the alternative, failure to act and its failure to lawfully and properly regulate and protect the Menhaden fishery because the State Agency’s failure to act leads to the degradation of the Menhaden fishery and the dependent fisheries and ecosystems in Virginia waters and the Chesapeake Bay; and (iii) these injuries will likely be redressed by a favorable decision by the Court finding the State Agency’s regulation was arbitrary and capricious, unsupported by substantial evidence, and noncompliant with applicable Virginia law and ordering the State Agency to revise its regulation to ensure consistency with Va. Code Ann. 28.2-203, or, in the alternative, finding that the State Agency’s failure to act, as well as regulate all of Virginia waters, constitutes agency action unlawfully, without substantial evidence, and arbitrarily and capriciously withheld or unreasonably delayed and ordering the State Agency to take final agency action.

48. Venue is proper in this Court pursuant to Va. Code Ann. §§ 2.2-4003 and 2.2-4026, and Va. Code Ann. § 8.01-261.

LEGAL BACKGROUND

49. Va. Code Ann. § 28.2-101 gives the State Agency “jurisdiction over all commercial fishing and all marine fish...” and “shall include the Commonwealth’s territorial sea...”

50. Va. Code Ann. § 28.2-101 defines “marine fish” to include finfish. Menhaden are finfish.

51. The State Agency is charged with promulgating marine fisheries regulations. Va. Code Ann. § 28.2-103.

52. The State Agency manages the Virginia portion of the Chesapeake Bay and shoreline, which stretches 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. §§ 28.2-100, -101.

53. Va. Code Ann. § 28.2-201 gives responsibility to the State Agency “to manage Atlantic menhaden and ... adopt regulations necessary for its management, including those necessary to comply with the [Interstate Commission] Interstate Fishery Management Plan for Atlantic Menhaden.”

54. Va. Code Ann. § 28.2-201 further provides “[the State Agency] 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] Interstate Fishery Management Plan for Atlantic Menhaden.”

55. The regulations promulgated by the State Agency pertaining to Menhaden are codified under Title 4, Chapter 1270 of the Virginia Administrative Code. 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." 4 VAC 20-1270-10, *et seq.*

56. The enabling statute, Va. Code Ann. § 28.2-203, prescribes the applicable fishery standards and conservation measures with which the State Agency must ensure its regulations are consistent. These are:

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 Ann. § 28.2-203 (emphasis added).

57. Each year, the Interstate Commission sets the total allowable catch for Menhaden for all member states. The Interstate Commission then makes recommendations concerning the total allowable Menhaden catch. *Atlantic States Marine Fisheries Compact*, Pub. L. No. 539, ch. 283, art. IV, 56 Stat. 267, 268 (1942). Nothing precludes a state from setting a catch limit that is

less than the Interstate Commission's recommendation. The total allowable catch for member states is based on the Interstate Commission's Menhaden stock assessments and fertility estimates. The state allocations are based on historic commercial landings, and adjusted based on coastwide stock assessments.

58. In 2017, the Interstate Commission set a cap for the industrial Menhaden harvest within the geographic limit of the Chesapeake Bay (sometimes referred to as the "Chesapeake Bay Cap"), as a subcomponent of the maximum allocation to Virginia. The Interstate Commission's Chesapeake Bay Cap allows industrial Menhaden harvesters to take a maximum of 51,000 metric tons of Menhaden from within the Chesapeake Bay (or 22% of the Atlantic's coastwide total harvest). *See* Attachment E, at 13 (Draft Proceedings of the ASMFC Atlantic Menhaden Management Board - August 3, 2022). This framework still applies today.

59. On October 31, 2025, the Interstate Commission Atlantic Menhaden Board reduced the 2026 Total Allowable Catch by 20% and initiated an Addendum for the Chesapeake Bay Cap. *See* Attachment C, at 1 (ASMFC Atlantic Menhaden Board Reduces 2026 TAC by 20% and Initiates Addendum for Chesapeake Bay Cap - October 31, 2025). Under the October 2025 allocation, Virginia would continue to receive 75% of the Atlantic Ocean's coastwide total harvest. However, after the Interstate Commission reduced the 2026 coastwide Total Allowable Catch to 186,840 metric tons, Virginia's revised preliminary allocation is approximately 139,300 metric tons. *See* Attachment F, at 2 (2026 Atlantic Menhaden Preliminary Quota Allocations - December 1, 2025). Virginia still holds a significant majority percentage of allocation for Menhaden harvesting in the Chesapeake Bay (75.21%). Virginia's Menhaden recommended allocation dwarfs the allocations to the other states (the next highest allocations go to New Jersey

(11%) and Maine (4.8%)). *Id.* Virginia has the only remaining industrial Menhaden reduction plant operating on the Atlantic Coast. *Id.*

60. Virginia must manage its fisheries within the maximum harvest limits set by the Interstate Commission. 16 U.S.C. § 5104. States, including Virginia, may set allowable harvest limits below the maximum harvest limits set by the Interstate Commission. Va. Code Ann. § 28.2-1000. The State Agency's obligations are to establish a management plan that does not exceed the maximum allocation set by the Interstate Commission, and to promulgate regulations in accordance with its statutory directives to meet specific conservation and management standards, including Va. Code Ann. § 28.2-203.

61. Regulations must 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" Va. Code Ann. § 28.2-203(4).

62. The State Agency currently authorizes industrial removal of Menhaden from the Chesapeake Bay under 4 VAC 20-1270-30.

63. The Virginia Administrative Process Act (VAPA) is intended "to do generally that which the General Assembly cannot be expected to do specifically each time it confers administrative powers, to guide agencies, to inform the public, and to lessen the chances for miscarriage of administrative justice by agencies in the first instance or by courts when they review administrative action." Virginia Code Commission, *Administrative Process Act*, House Document No. 26, at 7 (1975 Session), available at <http://tinyurl.com/mrktcdue> (1975 Code Commission Report); *see also Nat'l Ass'n for the Advancement of Colored People v. Commonwealth ex rel. State Water Control Bd.*, 74 Va. App. 702, 717 (2022) (citing the 1975 Code Commission Report in interpreting the Act).

64. Article 5 of the VAPA, codified at Va. Code Ann. §§ 2.2-4025 – 2.2-4030, establishes the framework for judicial review of administrative agencies’ regulations.

65. A party seeking judicial review under Article 5 must “designate and demonstrate an error [of] law subject to review by the court.” Va. Code Ann. § 2.2-4027. Such errors include an agency’s: (a) failure to “compl[y] with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter . . . and the factual showing respecting violations or entitlement in connection with case decisions,” Va. Code Ann. § 2.2-4027(ii); (b) failure to “observ[e] required procedure,” where that failure “is not mere harmless error,” *id.* § 2.2-4027(iii); or (c) error concerning “the substantiality of the evidentiary support for findings of fact,” *id.* § 2.2-4027(iv).

66. A reviewing court “may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed” and may “suspend or set 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 Ann. § 2.2-4029. Accordingly, VAPA “grant[s] to the circuit court . . . the discretion to specify exactly what shall be done on remand.” *Va. Bd. of Med. v. Fetta*, 244 Va. 276, 280 (1992).²

67. The Commonwealth holds marine fisheries resources in public trust for present and future generations. *See Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904); *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982). When scientific uncertainty exists concerning

² Federal and Virginia courts have agreed “that ‘the scope of court review under’ the federal [Administrative Procedure Act (‘APA’) and VAPA] ‘is virtually identical.’” *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 81 (4th Cir. 2020) (quoting *Virginia State Board of Health v. Godfrey*, 223 Va. 423, 434 n.6 (1982)). The APA recognizes review of agency inaction under 5 U.S.C. §§ 702, 706(1). “Agency action” is defined in § 551(13) to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” (emphasis added). In *Norton v. Southern Utah Wilderness Alliance*, the U.S. Supreme Court explained that the APA permits a plaintiff to seek relief when an agency fails to take a discrete action that it is legally required to undertake. 542 U.S. 55, 62-65 (2004). 5 U.S.C. § 706(1) provides a means of compelling agencies to fulfill their statutory obligations. *Id.* at 63-65.

stock status or ecosystem impacts, precaution is required under well-established fisheries management principles. *See* Va. Code § 28.2-203; National Marine Fisheries Service, *Magnuson-Stevens Act National Standard Guidelines* (2016), at 9-12; FAO, *Code of Conduct for Responsible Fisheries*, Article 7.5 (1995). Failure to act in the face of structural uncertainty and documented impacts to Menhaden and species subsisting on Menhaden would conflict with statutory duties.

FACTUAL AND PROCEDURAL BACKGROUND

68. Menhaden are central to the Chesapeake Bay ecosystem. These small, nutrient-packed fish are critical forage food for predatory fish such as striped bass (also known as “stripers” or “rockfish”), weakfish, and bluefish, birds that rely on Menhaden, such as ospreys, and marine mammals such as dolphins. Menhaden also act as a filter feeder, with each fish filtering up to seven gallons of water every minute. The Chesapeake Bay is one of the most important nurseries for Menhaden, helping to sustain the population along the Atlantic coast. *See* Attachment G, at 1 (In Support of Petition for Rulemaking: Establish a Temporary Moratorium on Chesapeake Bay Menhaden Reduction Fishing - February 17, 2026).

69. The commercial harvest of Menhaden is divided into two harvesting types: “reduction” fishing and “bait” fishing sectors. Both sectors use a type of industrial harvest gear called purse seine netting, which drags a large net and draws it into a pouch near the vessel. *See* Attachment H, (ASMFC Stock Assessment Overview: Atlantic Menhaden - October 2025); *see also* Attachment I, at 4-5 (ASMFC’s Menhaden FAQ - October 2025). The reduction fishery (or “Industrial Harvester”) uses spotter planes to locate schools of Menhaden, and then deploys large purse seine nets, each the size of a football field, that capture enormous amounts of fish each time the net is deployed and dragged back to the vessel. Those Menhaden caught by the

Industrial Harvester are then processed by grinding them into fish meal, oils, and other supplements. The reduction fishery in Virginia is comprised of a single company that operates a fleet of large vessels.

70. The Industrial Harvester's processing facility is located in the northern neck of Virginia, on the Chesapeake Bay. *Id.* Menhaden are first taken from areas of the Chesapeake Bay most convenient to the Industrial Harvester, near the processing facility. In an attempt to partially limit the overharvest of Menhaden in the Chesapeake Bay, the Interstate Commission requires a Chesapeake Bay Cap of 112 million pounds of Menhaden annually. The area governed by the Chesapeake Bay Cap stops at the Chesapeake Bay Bridge-Tunnel, and in the absence of any restrictions by the State Agency, leaves the entirety of the mouth of the Chesapeake Bay and the Virginia waters directly adjacent to it completely unrestricted in terms of Menhaden harvest. When the Industrial Harvester's take reaches its cap on the maximum number of Menhaden that it is allowed to remove from the Chesapeake Bay, its boats move out into the mouth of the Chesapeake Bay to obtain the balance of what it is permitted to take, concentrating its harvest just in- and outside of the mouth of the Chesapeake Bay. This practice not only depletes Menhaden in the Chesapeake Bay, but also prevents regional Menhaden populations from entering and replenishing the already depleted Chesapeake Bay population.

71. As described above, no restrictions currently exist to preclude the reduction industry from taking all 276 million pounds of its harvest allocation from the mouth of the Chesapeake Bay and adjacent Virginia waters off of Virginia Beach and Virginia's eastern shore. In fact, each year, the reduction industry catches the majority of its coastwide allocation within Virginia waters, and in some years the vast majority of its allocation all within Virginia waters, unrestricted by the State Agency, with no limits at all within the hundreds of square miles of

Virginia waters immediately east of the Chesapeake Bay Bridge-Tunnel, in the mouth of the Chesapeake Bay. Despite having jurisdiction over the “Commonwealth’s territorial sea” under Va. Code Ann. § 28.2-101, the State Agency abdicates its responsibility to regulate these waters beyond the Chesapeake Bay Bridge-Tunnel. In doing so, the State Agency allows the reduction fishery to harvest their entire quota outside of the area subject to the Chesapeake Bay Cap.

72. In October 2025, the Interstate Commission adopted updated Menhaden management benchmarks and ecological reference point analyses. *See* Attachment C (ASMFC Atlantic Menhaden Board Reduces 2026 TAC by 20% and Initiates Addendum for Chesapeake Bay Cap, October 31, 2025). As discussed above, in October 2025, the Interstate Commission took several major actions related to the management of Menhaden in response to updated ecological assessments and growing concerns about forage availability for predator species along the East Coast. Most notably for this Petition, the Interstate Commission voted to reduce the coastwide Menhaden total allowable catch for 2026 by 20%, lowering the quota from 233,550 metric tons to 186,840 metric tons. *Id.* The decision followed a new ecological reference point stock assessment indicating that Menhaden biomass and reproductive capacity were likely 50% lower than previously estimated and that fishing mortality remained above ecosystem-based target levels. *Id.* It concluded that harvest reductions were necessary to improve ecosystem conditions and better support predators, such as striped bass that depend heavily on Menhaden for sustenance. *Id.*

73. Technical analyses presented to the Interstate Commission’s Atlantic Menhaden Management Board showed that even with a 20% reduction, fishing mortality would still remain too high, above the ecological target established under the Interstate Commission’s

ecosystem-based management framework. *Id.* Those same analyses also suggested that reductions exceeding 50% could be necessary to fully achieve those ecological targets. *Id.*

74. The Interstate Commission framework expressly contemplates state implementation and state-level management analysis concerning total allowable catch and conservation measures for Menhaden. 16 U.S.C. § 5104. The Interstate Commission’s governing framework does not establish an “automatic” implementation mechanism exempting states from independent analysis or regulatory action. Rather, that framework requires participating states, like Virginia, to undertake independent regulatory or scientific evaluations regarding fisheries management measures and allowable Menhaden harvest levels. The Interstate Commission’s October 2025 action therefore triggered the State Agency’s obligation to evaluate Virginia’s Menhaden management framework under applicable Virginia law.

75. Virginia’s marine fisheries statutory provisions establish the State Agency as the Commonwealth’s principal authority for the management and conservation of Virginia marine fisheries, including Menhaden. Va. Code Ann. § 28.2-101. Through this statutory grant of authority, the General Assembly vested the State Agency with responsibility for regulating the Menhaden fishery and managing those resourcing within the Commonwealth’s jurisdiction. As a member of the Atlantic States Marine Fisheries Compact, Virginia participates in the Interstate Commission’s interstate framework that the State Agency is required to incorporate into Virginia law.

76. Following the Interstate Commission’s October 31, 2025, 20% reduction, the State Agency was required to promptly initiate a regulatory process which would evaluate the Interstate Commission’s findings, the total allowable catch, and ecosystem impacts, and

subsequently provide public notice and solicit public comments, and finally, adopt certain management measures based on the State Agency's reasoned analysis.

77. As discussed above, Va. Code § 28.2-201 provides that the State Agency "shall adopt regulations necessary for" the management of Menhaden, including regulations necessary to comply with the Interstate Commission Interstate Fishery Management Plan for Menhaden. This provision demonstrates that, where the General Assembly has incorporated an Interstate Commission management requirement into Virginia law, the State Agency's obligation is not merely discretionary or advisory. The State Agency must exercise its regulatory authority to give effect to the applicable interstate management requirements within Virginia's jurisdiction.

78. To meet VAPA requirements, the State Agency should have published proposed regulations by approximately December 31, 2025, allowed for a public comment period, publicly disclosed its analysis supporting the proposed action, and promulgated its final agency action by the end of the 2025 regulatory period.

79. In addition to establishing Menhaden harvest limits within and just outside the Chesapeake Bay via properly promulgated rulemaking actions, the State Agency was statutorily required to consider conservation and management measures to: achieve an optimum yield of Menhaden; use the best scientific, economic, biological, and sociological information relating to Menhaden; use the best method of managing Menhaden *as a unit* throughout the territorial waters of the Commonwealth; ensure interrelated stocks of fish shall be managed as a unit in close coordination to develop a plan that is fair and equitable to all fishermen that promotes conservation, and measures to promote efficiency; and assure that the allocation does not have economics as its sole purpose. *See Miles v. Va. Marine Res. Comm'n*, 54 Va. Cir. 325, 325 (Cir. Ct. 2000) (applying Va. Code Ann. § 28.2-203).

80. The State Agency performed none of these actions.

81. Between November 1, 2025, and December 31, 2025, the public was kept in the proverbial dark. Due to the State Agency's inaction and its secret action via private letters, interested and aggrieved parties, including the Fishermen, resorted to other measures to have their voices heard regarding the State Agency's limit on industrial Menhaden extraction. On December 30, 2025, an interested person, Tanya O'Connor, filed a Petition for Rulemaking pursuant to Va. Code § 2.2-4007 before the State Agency. The Petition requested that the State Agency temporarily stop industrial purse-seine Menhaden fishing in the Chesapeake Bay and to reopen or amend the existing regulation that allows it, 4 VAC 20-1270-35.

82. On February 17, 2026, the Fishermen and individual members submitted comments in support of the December 30, 2025, Petition for Rulemaking, urging the State Agency to incorporate better Menhaden fishery management regulations, 4 VAC 20-1270-10, *et seq.* See Attachment G (In Support of Petition for Rulemaking: Establish a Temporary Moratorium on Chesapeake Bay Menhaden Reduction Fishing - February 17, 2026). The Petition and the Fishermen's comments established that the State Agency is legally required to base fishery decisions on adequate scientific and ecological information, but has continued authorizing large-scale Menhaden harvests in the Chesapeake Bay without having key Chesapeake Bay-specific data.

83. The State Agency held a hearing for the Petition for Rulemaking on April 21, 2026. Virginia Marine Resources Commission. (2026). *April 21, 2026 Transcript, Virginia Marine Resources Commission Hearing on Petition for Rulemaking by T. O'Connor*. (Full transcript available at: [2026-04-21 Virginia Marine Resources Commission Meeting](#)) (last visited October 20, 2026).

84. After hearing oral argument, the State Agency denied the Petition for Rulemaking.

85. Unbeknownst to the public and Appellant, and only discovered through VFOIA requests,³ on January 30, 2026, the State Agency had already secretly issued the instant challenged regulation in the form of private letters to individual licensees for Menhaden harvest. The letters stated “[a]s provided in Chapter 4 VAC 20-1270-30, the total allowable landings for menhaden shall be allocated among the purse seine menhaden reduction sector, purse seine menhaden bait sector, and non-purse seine menhaden bait sector in proportion to each sector’s share of average landing in 2002 through 2011.” To the purse seine Menhaden reduction sector, which comprises a single company, the State Agency allocated 90.04%, or 276,584,578 pounds of Virginia’s portion of the total quota. *See* Attachment D (Quota Allocation Letters - January 30, 2026).

86. These Quota Letters effectively qualify as a regulation issued by the State Agency. The Quota Letters set the binding sector-wide 2026 harvest, including 276,584,578 pounds for the reduction sector, which became the operative and enforceable rule of the Menhaden fishery for the year.

87. Despite having the same effect as a regulation, the State Agency provided no statement as to its methodology for selecting the quota levels aside from relying on 4 VAC 20-1270-30, which was incorrectly applied here.

88. There are several reasons why 4 VAC 20-1270-30 was incorrectly applied to issuing the Quota Letters. The State Agency may contend that 4 VAC 20-1270-30 incorporated

³ In response to Appellant’s VFOIA request #841 related to Menhaden harvest quotas from the State Agency, the State Agency did not provide the Quota Letters in its July 20, 2026, response despite the fact that they were reflected as attachments in the correspondence that State Agency did provide. The Quota Letters also fell squarely within the description of requested documents. Only after a follow-up request did the State Agency finally provide the Quota Letters on September 1, 2026.

an allocation percentage tied to the Interstate Commission's coastwide management decisions. In litigation focused on the State Agency's issuance of 4 VAC 20-1270-30, the Fishermen previously highlighted that the potential effect of this regulation change would be to allow Virginia's harvest limit to change automatically, perpetually, and without due consideration of Va. Code § 28.2-203's factors as the Interstate Commission changed the applicable coastwide total allowable catch.

89. However, in the spring of 2023, the State Agency represented to a Virginia Circuit Court that this was not the practical effect of 4 VAC 20-1270-30, and that the regulatory mechanism did **not** constitute an abdication of the State Agency's independent regulatory responsibility, nor was it intended to bind Virginia automatically to the Interstate Commission allocations in perpetuity. Specifically, the State Agency stated:

By removing the poundage and keeping only the percentage, it means [the State Agency] is not 'continuously opening regulations when it's unnecessary.' DAR 105. In other words, adopting allocation percentages in the regulation instead of poundage will minimize the regulatory burden. See Va. Code § 28.2-203(7) ('[R]egulations shall, where practicable, minimize regulatory burdens which inhibit innovation, expansion, and normal business operations.'). Nothing in staff's evaluation or comments indicates that [the State Agency] has abdicated its responsibility to regulate menhaden and will only adopt [Interstate Commission]'s allocations in perpetuity. The statement in the staff evaluation explicitly says that **it is meant to account for slight variations in the [total allowable catch] between 2023 and 2025**. DAR 105, 114. [The State Agency] staff state clearly that they are referring only to the form, not the substance, of the regulation when talking about removing the poundage and, furthermore, that they are trying to prevent [the State Agency] from being required to update the regulation every year to account for minor fluctuations. DAR 105. At no point do staff or the Commissioners say anything to indicate that they will never deviate from [Interstate Commission]'s [total allowable catch] or allocations in the future.

See Attachment J, at 11-12 (Va. Marine Res. Comm'n's Resp. to Appellant's Opening Br., *S. Md. Recreational Fishing Org. v. Va. Marine Res. Comm'n*, No. CL23002246 (Richmond City Cir. Ct.) (2024) (emphasis added)).

90. The State Agency thus stated that the 2023 regulatory change in 4 VAC 20-1270-30 was intended to accommodate only “slight variations” in the total allowable during the 2023-2025 period and to reduce the administrative burden associated with minor annual adjustments. *Id.*

91. The above quote demonstrates why 4 VAC 20-1270-30 should not apply to the 2026 fishing period or for any period which follows a significant change to the Interstate Commission’s total allowable catch: A 20% reduction in the Atlantic Coast’s entire total allowable catch does not constitute a “slight variation” and therefore should not have been robotically applied following the Interstate Commission’s October 2025 reduction. The application of 4 VAC 20-1270-30 and the issuance of new harvest allocations via private Quota Letters also demonstrates that the State Agency continues to abdicate its responsibility to manage the Commonwealth’s marine fisheries under Va. Code Ann. §§ 28.2-201 and 203, and solely relies on the Interstate Commission in regulating Menhaden.

92. The State Agency has expressly acknowledged its reliance on the Interstate Commission’s scientific findings and management recommendations. That reliance extends to adopting the precise maximum limits for Menhaden harvest prescribed by the Interstate Commission, rather than independently determining the appropriate harvest level for Virginia waters.

93. In litigation proceedings from 2024, the State Agency defended this approach, stating:

[The State Agency] is not required by any law or regulation to conduct an analysis from scratch. ... [the State Agency] follow[s] the recommendations of the [Interstate Commission], which, is authorized to advise [the State Agency] and [Interstate Commission]’s findings must be based upon the “best scientific information available.”

Id.

94. The State Agency's actions at issue demonstrate that the State Agency misrepresented how 4 VAC 20-1270-30 would operate and that the regulation is doing exactly what the State Agency expressly stated it would **not** do. By communicating the reduction fishery's new harvest limit directly to the industry by private letter, the State Agency automatically adopted the Interstate Commission's maximum allocation, abdicating its responsibility to determine an independent management evaluation explaining the appropriate harvest level for Virginia waters in light of the new Interstate Commission reduction and undertake a new public rulemaking to address that substantial reduction. The State Agency provided no public notice-and-comment proceeding concerning that decision, no publicly presented management evaluation specific to the change, and no properly promulgated regulation addressing the Interstate Commission's 20% reduction.

95. These private communications provide further evidence of ongoing, publicly-opaque coordination between the State Agency and the reduction fishing industry.

96. Concerns regarding the State Agency's regulation of the Menhaden reduction fishery have also arisen within the State Agency itself. On April 21, 2026, the State Agency considered Tanya O'Connor's Petition for Rulemaking seeking a temporary moratorium on Chesapeake Bay Menhaden reduction fishing. During that proceeding, the State Agency Board Member Patrick Hand addressed the ecological effects of the reduction fishery and the State Agency relationship with the reduction industry, which consists of one company: Omega Protein Corporation ("Omega").

97. Commissioner Hand stated:

[The reduction industry] happen[s] to be in a business that affects the Chesapeake Bay. The question is: how much it affects the Chesapeake Bay and there's a lot of

unknowns I believe the reduction fishery is so efficient, so thorough, and the catch is so great that it does have a serious effect on the chemistry of the whole Bay. [...] [The reduction industry] catch[es] 70% out [of the Chesapeake Bay Cap] now; go catch the other 30%. ... So, we're not closing down Omega if we further restrict or create a temporary moratorium in the Chesapeake Bay. We are affecting the efficiency of the top 30% []. Yes, jobs are very important, but I think there could be other solutions. [...] And I brought up in a previous meeting 'maybe there's a happy medium, maybe there could be a few days allowed in the [Chesapeake] Bay just for those worst weather days, or something like that.'

Virginia Marine Resources Commission. (2026). *April 21, 2026 Transcript, Virginia Marine Resources Commission Hearing on Petition for Rulemaking by T. O'Connor*. (Full transcript available at: [2026-04-21 Virginia Marine Resources Commission Meeting](#)) (last visited October 20, 2026).

98. Commissioner Hand then addressed the reduction industry's (i.e., Omega's) influence over the regulatory process:

But right now Omega doesn't need to negotiate that. They have things well under control. **They have this Board under control.** They have the State House and State Senate under control. But if there was a moratorium, in my opinion, they'd be coming to us looking for a study, or looking to negotiate something that works for everyone, that may benefit the Chesapeake Bay and may benefit recreational fishing. That would be my hope. My mind is made up.

Id. (emphasis added).

99. Commissioner Hand's statements were made during an official State Agency proceeding concerning whether additional restrictions should be imposed on reduction fishing within the Chesapeake Bay. His statements identified both unresolved questions concerning the reduction fishery's effects on the Chesapeake Bay and concerns regarding regulatory capture, and the State Agency's ability and willingness to impose additional restrictions on that fishery.

100. Against this factual backdrop, the State Agency's implementation of the Interstate Commission's substantial total allowable catch reduction through a private quota letter—without a new public rulemaking, a publicly presented Virginia-specific management evaluation, or a

public hearing on the resulting harvest limits—stands in contrast to the State Agency’s previous representations that it had not abdicated its responsibility to regulate Menhaden and would not simply adopt the Interstate Commission allocations in perpetuity.

101. The State Agency’s action and/or failure to act resulted in a quota allocation that automatically provided the Menhaden reduction sector with approximately 90% of Virginia’s Menhaden harvest. *See* Attachment D (Quota Allocation Letters - January 30, 2026). The State Agency did not properly promulgate this decision, nor did they include or inform the public in any way of this decision that substantially affects the entire Menhaden fishing industry in the Chesapeake Bay, including the Fishermen.

102. Proper regulation of the Menhaden fishery is essential to the Fishermen’s livelihoods, as well as the health of the entire Chesapeake Bay. As discussed above, Menhaden are a foundational forage species in the Chesapeake Bay and provide essential ecological services for other important species, such as osprey, striped bass, blue crabs, and more. Management of Menhaden must therefore account not only for whether enough Menhaden remain to sustain commercial harvest, like the reduction sector, but whether a sufficient level of Menhaden remains to sustain the species and entire marine ecosystem that depend on them. Evidence for overharvesting of Atlantic menhaden in the Chesapeake Bay was documented by the Potomac River Fisheries Commission, as they track the pound net harvesting of Atlantic menhaden in the Potomac River. The long term average annual commercial harvest of Atlantic menhaden was 3.4 million pounds (2001 - 2022). In 2023, the commercial harvest was down to 2 million pounds. In 2024, it was down below 700,000 pounds, and preliminary estimates for 2025 are under 200,000 pounds. *See* Attachment B (Phil Zalesak affidavit); *see also* Attachment K (Potomac River Fisheries Commission, Potomac River Preliminary Commercial Finfish

Landings for 2001-2025 - April 1, 2026). The grave consequences of this localized depletion are many.

103. First, the Chesapeake Bay supports the largest breeding population of ospreys, making the species an important indicator of changing ecological health and fish availability within the Chesapeake Bay. The following referenced studies regarding the impact of Menhaden overfishing can be found in **Attachment L**. Recent scientific evidence demonstrates severe reproductive failure among Chesapeake Bay osprey. In a Bay-wide study involving 571 osprey nests, Watts, *et al.* (2026) found that “[a]ll high-salinity study areas functioned as demographic sinks.” None of the ten high-salinity study areas examined achieved the reproductive threshold believed necessary for population maintenance. The researchers concluded that ospreys throughout the main stem of the Chesapeake Bay are experiencing a “demographic deficit that threatens population stability.” Watts, *et al.* (2026), *Widespread Reproductive Deficits in Chesapeake Bay Ospreys*, *Frontiers in Marine Science* 13:1685158. Watts, *et al.* found that the current osprey reproductive deficit is accompanied by substantial evidence of food stress. The researchers identified that “Atlantic menhaden availability is the primary driver of low reproduction” in the high-salinity reaches studied.

104. These findings confirm and expand upon a decades-long study of osprey, which found that “[t]he population transitioned from reproductive surplus (demographic source) to reproductive deficit (demographic sink).” Watts, *et al.* (2024), *Demographic Response of Osprey Within the Lower Chesapeake Bay to Fluctuations in Menhaden Stock*, *Frontiers in Marine Science* 10:1284462. Menhaden historically comprised approximately 75% of osprey diet by weight. *Id.* at 11. Such dietary specialization increases vulnerability to forage decline and reduced fish delivery frequency directly affects chick survival. *Id.* at 37. During the study period,

Menhaden delivery to osprey nests fell, and, in turn, young osprey mortality—osprey lost between hatching and fledging stages—increased from approximately 5% in 1974-75 to approximately 76% in 2021. By 2021, osprey productivity was well below the level necessary to sustain the population.

105. Critically, experimental evidence demonstrates the strong relationship between Menhaden availability and osprey reproductive success. The Watts, *et al.*, 2026 study concluded that “food stress and associated reproductive failure in ospreys are reversible if fish stocks are managed to fulfill their role within the ecosystem.”

106. Second, the consequences of insufficient Menhaden populations in the Chesapeake Bay are not confined to birds. Atlantic striped bass, one of the Chesapeake Bay’s most ecologically, recreationally, and economically important fish, depends on Menhaden. Ecosystem modeling developed specifically to establish ecological reference points for Menhaden demonstrates a direct management tradeoff between Menhaden harvest and striped bass biomass. Chagaris, *et al.* (2020) found that the relationship was nonlinear, such that “small increases in menhaden [mortality from fishing] resulted in disproportionate drops in striped bass biomass.” Chagaris, *et al.* (2020), *Ecological Reference Points for Atlantic Menhaden Established Using an Ecosystem Model of Intermediate Complexity*, *Frontiers in Marine Science* 7:606417.

107. These ecological concerns are especially significant because striped bass are themselves in a depleted condition. The Interstate Commission currently classifies the striped bass stock as “overfished.”⁴ Accordingly, the State Agency’s management decisions with regard to Menhaden have a direct impact on the already-overfished striped bass.

⁴ Atlantic States Marine Fisheries Commission, *Atlantic Striped Bass*, <https://asmfc.org/species/atlantic-striped-bass/> (last visited October 20, 2026).

108. Notably, recreational sport fishing of species like the striped bass is also an important consideration in this matter to the Fishermen and to the public. Recreational sport fishing is a key economic driver, supporting local businesses, charter boat operators, fishing guides, and fisheries conservation programs. For example, according to the Maryland Department of Natural Resources' *Fiscal Year 2025 Budget Report to the Sport Fisheries Advisory Commission*, in fiscal year 2025, Maryland issued approximately 393,000 revenue-generating recreational fishing licenses and 614 recreational fishing and crabbing business licenses. Revenue generated by recreational anglers through fishing licenses and federal excise taxes on fishing equipment also funds nearly half of Maryland's fisheries programs. These figures demonstrate the substantial economic value of recreational fishing and the importance of maintaining healthy fish populations to sustain this industry.

109. Protecting species like striped bass is therefore both an ecological and economic priority. Striped bass rely on Menhaden as an important food source, and overfishing Menhaden can and will undermine the health of striped bass populations, threatening recreational fishing opportunities and the businesses and revenues they support. Fisheries conservation is essential to sustaining economic opportunities and supporting the broader outdoor economy. Protecting Menhaden from overfishing is thus critical to preserving the ecological balance and long-term economic benefits of recreational sport fishing.

110. These harms cannot be adequately addressed through the State Agency's current regulatory regime, which does not abide by statutorily-mandated conservation considerations. Science-based and precautionary regulation of the Menhaden fishing industry is essential to ensure that the reduction fishing industry does not undermine the ecological functions that

Menhaden perform within the Chesapeake Bay. It is also essential to ensure that all entities in the fishing industry are given equitable access to this public resource, as required by law.

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

A. Noncompliance with Statutory Authority Under Va. Code Ann. § 2.2-4027:

(Error of law because it: ignores the several requirements of the statute designed to protect the Commonwealth, while merely mirroring the Interstate Commission maximums.)

111. The Fishermen incorporate by reference the allegations contained in Paragraphs 1 through 110.

112. Under VAPA, judicial review of agency action includes determining whether the agency complied with its statutory authority, applicable law, and required procedures. Va. Code § 2.2-4027(ii).

113. Agency action that is arbitrary and capricious is invalid. *Avery v. Va. Ret. Sys.*, 31 Va. App. 1, 14 (1999). Virginia courts have defined arbitrary and capricious action as action that is “willful and unreasonable and taken without consideration or in disregard of facts or law or without determining principle,” or where the decision-making body has departed from the appropriate standard in reaching its decision. *James v. City of Falls Church*, 280 Va. 31, 42 (2010) (quoting *City of Norfolk Sch. Bd. v. Wescott*, 254 Va. 218, 224 (1997); *Johnson v. Prince William Cnty. Sch. Bd.*, 241 Va. 383, 389 n.9 (1991)).

114. The State Agency’s issuance of an unpromulgated regulation through the Quota Letters to individual licensees of the Menhaden fishing industry violated the foregoing standards because it failed to apply the prescribed fisheries management plan requirements pursuant to Va. Code Ann. § 28.2-203. The State Agency failed to apply the required analysis for rulemaking,

instead abdicating its responsibility to conduct its own Virginia analysis, irrespective of the October 2025 multi-state, coastwide Interstate Commission decision.

115. Further, the State Agency failed to apply the applicable statutory factors to Virginia waters generally and to the portion of Virginia waters east of the Chesapeake Bay Bridge-Tunnel.

116. The Interstate Commission's governing statutory language contemplates state-level implementation and independent regulatory judgment concerning total allowable catch and conservation measures. The updated Interstate Commission scientific findings that prompted its 20% reduction in October 2025 triggered the State Agency's obligation to independently evaluate Virginia's Menhaden management framework.

117. Any regulation regarding management or protection of the Menhaden fishery must be developed using conservation and management measures to protect Virginia waters and the Chesapeake Bay that are explicitly set forth in the governing statute, Va. Code Ann. § 28.2-203.

118. The State Agency failed to conduct such an analysis, instead opting to issue new harvest allocations to the industry without public explanation as to its decision and developing a regulation without using the required conservation and management measures.

119. Accordingly, the State Agency's promulgation of the challenged regulation was arbitrary and capricious, contrary to applicable Virginia law, and an abuse of State Agency's discretion and the regulation should be found invalid.

SECOND ASSIGNMENT OF ERROR

B. The State Agency failed to comply with required procedure where any failure therein is not mere harmless error:

(not harmless error because it: 1) failed to promulgate a regulation that appropriately addresses the needs of Virginia waters, and 2) frustrates public participation by avoiding scrutiny.)

120. The Fishermen incorporate by reference the allegations contained in Paragraphs 1 through 119.

121. Under Va. Code Ann. § 2.2-4027, courts reviewing agency action must determine whether the agency complied with the procedures required by law.

122. An agency must support its action through the grounds articulated during the administrative proceedings, rather than relying on post-hoc rationalizations presented for the first time during judicial review. *May Dep't Stores Co. v. Commonwealth Dep't of Env't Quality*, Record No. 3356-01-2, 2002 WL 1792095, at *2 (Va. Ct. App. Aug. 6, 2002); *see also Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 468 (4th Cir. 2013).

123. Where the administrative record is inadequate to permit informed judicial review, remand may be appropriate. *Jones v. Willard*, 224 Va. 602, 607 (1983).

124. The State Agency failed to comply with the procedures required by Va. Code Ann. §§ 28.2-201 and 203 by improperly issuing a regulation that established and assigned Menhaden harvest levels through the private Quota Letters. Under Va. Code Ann. § 28.2-201, the State Agency “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].” *Id.* (emphasis added).

125. By issuing the Quota Letters, the State Agency issued a regulation without undertaking the administrative action required to adopt the applicable harvest level and total allowable catch under Virginia law on January 30, 2026, outside the prescribed rulemaking period.

126. The State Agency further failed to provide the notice and opportunity for public participation required for the challenged agency action. Appellant and others actively sought to participate in Menhaden harvest regulation in Virginia through the December 30, 2025, Petition for Rulemaking, the February 17, 2026, Comments, and the April 21, 2026 Hearing.

127. Under Va. Code Ann. § 28.2-203, the State Agency's regulations must be consistent with seven standards for fishery conservation and management. The State Agency further failed to conduct the required analysis under Va. Code Ann. § 28.2-203 before issuing the Quota Letters and allocations.

128. The State Agency also failed to conduct the analysis required for the portion of Virginia waters east of the Chesapeake Bay Bridge-Tunnel.

129. The State Agency has provided no justification as to why it made an out-of-time rulemaking that was only conveyed to the purse seine Menhaden reduction sector, purse seine Menhaden bait sector and non-purse seine Menhaden bait sector.

THIRD ASSIGNMENT OF ERROR

C. The State Agency's regulatory determination lacked adequate evidentiary support and was arbitrary and capricious:

130. The Fishermen incorporate by reference the allegations contained in Paragraphs 1 through 129.

131. Va. Code Ann. § 2.2-4027 provides that, when judicial review is conducted upon an agency record, the reviewing court determines whether substantial evidence supports the agency's factual determinations, where that standard applies.

132. Under the substantial-evidence standard applicable to reviewable agency factual findings, the evidence must be relevant to the conclusion reached. *Goad v. Va. Bd. of Med.*, 40

Va. App. 621, 634 (2003) (quoting *Atkinson v. Va. Alcoholic Beverage Control Comm’n*, 1 Va. App. 172, 178 (1985)).

133. The State Agency issued a regulation through the privately issued Quota Letters to individual licensees with absolutely no findings made under § 28.2-203, no record built, and no rationale provided to the public. The State Agency issued the January 30, 2026, Quota Letters without a lawful administrative process or a disclosed analysis supporting the harvest level and individual allocations reflected in those letters.

134. The State Agency’s action lacks substantial evidentiary support for the statutory findings and management determinations required before establishment or implementation of the applicable harvest level and total allowable catch. The State Agency provided no support for its action and should not be able to rely on post-hoc rationalizations during judicial review.

135. The State Agency’s failure to consider relevant factors renders the regulation arbitrary and capricious.

FOURTH ASSIGNMENT OF ERROR, IN THE ALTERNATIVE

D. The State Agency unlawfully withheld or unreasonably delayed required agency action required by applicable Virginia law:

136. The Fishermen incorporate by reference the allegations contained in Paragraphs 1 through 135.

137. In the alternative to the Fishermen’s challenge to the January 30, 2026 Quota Letters as agency action and if the Court concludes that the Quota Letters do not constitute a regulation, the Fishermen assert that the State Agency failed to take the agency action required to implement into Virginia law the Interstate Commission’s October 31, 2025 maximum recommended Menhaden harvest amount.

138. Under Va. Code Ann. § 2.2-4029, a reviewing court may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed, provided that the Court does not itself undertake to supply agency action committed by law to the agency. Accordingly, where the State Agency has failed to perform a duty imposed by applicable Virginia law, the Court may compel the State Agency to take the legally required action, while preserving the State Agency’s lawful discretion concerning the substance of its determination.

139. The State Agency failed to adopt, through lawful administrative action, an appropriate harvest level and total allowable catch for Menhaden under Virginia law. Under Va. Code Ann. § 28.2-201, the State Agency “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].” *Id.* (emphasis added).

140. As described above, in October 2025, the Interstate Commission issued a decision concerning Menhaden management and ecological reference point, establishing a 20% reduction of the Atlantic Coast Menhaden catch. The State Agency was required to initiate a regulatory process following that action. That obligation included analysis and publication of proposed regulatory measures, its analysis determining whether its decision was consistent with the requirements set out in Va. Code Ann. § 28.2-203, provision of public notice, and an opportunity for public comment. The State Agency did not act during the statutorily mandated time frame. To this day, the State Agency has still not promulgated any rulemaking.

141. The October 2025 Interstate Commission’s action, recent scientific findings, and economical reference point analyses have raised concerns regarding, *inter alia*:

- a. Elevated fishing mortality;
- b. Declining fecundity;
- c. Localized depletion;
- d. Predator forage limitation; and

e. Ecosystem impacts associated with industrial Menhaden reduction fishing.

142. The State Agency has failed to conduct any public scientific evaluation of these issues. Further, the best scientific evidence demonstrates that Menhaden are overfished, subject to overfishing, and their depletion has caused significant declines in osprey, striped bass, and other Menhaden-dependent species' population numbers. The State Agency has failed to provide justification for whether existing Virginia management measures are consistent with ecosystem-based management principles or statutory conservation requirements. The State Agency has also failed to evaluate whether the current total allowable catch level is justified given the Interstate Commission's updated ecological reference point analyses.

143. The State Agency's failure to take required agency action constitutes an unlawful withholding or unreasonable delay of agency action.

144. The State Agency's failure to act is arbitrary and capricious, unlawful, inconsistent with statutory authority, and unsupported by substantial evidence because, *inter alia*, it disregarded relevant scientific evidence that is crucial to making a reasoned evaluation regarding the total allowable catch for Menhaden in Virginia waters.

FIFTH ASSIGNMENT OF ERROR, IN THE ALTERNATIVE

E. The State Agency failed to comply with required procedure where any failure therein is not mere harmless error:

(not harmless error because it: 1) failed to promulgate a regulation that appropriately addresses the needs of Virginia waters, and 2) frustrates public participation by avoiding scrutiny.)

145. The Fishermen incorporates by reference the allegations contained in Paragraphs 1 through 144.

146. In the alternative to the Fishermen's challenge to the January 30, 2026 Quota Letters as agency action and if the Court concludes that the Quota Letters do not constitute a

regulation, the Fishermen assert that the State Agency violated Va. Code Ann. § 28.2-201, which states that “the [State Agency] shall have the exclusive authority to manage Atlantic menhaden and shall adopt regulations necessary for its management, including those necessary to comply with the [Interstate Commission] Interstate Fishery Management Plan for Atlantic Menhaden.”

147. The State Agency failed to comply with the procedures required by Va. Code Ann. §§ 28.2-201 and -203 by abdicating its responsibility to issue a regulation following the October 2025 Interstate Commission 20% reduction. Under Va. Code Ann. § 28.2-201, the State Agency “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].” *Id.* (emphasis added).

148. Despite the statutory obligation to promulgate a rulemaking that would ensure compliance with the Interstate Commission during the October 1-December 31 timeframe, the State Agency did nothing.

149. By doing nothing, the State Agency failed to provide the notice and opportunity for public participation that should have been available for interested parties, like the Fishermen.

150. The State Agency further failed to conduct the required analysis under Va. Code Ann. § 28-2-203 necessary to ensure compliance with the Interstate Commission’s October 2025 reduction.

151. The State Agency has provided no justification as to why it did not issue a rulemaking. The State Agency was obligated to initiate a rulemaking following the Interstate Commission’s October 2025 reduction. The State Agency was further required to consider the conservation requirements established by Virginia law and follow applicable rulemaking procedures.

152. The State Agency's failure to follow procedure is unlawful, contrary to statutory authority, unsupported by substantial evidence, and arbitrary and capricious.

RELIEF REQUESTED

WHEREFORE, Appellant respectfully requests that this Court:

- a. Find that the State Agency's improper issuance of a regulation in the form of the privately sent Quota Letters to the Menhaden reduction fishing industry violated applicable Virginia law, exceeded or failed to comply with its statutory authority, and was arbitrary and capricious;
- b. Find that the challenged agency actions were unsupported by substantial evidence;
- c. Find that State Agency failed to comply with procedures required by applicable Virginia law;
- d. Set aside, suspend, or remand the challenged regulation to State Agency for further proceedings consistent with applicable law, as authorized by VAPA;
- e. Alternatively, find that the State Agency unlawfully withheld or unreasonably delayed action required by law;
- f. Order the State Agency to take rulemaking pursuant to comply with Va. Code Ann. § 28.2-203 to protect Virginia waters and the Chesapeake Bay;
- g. Establish a prompt deadline by which the State Agency must accomplish the required analysis and promulgate a rule implementing the Interstate Commission's decision to reduce the total allowable Menhaden catch by 20%;
- h. Pursuant to Virginia law, including but not limited to Va. Code Ann. § 2.2-4030, award Appellant its reasonable costs and attorneys' fees; and,

- i. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

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