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SUPREME COURT OF NEW JERSEY
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SUPREME COURT
OF NEW JERSEY

AMPRO FISHERIES, INC.,)

Appellant-Respondent,)

LXA
v.)

JUDITH YASKIN, COMMISSIONER)
OF ENVIRONMENTAL PROTECTION;)
GEORGE HOWARD, DIRECTOR,)
DIVISION OF FISH, GAME AND)
WILDLIFE; and BRUCE FREEMAN,)
ADMINISTRATOR, MARINE)
FISHERIES ADMINISTRATION.)

Respondents-Petitioners.)
LXR

Civil Action

On Petition for Certification
to the Superior Court of New
Jersey, Appellate Division

Sat Below: Pressler, Deighan,
and Baime, JJ.A.D.

WR JW

PETITION FOR CERTIFICATION AND APPENDIX

D
ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents-
Petitioners
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1509

MARY C. JACOBSON
Deputy Attorney General
Of Counsel

WJA
RACHEL HOROWITZ
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

This petition seeks review of an Appellate Division decision that, if uncorrected, will severely undermine this State's ability to protect through regulation the many fisheries resources within Delaware Bay. Currently, the State regulates those fisheries so as to prevent overfishing of any species; protect threatened species; ensure an appropriate allocation of fisheries resources among competing user groups; promote boating safety; and prevent the pollution attributable to fishing operations (Pa14-Pa21). The Appellate Division's ruling jeopardizes all of these goals, however, by incorrectly invalidating within Delaware Bay all of the State's fisheries regulations concerning the menhaden fish by the basis of its erroneous conclusion that New Jersey has no authority to regulate Delaware Bay fisheries on its own, but can instead only pass laws in concert with Delaware pursuant to a 1905 Compact between the States that was never implemented by either State.

The Appellate Division's ruling regarding New Jersey's ability to regulate fisheries within Delaware Bay under the 1905 Compact represents the first ruling by a court of this State on this important issue, and, it is submitted, interprets that Compact incorrectly. The Appellate Division's interpretation deviates from the Compact's plain meaning and from well established contract law, as well as from the practice followed by New Jersey and Delaware for the past 86 years. In addition, the interpretation is totally contrary to a 1984 decision of the Delaware Superior Court, which

holds that Delaware and New Jersey are free to pass their own laws in the Bay. Thus, while petitioners have now been told by this State's Appellate Division that they cannot regulate in the Bay unless they do so in concert with Delaware, their counterparts in Delaware have been told by the Delaware Superior Court that Delaware is free to pass its own laws and has no obligation whatsoever to jointly regulate with New Jersey.

Clearly, these issues warrant review by this Court. Although the Appellate Division's decision technically only invalidates New Jersey's menhaden regulations within Delaware Bay, it casts doubt on the validity of all State fisheries regulations within this area and within the Delaware River which is also covered by the Compact, and thus has the potential of rendering the entire State regulatory program for Delaware Bay and River fisheries void. Accordingly, unless certification is granted and the decision reversed, it will have an extremely adverse and far-reaching impact on the conservation, resource allocation and boating safety measures which the existing regulatory program now addresses.

PROCEDURAL HISTORY AND STATEMENT OF FACTS*

This matter involves the validity within Delaware Bay of New Jersey's regulations that govern the taking of menhaden, N.J.A.C. 7:25-1 et seq., and the interpretation of a 1905 Compact between New Jersey and Delaware which the Appellate Division held rendered those regulations invalid in its opinion of April 3, 1991 (Pa1-Pa8). The 1905 Compact was entered into by New Jersey and Delaware to resolve a longstanding lawsuit between the States-- New Jersey v. Delaware, 291 U.S. 361, 377 (1933) -- and is codified at N.J.S.A. 52:28-34 et seq., Del. Code Ann. Title 23 and 34 U.S. Stat. 858 (1907). The provision of the Compact at issue in this matter, N.J.S.A. 52:28-38, states that each state shall appoint specifically named individuals as commissioners to draft uniform fishing laws for Delaware River and Bay; that these commissioners shall report to their respective state legislatures, and that "upon the adoption and passage of said laws so recommended by the respective legislatures of said two states ... said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states." N.J.S.A. 52:28-38. The Appellate Division held that this compact preempted any New Jersey regulations of the Bay, even though New Jersey and Delaware never enacted any uniform provisions as a result of the Commission's recommendations.

* Since the procedural and factual histories of this matter are inextricably intertwined they are combined in this brief.

The 1905 Compact was approved by Congress in 1907, and resulted in the appointment of commissioners by each state pursuant to each state's implementing statute and the drafting of uniform fishing laws by the Commission for Delaware River and Bay. The recommended uniform laws were adopted by New Jersey in 1907, but were not adopted by Delaware. In light of Delaware's failure to take action, in 1911 New Jersey unilaterally passed its own act regulating fishing in the area. Historical Note, N.J.S.A. 52:28-38. Thus, despite passage of the 1905 Compact, New Jersey and Delaware never enacted uniform fishing laws for the Bay or River. Rather, since 1907, each State has exercised its preexisting sovereign right to enact and enforce its own fishing laws for the area within its territorial jurisdiction.

In 1984, the Delaware Superior Court upheld the validity of separate State regulation by Delaware of the Bay. State v. Mick, Parsons, Crow and Willey, 83-05-0092-93, 0094-95, 0081-0091, 0071-0080, 1080, 2080, 3080, 1091, 2091, 3091 (Del. Super. Ct. 1984) (Pa9-Pa11).^{*} The court based its decision on the States' failure since 1907 to effectuate the compact provision authorizing passage of uniform legislation. This decision is, of course, directly contrary to the Appellate Division's decision in this case (Pa1-Pa8).

The menhaden regulations invalidated as to the Delaware Bay by the Appellate Division were originally adopted as an emer-

^{*} This case represents the decisional law of the State of Delaware, and therefore may be the subject of judicial notice by the Court. Evid.R. 9(2).

gency rule in 1984 following a serious conflict between commercial menhaden fishing vessels and recreational anglers. 16 N.J.R. 2171 (1984). The regulations applied to all State waters, including those in Delaware Bay, and were not objected to by the affected industry. In July 1989, the regulations were amended after public notice and comment. 21 N.J.R. 107 (1989); 21 N.J.R. 2035 (1989). The amended regulations were adopted to lessen conflicts between the very large boats and nets used by the menhaden reduction industry and smaller recreational craft, and to afford more protection for juvenile menhaden in near-shore waters by prohibiting fishing for menhaden reduction purposes*within 1.2 miles of shore, or in Delaware, Raritan, and Sandy Hook Bays. Ibid.

In February 1990, respondent Ampro Fisheries, Inc. ("Ampro"), a company engaged in taking menhaden for reduction purposes, filed a lawsuit in the Chancery Division challenging the amended regulations. On motion by the State defendants ("the State"), this suit was subsequently transferred to the Appellate Division. In its attack on the regulations in the Appellate Division, Ampro argued primarily that they violated the Commerce Clause, the Privileges and Immunities Clause, were preempted by federal legislation, were unreasonable and were ultra vires. In addition, Ampro argued that the regulations were invalid in Delaware Bay, based on the 1905 Compact. However, this issue was not extensively briefed by either side, since it was considered to be a subsidiary issue.

On April 3, 1991, the Appellate Division upheld the general validity of the regulations, holding that they did not violate any federal constitutional provision, were not preempted by federal law, were reasonable and were fully authorized by the enabling legislation (Pa5-Pa7). However, the Appellate Division also held, in two terse paragraphs, that the regulations were invalid within Delaware Bay. This holding was based on the premise that the 1905 Compact precluded New Jersey from unilaterally regulating fishing in that area (Pa2; Pa7).

On April 15, 1991, the State asked the Appellate Division to reconsider its ruling invalidating the regulations in Delaware Bay, in part because its further research had disclosed a 1984 Delaware Superior Court decision holding that the 1905 Compact did not require the passage by Delaware and New Jersey of uniform fishing laws in Delaware Bay, State v. Mick, et al., supra (Pa9-Pa11). This motion was denied on May 1, 1991 (Pa12). In addition, on April 17, 1991, the State moved before that court for a stay of its ruling invalidating the regulations in Delaware Bay, arguing that the absence of regulation in the Bay pending appellate review would irreparably harm fisheries resources, the boating public and associated industries, including the tourist industry (Pa14-Pa21). This motion was granted on May 1, 1991 (Pa13).

The State now asks this Court to review the Appellate Division's decision of April 3, 1991 to correct its erroneous-- and largely gratuitous -- interpretation of the 1905 Compact to prevent the far-reaching, adverse effect that interpretation will

have on this State's ability to protect its fisheries resources and other important public interests.

ARGUMENT

THE COURT SHOULD GRANT CERTIFICATION IN THIS MATTER AND REVERSE THE APPELLATE DIVISION'S DECISION RESPECTING THE 1905 COMPACT BETWEEN DELAWARE AND NEW JERSEY BECAUSE THAT DECISION IS CONTRARY TO THE COMPACT'S PLAIN MEANING AND WILL HAVE A FAR-REACHING, ADVERSE EFFECT ON STATE FISHERIES RESOURCES UNLESS IT IS CORRECTED.

The issue before this Court is whether the 1905 Compact between New Jersey and Delaware precludes separate New Jersey regulation of Delaware Bay in the absence of enactment by both states of uniform fishing regulations implementing that Compact. Although the Compact was adopted in 1905, the authorization it provided for the passage of uniform fishing laws for the Delaware Bay and River has never previously been interpreted by any court of this State, much less this Court. The interpretation of the Compact given by the Appellate Division -- some 86 years later -- that joint fishing regulation by New Jersey and Delaware is required in the Delaware Bay and River and that regulations not jointly passed are invalid in that area -- potentially calls into question all of this State's existing fishing laws and regulations as applied in the Delaware Bay and River, as well as any future regulatory actions in that area. Thus, this matter presents a question of general public importance which this Court has not addressed but should resolve, and the petition for certification should be granted. R. 2:12-4.

Moreover, the interpretation of the Compact given by the Appellate Division is patently contrary to the Compact's plain

meaning, basic principles of contracts law applicable to interstate compacts and to a decision of the Delaware Superior Court on the same issue. Thus, in its ruling, the Appellate Division has in a few short paragraphs erroneously obliterated the carefully crafted regulatory scheme that has been used by this State to protect Delaware Bay for the past 86 years. Moreover, the decision effectively tells the State of New Jersey that it cannot exercise independent regulatory authority in Delaware Bay at all, notwithstanding the fact that the State of Delaware has been told by its courts that it retains plenary independent authority over fishing in its territorial waters in the Bay. Surely, the confusion inevitably resulting from the decision below should not be countenanced by this Court.

The error committed by the Appellate Division in interpreting the Compact which this Court should correct is apparent from a straightforward reading of the pertinent Compact provision, N.J.S.A. 52:28-38. That statute provides in pertinent part:

Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two states, which said commissioners for each state respectively shall, within two years from the date of their appointment, report to the Legislature of each of said states the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two states, said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the

said river and bay between said states.
[Emphasis added].

It is clear from this language that in 1905 the states agreed to a mechanism for passing uniform laws, and further agreed that after passage of uniform laws in accordance with that mechanism, previously existing laws would be supplanted. See N.J.S.A. 52:28-39 (providing for the continuation in force of each State's laws "until the enactment of said concurrent legislation as herein provided"). It is equally clear, however, that the uniform scheme authorized by N.J.S.A. 52:28-38 was and has never been implemented. See Historical Note, N.J.S.A. 52:28-38; State v. Mick, et al., supra (Pa9-Pa11). Thus, under the plain language of N.J.S.A. 52:28-38, uniform regulation by Delaware and New Jersey is authorized, but not required, and current non-uniform legislation in the Bay is valid.

In ruling that joint regulation was required, the Appellate Division relied on the fact that the 1905 Compact was approved by Congress (Pa7). However, this conclusion ignores the obvious fact that, in approving the Compact, Congress merely authorized-- but did not require -- uniform regulation by the two states in the Bay. By consenting to the Compact in 1907, the United States Congress did not alter the procedures authorizing passage of uniform legislation, as set forth in N.J.S.A. 52:28-38, into a binding requirement that the Compact states adopt uniform laws, otherwise purport to invalidate the existing non-uniform laws, or otherwise alter the Compact as proposed by the States in their respective statutes in any way. See 34 Stat. 858 (1907). Rather, Congress

simply agreed that the states could enter into the Compact, in light of the fact that federal approval of certain kinds of interstate agreements is required under the Compact Clause of the federal Constitution. U.S. Const. Art. I, §10, cl. 3; see Virginia v. Tenn., 148 U.S. 503, 518-519 (1893).*

In addition, in interpreting the Compact as it did, the Appellate Division also ignored basic legal principles concerning the interpretation of interstate compacts, in particular, and contracts in general. It is well established that an interstate compact is, in essence, a contract between two states and that it must be interpreted as such. Texas v. New Mexico, 482 U.S. 124, 129 (1987). It is also settled that a contract may contain a condition precedent, namely an event which must occur before a duty under the contract becomes presently enforceable. See Williston on Contracts, §666A (3d Ed.); Am.Jur.2d, Contracts, §469; Moorestown Mgmt. Inc. v. Moorestown Bookshop, Inc., 104 N.J. Super. 250, 262 (Ch. Div. 1969).

* Generally speaking, Congressional consent to an interstate Compact is required in instances where the interstate agreement may increase the power of the contracting states at the expense of federal supremacy. See United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 466-71 (1978). Under this standard, it is questionable whether the 1905 Compact even required Congressional approval, given the fact that Delaware Bay and River are State, not federal, waters, and are thus subject to State fisheries regulation and police power. Nevertheless, it can be inferred that in 1905 Delaware and New Jersey desired Congressional approval to facilitate resolution of their longstanding dispute by affording the states the opportunity to pass binding, uniform, laws that neither state could thereafter change without Congressional consent. It can also be inferred that since 1907, neither State has considered it necessary or desirable to avail itself of that opportunity, since it has never been effectuated.

Clearly, under the plain language of N.J.S.A. 52:28-38, the passage of the Commissioner-recommended uniform laws by the Delaware and New Jersey legislatures was a condition precedent which was required to be met before any non-uniform laws became invalid. Cf. Suburban Transfer Svc., Inc. v. Beech Holdings, Inc., 716 F.2d 220, 222 (3d Cir. 1983) (lender was not entitled to reimbursement under contract where loan was not made in the form required by the contract). However, that condition was not met in 1907, and has not been satisfied since. Moreover, the Compact does not, by its terms, require that such joint regulation be undertaken. It is therefore evident that the contemplated uniform legislation authorized by the Compact never became effective, and that the Appellate Division erred in concluding that separate regulation by New Jersey was invalid.

Likewise, the Appellate Division also erred in reasoning that, pursuant to Guarini v. New York, 215 N.J. Super. 426 (Ch. Div.), aff'd o.b. 215 N.J. Super. 293 (App. Div. 1986), cert. den. 484 U.S. 817 (1987), it lacked the authority to "abrogate" the Compact by declaring its provision for uniform regulation in Delaware Bay no longer effective. Guarini involved a border dispute between New Jersey and New York, specifically New Jersey's attempt to enjoin the State of New York from exercising jurisdiction over the island on which the Statue of Liberty is located. That was clearly subject to the original jurisdiction of the United States Supreme Court and was beyond state court jurisdiction. U.S. Const. Art. III, §2. However, this matter does not involve a dispute

with Delaware or an attempt to adjudicate Delaware's rights in New Jersey's courts. Rather, it involves a dispute between this State and a private party over the validity of certain state regulations and over this State's obligations under the 1905 Compact. Compact obligations have, in general, previously been defined and interpreted by this Court and by other courts of this State. See e.g., Eastern Paralyzed Veterans v. Camden, 111 N.J. 389 (1988). Moreover, the Delaware Superior Court has construed the particular Compact provision at issue here, and this Court and other courts of this State have construed other provisions of that Compact. See State v. Federanko, 26 N.J. 119 (1958); Main Associates, Inc. v. B. & R. Enterprises, Inc., 74 N.J. Super. 483 (Ch. Div. 1962); State v. Mick, et als., supra (Pa9-Pall). Finally, New Jersey's position in this matter is completely consistent with that of Delaware, insofar as for the past 86 years neither state has sought to supplant its own laws in Delaware Bay or River with uniform laws. Thus, there is no current dispute between Delaware and New Jersey, but simply a dispute between New Jersey and Amprc.

In light of these circumstances, this Court should grant the petition for certification. Review of the Appellate Division's decision is necessary to examine the nature of this State's regulatory authority in Delaware Bay and River, and to prevent the potentially needless destruction within the Delaware Bay and River of an entire body of laws and regulations adopted to protect fisheries resources and the public dependent on them. Those laws and regulations include N.J.S.A. 23:3-1 (requiring a license to

take fish from fresh water), N.J.S.A. 23:3-46 (requiring a license to take fish by shirred or purse seine, otter or beam trawl), N.J.S.A. 23:3-50 et seq. (requiring a license to take menhaden), and N.J.S.A. 23:5-1 et seq. (establishing fishing seasons and other requirements for the taking of species such as bass, salmon, perch, lobsters and eels). They also include N.J.A.C. 7:25-18.1 et seq. (governing the time and manner for taking bluefish, weakfish, sea bass, kingfish, summer flounder, striped bass and other species).

Both the menhaden regulations invalidated by the Appellate Division and the laws and regulations now subject to invalidation on the basis of the Appellate Division's ruling advance critical conservation and safety interests. Specifically, as set forth in the affidavit of Bruce Halgren submitted to the Appellate Division on April 16, 1991 in support of the State's motion for a stay, the menhaden regulations prevent depletion of both the menhaden resource and of species which feed on or school near menhaden, including bluefish, weakfish, striped bass and black drum, by establishing a menhaden fishing season to prevent overfishing and by prohibiting the bycatch of species besides menhaden (Pa17-Pa18). In addition, the invalidated menhaden regulations protect the oyster beds located in Delaware Bay by preventing the large nets used by the menhaden industry from disrupting those beds, prevent pollution within the Bay from decaying fish and fish parts (Pa18-Pa19), and protect the many small, recreational fishing vessels used in the Bay from

potentially life-threatening conflicts with the very large boats and nets used by the menhaden reduction industry (Pa16-Pa17).

Similarly, the laws and regulations for species besides menhaden, which are now subject to invalidation, promote vital interests. These regulations protect species such as shad, weakfish and striped bass from depletion by establishing the harvest season, size of fish, and size of nets that may be used. They also assure that species such as summer flounder, bluefish, weakfish and striped bass are available to recreational and small-gear commercial fisheries, by prohibiting the use within Delaware Bay of high-efficiency commercial equipment such as otter trawls (Pa19-Pa20). See N.J.A.C. 7:25-18.1 et seq.; N.J.S.A. 23:3-47. Clearly, any inability to protect those species will have serious consequences on the fishing and tourist industries, and on the public as a whole.

Nevertheless, despite the obvious need to prevent over-fishing and pollution, and to promote conservation, resource allocation, and boating safety in Delaware Bay and River, the Appellate Division has now effectively stripped the State of its ability to respond to any of these concerns. This action leaves the State powerless to protect its resources within the Bay and River, and all of the persons and industries dependent on them. It should not be permitted to occur on the basis of the opinion below. Accordingly, the petition for certification should be granted and the decision of the Appellate Division reversed insofar as it invalidated the menhaden regulations affecting Delaware Bay.

CONCLUSION

For all these reasons, the petition for certification should be granted.

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: *Rachel Horowitz*
Rachel Horowitz
Deputy Attorney General

DATED: *May 29, 1991*

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4562-89T5

AMPRO FISHERIES, INC.,

Appellant,

v.

JUDITH YASKIN, COMMISSIONER OF
ENVIRONMENTAL PROTECTION; GEORGE
HOWARD, DIRECTOR, DIVISION OF
FISH, GAME & WILDLIFE; and BRUCE
FREEMAN, ADMINISTRATOR, MARINE
FISHERIES ADMINISTRATION,

Respondents.

ORIGINAL FILED

APR 3 1991

Emilie R. Cox, Esq.
Clerk

Argued February 26, 1991 - Decided APR -3 1991

Before Judges Pressler, Deighan and Baime.

On appeal from the New Jersey Department of
Environmental Protection.

Edward V. Cattell, Jr. argued the cause for
appellant (Clark, Ladner, Fortenbaugh & Young,
attorneys; Mr. Cattell and Douglas K. Walker on
the brief; Mr. Cattell on the reply brief).

Rachel Horowitz, Deputy Attorney General, argued
the cause for respondents (Robert J. Del Tufo,
Attorney General, attorney; Mary C. Jacobson,
Deputy Attorney General, of counsel; Ms. Horowitz
on the brief).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

This appeal challenges the July 1989 action of the Division
of Fish, Game and Wildlife, Department of Environmental Protection,
in amending N.J.A.C. 7:25-22.1 and -22.2 and adopting 7:25-22.3 and

-22.4, the regulations governing Atlantic menhaden fishing in New Jersey's territorial waters. More particularly, Ampro Fisheries, Inc., a foreign corporation whose principal place of business is in Virginia, attacks the validity of those provisions of the regulations which prohibit purse seine fishing for menhaden for purposes other than for bait in the Delaware, Raritan and Sandy Hook Bays and within 1.2 nautical miles of shore. N.J.A.C. 7:25-22.2(a)(2). The regulations bar purse seine fishing of menhaden for bait within .6 nautical miles of shore and permit limited incursion for bait fishing into the bays. N.J.A.C. 7:25-23.3.

Ampro, whose purse seine menhaden fishing operation is affected by the 1.2 mile limit and bay preclusion, contends that the regulations, insofar as they affect the waters of Delaware Bay, are invalid because they contravene the Compact of 1905 by which New Jersey and Delaware agreed to joint regulation of fishing in that body of water. See N.J.S.A. 52:28-34, et seq.; Del. Code Ann. tit. 23; 34 U.S. Stat. 858 (1907). Ampro also argues that the restrictions violate the interstate commerce, privileges and immunities, and supremacy clauses of the United States Constitution and that they are ultra vires and constitute an invalid use of the police power.

We agree with Ampro that the 1905 Compact precludes the power of this state unilaterally to regulate fishing in Delaware Bay. The regulations must consequently be modified in that respect. We reject, however, as without merit, its remaining challenges to the regulations.

Our consideration of the regulations requires a brief contextual reference. Atlantic menhaden are a plentiful Atlantic Ocean fish which migrate in schools from North Carolina to Maine. Although they are neither a sport nor a food fish, they are pursued by commercial fishing operators for two primary purposes: bait and reduction. The reduction process produces fish oil and fish meal, which have significant commercial applications. Typically, vessels engaged in obtaining menhaden for reduction purposes are 165 to 220 feet long, weigh approximately 190 tons, and use purse seines which are 1200 feet long by 90 feet deep. They rely on spotter aircraft to locate schools, which are frequently but not exclusively, within 1.2 nautical miles of shore. Historically, New Jersey has issued about 16 menhaden reduction licenses annually. See N.J.S.A. 23:3-51 and -52. There has been no New Jersey-based company taking menhaden for reduction since the early 1980's. Menhaden fishing for bait is undertaken by much smaller vessels, typically less than 90 feet, which use much smaller nets.

According to the record, there is a long history of social and spacial tensions in the near-coastal Atlantic waters between recreational sport fishing boats and commercial menhaden vessels, which have led to the adoption by most Atlantic coastal states of some sort of commercial-fishing restrictions. New Jersey's first regulation of menhaden fishing was responsive to a serious conflict between 16 menhaden vessels and a group of recreational boaters in 1983. The regulation adopted the following year, N.J.A.C. 7:25 22.1 and -22.2, made no distinction between reduction and bait

fishing, barring all purse seine menhaden fishing within .6 nautical miles of shore and on weekends and holidays. Consideration of the regulatory issue continued, however, and in 1987 the New Jersey Marine Fisheries Council which advises DEP, see N.J.S.A. 23:2B-1, et seq., particularly 23:2B-4, appointed a menhaden subcommittee. It was this subcommittee which conceived of the scheme of separately regulating the bait and reduction operations.

Following considerable debate and discussion involving representatives of all affected groups, public and private, the present regulations were proposed, a public hearing held, and the regulations adopted. DEP's comments accompanying both its proposal and adoption, 21 N.J.R. 107 (1989) and 21 N.J.R. 2035 (1989), respectively, indicate that while the regulations would have a negative impact on the menhaden reduction industry, the same quantity of fish could be caught with additional fishing time. On the other hand, the DEP was of the view that the regulations would have the positive effect of removing "large-scale vessels operating large nets from an already crowded near-shore fishing area" and reducing "spacial conflicts with coastal navigation." 21 N.J.R. 107. DEP also concluded that the regulations, in their totality, including their clean-up provisions, would benefit coastal communities, would provide additional protection for the menhaden stock, especially juvenile menhaden, and would enable predatory fish and birds to feed more easily within the protected zone. Finally DEP anticipated economic benefit for other industries,

including commercial crabbers and lobstermen and suppliers of recreational fishing equipment and bait.

Leaving aside for the moment the Delaware Bay problem, we are satisfied that the regulations are otherwise valid and that Ampro has failed in its heavy burden of overcoming the presumptive validity and reasonableness which attends administrative regulation. See e.g., Bergen Pines Hosp. v. Department of Human Serv., 96 N.J. 456, 477 (1984). Clearly, the regulations are well within the scope of the enabling statutes and consistent with its legislative purpose and policy. See N.J.S.A. 23:2B-1 and particularly N.J.S.A. 23:2B-2 and -6. The ultra vires argument is therefore meritless. Moreover, the disparate treatment of bait and reduction enterprises is based upon rational classification supported by the record as is the extent of the restrictions. Moreover, the record supports the reasonableness of the restriction imposed in terms of the problem to be addressed, the extent of the legislative power to address it, and the need to accommodate the panoply of competing interests. We therefore reject Ampro's "police power" argument as well.

With respect to Ampro's privileges and immunities claim, we note first that as a corporate litigant, that argument is not available to it. Corporations have been consistently held to be excluded from the protections of Art. IV, section 2, clause 1 of the United States Constitution. See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656, 68 L. Ed.2d 514, 522-523 (1981). Beyond that, the regulations are, on

their face, resident-neutral. Any New Jersey resident choosing to enter the menhaden reduction business will be subject to the same restrictions as now apply to the present out-of-state fleet.

Nor do we find merit in the commerce clause argument Ampro advances under Article I, section 8, clause 3 of the United States Constitution. We note that this court has recently considered the effect of that clause on the validity of administrative regulations in In the Matter of Allegations of Violations By Recycling & Salvage Corporation, ___ N.J. Super. ___ (App. Div. 1991) (approved for publication February 21, 1991). We need not retread the ground so carefully covered by Judge Michels. It suffices to repeat the principle that "a legitimate nondiscriminatory exercise of police power is not barred by the commerce clause because it might indirectly affect interstate commerce." (slip opinion at 16-17). This is particularly so where the weight and nature of the state's regulatory concerns outweigh the incidental effect of its regulatory scheme on interstate commerce. See Matter of Fiorillo Bros. of N.J., Inc., 242 N.J. Super. 667, 679 (App. Div. 1990). We are convinced that the regulations here constitute a legitimate, nondiscriminatory exercise of police power substantially advancing a legitimate state interest which, particularly in view of the complex of other coastal states' restrictions, affects interstate commerce only indirectly and incidentally.

Ampro's supremacy argument under Art. VI, section 2, is based on federal navigational laws and federal enrollment and licensing laws which, it claims, preempt state regulation of the activities

of federal licensees in coastal waters. While a total prohibition of menhaden fishing in state waters might well run afoul of Ampro's federally licensed rights, see Douglas v. Seacoast Products, Inc., 431 U.S. 265, 52 L. Ed.2d 304 (1977), the regulations here are not prohibitory but only regulatory, constituting a reasonable and nondiscriminatory conservation and environmental protection scheme not substantially inconsistent with Ampro's federally-accorded rights.

We turn now to the Delaware Bay issue. DEP attempts to justify New Jersey's unilateral action in excluding menhaden reduction fishing in that body of water by arguing that the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws. We must reject that argument. The Compact, as we have noted, was enacted by both states and approved by an act of Congress. Not only is it not subject to unilateral abrogation by either state but it is also clear that a state court lacks "the power to abrogate or modify interstate compacts approved by Congress." Guarini v. State of New York, 215 N.J. Super. 426, 432 (Ch. Div.), aff'd o.b. 215 N.J. Super. 293, 294 (App. Div. 1986), cert. denied 484 U.S. 817, 98 L. Ed.2d 34 (1987). It is hence not within the competence of the judiciary of one of the Compact states to rule that the Compact no longer exists by reason of abandonment. That is a matter for legislative action. It is, however, clear that the Delaware Bay provision of the regulation is entirely severable and that its

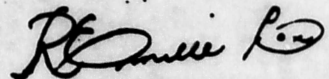
illegality does not taint the validity of the remaining regulatory scheme.

Insofar as N.J.A.C. 7:25-22.1 to -22.4 affects menhaden fishing in the Delaware Bay, the regulation is invalid. In all other respects the regulation is valid and enforceable.

I hereby certify that the foregoing is a true copy of the original on file in my office

- 8 -

8a



Clerk

U

SUPERIOR COURT
OF THE
STATE OF DELAWARE

Claud L. Tease
Judge

Court House
Georgetown, DE 19947

May 2, 1984

Michael J. Malkiewicz, Esq.
P. O. Box 1901
Dover, DE 19903

F. Michael Parkowski, Esq.
Parkowski, Noble & Guerke
P. O. Box 308
Dover, DE 19901

Bonnie M. Benson, Esq.
Parkowski, Noble & Guerke
P. O. Box 308
Dover, DE 19901

RE: State v. Mick, Parsons, Crow and Willey
83-05-0092-93, 0094-95, 0081-0091
0071-0080, 1080, 2080, 3080, 1091,
2091, 3091

Gentlemen and Madam:

The parties do not dispute the fact that in 1905 Delaware and New Jersey entered into an interstate compact relating to disputes over territory, jurisdiction, and the taking and catching of fish in the Delaware River and Bay.

The compact authorized the passage of uniform laws by the states but did not require them to be passed.

In 1907, contrary to the position taken by defendants, the states did not enact uniform laws pursuant to the compact and this lack of uniformity is obvious from an examination of the pertinent provisions of the 1907 legislation.

Consequently, the various laws regulating the taking of fish, enacted by the Delaware General Assembly between 1907 and today, are valid and enforceable.

Michael J. Malkiewicz, Esq.
F. Michael Parkowski, Esq.
Bonnie M. Benson, Esq.

May 2, 1984

Aside from the obvious substantive differences in the content of the 1907 Delaware and New Jersey statutes, historians, individuals, organizations and legal advisors have consistently agreed over the years that the 1907 laws were not uniform in many important respects.

Since the provisions of Article IV of the compact, authorizing the states to pass uniform laws, were never put into effect, the states have been free to enact their own legislation regulating the fishing in the bay and ocean.

An excellent in-depth review of this question is found in the State's answering brief filed on September 7, 1983, pp. 16-35.

Defendant's argument relating to the 1915 Delaware Code "revisions" is without merit because the changes were simply proposed, and New Jersey had then, and has since had, its own statutes dealing with the taking of fish, different in substance from Delaware's.

Because no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact.

* * * * *

Defendants challenge the pertinent statutes on the ground of vagueness and the consequent failure to give notice as to what type of conduct is prohibited. Such challenges must be examined in the light of the facts of the particular case at hand. U.S. v. Maguire, 419 U.S. 544 (1975); Opshur v. State, Del. Supr., 420 A.2d 165 (1980). (There are no First Amendment rights raised by defendants.)

It is abundantly clear from the facts of record in these cases that defendants knew what type of conduct would be considered unlawful under 7 Del. C. §910 and 936.

* * * * *

I find no inconsistencies in Chapter 9 of 7 Del. C. sufficient to support a constitutional attack on any of the sections of that chapter. When read and analyzed together they are reasonably clear and consistent.

Page 3

Michael J. Malkiewicz, Esq.
 F. Michael Parkowski, Esq.
 Bonnie M. Benson, Esq.

May 2, 1984

A comprehensive resources management plan, whether put into effect by statute or regulation enacted pursuant to statute, is necessarily suspect and subject by its very nature to arguments relating to vagueness and inconsistency; but the administrators and the courts must be slow to throw them aside because of the importance of resource management to society, absent a clear showing of inconsistency.

* * * * *

The question raised by the parties regarding the duty of the Delaware General Assembly to modernize the fin fishing laws has been recently mooted. The duty of the courts, in most cases, is to interpret the law without regard to whether it comports with good public policy. And if a statute is antiquated or may produce a hardship to a special class of persons or may lead to an unwise result, it is for the legislative branch of government to act, not the judicial branch.

* * * * *

Defendants' non-enforcement argument has previously been disposed of by the Delaware Court of Chancery in Delaware Watermen's Assoc. v. DNREC, et al., C.A. 789 (1983), Kent County, Brown, Chancellor.

For the reasons set out herein the defendants' motions to dismiss must be, and they are hereby, denied.

Sincerely yours,


 Claud L. Tease

CLT:llf
 cc: Prothonotary
 Case Scheduling Office

REC'D MAY - 11 1984

FILED

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1A-4562-89T5

ORDER ON MOTION

AMPRO FISHERIES INC

vs.

JUDITH YASKIN, COMMISSIONER
OF ENVIRONMENTAL PROTECTION, et al

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
FILED DOCKET NO. A-4562-89T5
APPELLATE DIVISION MOTION NO. M-4400-90
BEFORE PART: E
MAY 3 1991 JUDGE(S): PRESSLER
DEIGHAN
BAIME

R. M. Lox
Clerk

MOTION FILED: APRIL 15 1991
ANSWER(S) FILED: APRIL 24 1991
BY: AMPRO FISHERIES INC
BY: _____
BY: _____
BY: _____
SUBMITTED TO COURT: APRIL 29 1991

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS

1st DAY OF May, 1991, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT/RESPONDENT
FOR RECONSIDERATION AND TO EXTEND
TIME TO FILE MOTION BRIEF IN SUPPORT

GRANTED	DENIED	OTHER
	X	

SUPPLEMENTAL:

RECORDED

MAY 11 1991

I hereby certify that the foregoing is a true copy of the original on file in my office.
R. M. Lox
Clerk

REC'D
APPELLATE DIVISION

MAY 3 1991

R. M. Lox
Clerk

FOR THE COURT:

Sylvia B. Pressler

SYLVIA B. PRESSLER

tgc

A-4562-89T5

ORDER ON MOTION

7

AMPRO FISHERIES INC

vs.

JUDITH YASKIN, COMMISSIONER
OF ENVIRONMENTAL PROTECTION, et al

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4562-89T5
MOTION NO. M-4399-90
CASE PART: E
JUDGE(S): PRESSLER
DEICHAN
BAIME

FILED
APPELLATE DIVISION

MAY 8 1991

R. Pressler

MOTION FILED: APRIL 18, 1991

ANSWER(S) FILED: APRIL 26, 1991

BY: AMPRO FISHERIES INC

BY:

BY:

BY:

SUBMITTED TO COURT: APRIL 29, 1991

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS

1st DAY OF May, 1991, HEREBY ORDERED AS FOLLOWS:

MOTION BY ~~AMPRO FISHERIES INC~~/RESPONDENT
FOR STAY OF APPELLATE DIVISION
JUDGMENT PENDING PETITION FOR
CERTIFICATION TO THE SUPREME COURT

GRANTED DENIED OTHER

X		
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SUPPLEMENTAL:

RECEIVED

MAY 8 1991

ASSISTANT CLERK OF COURT

REC'D
APPELLATE DIVISION

MAY 8 1991

R. Pressler
Clerk

I hereby certify that this foregoing is a true copy of the original on file in my office.

R. Pressler
Clerk

FOR THE COURT:

Sylvia B. Pressler

SYLVIA B. PRESSLER

P.S.A.C.

tgc

T-23
9/88

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents
401 East State Street
CN 402
Trenton, New Jersey 08625
(609) 292-4808

By: Howard Geduldig
Deputy Attorney General

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4562-89T5

AMPRO FISHERIES, INC.,)

Appellant,)

v.)

JUDITH YASKIN, COMMISSIONER OF)
ENVIRONMENTAL PROTECTION; GEORGE)
HOWARD, DIRECTOR, DIVISION OF)
FISH, GAME & WILDLIFE; and BRUCE)
FREEMAN, ADMINISTRATOR, MARINE)
FISHERIES ADMINISTRATION,)

Respondents.)

Civil Action

AFFIDAVIT OF
BRUCE HALGREN

STATE OF NEW JERSEY)

COUNTY OF MERCER)

) ss.

BRUCE HALGREN, of full age, being duly sworn upon his oath deposes
and says:

1. I am the Administrator of the Marine Fisheries Administration in
the Division of Fish, Game and Wildlife, Department of Environmental
Protection (DEP) where I have worked for the past 19 years. In that capacity,
I supervise the operations of the Bureau of Marine Fisheries and the Bureau of

Shellfisheries and am directly involved in New Jersey's marine fisheries program development and the administrative rulemaking process for implementing that program. I was involved in the drafting of N.J.A.C. 7:25-22 et seq., the administrative rules governing the menhaden fishery in New Jersey, and amendments thereto, as well as many, if not most, of the other rules affecting marine fisheries in New Jersey. I am thoroughly familiar with the promulgation of these administrative rules and am also familiar with the menhaden, weakfish, summer flounder, striped bass, bluefish, black drum and other marine fisheries, and the industries dependent thereupon, in and about the Delaware Bay.

2. N.J.A.C. 7:25-22.2 was amended in July 1989 primarily to advance boating safety, by lessening the likelihood that small recreational fishing boats would come into conflict with large menhaden purse seine vessels and their very large nets and secondarily to afford additional protection to juvenile menhaden in order to further the recruitment necessary to sustain the species and those sport fishes predatory upon menhaden.

3. It is my understanding that the court's decision in Ampro Fisheries v. Judith Yaskin, Commissioner of Environmental Protection, et al., Docket No. A-4562-89T5 (April 3, 1991), holds that N.J.A.C. 7:25-22 et seq., the administrative rules governing the menhaden fishery in all New Jersey waters, are invalid in the Delaware Bay. It is my further understanding that the decision also calls into question the validity in the Delaware Bay of many other New Jersey fisheries statutes and regulations, including those governing species besides menhaden.

4. Under the current regulatory scheme, persons wishing to take menhaden with a purse seine for reduction or for bait in any New Jersey waters, including Delaware Bay, must first obtain a license. N.J.S.A.

23:3-51. In addition, under the regulations invalidated by the court in this matter, vessels fishing with a purse seine for menhaden for reduction purposes were restricted to the Atlantic Ocean, that is they were not allowed in the Delaware Bay. N.J.A.C. 7:25-22.2(a)2. Invalidating New Jersey's laws governing the menhaden fishery in the Delaware Bay will result in an unrestricted menhaden fishery in those waters of the Delaware Bay under New Jersey's jurisdiction. Under the circumstances, large vessels using purse seines to harvest menhaden for the fish meal reduction industry will be unrestricted in the New Jersey waters of the Delaware Bay as to the number of vessels, net size allowed, season allowed for harvest, bycatch of other marine fisheries species, area within which to conduct that harvest, or discharges of dead fish, fish parts or garbage of any kind.

5. In my professional opinion, the effects of an unrestricted menhaden fishery of the type described above will likely be devastating to the menhaden resource in the Delaware Bay, as well as to other valuable commercial and recreational fisheries resources located in the Delaware Bay, will have an adverse effect upon the tourist industry and will cause troublesome aesthetic and health problems in and about the Delaware Bay for the following reasons:

a. Because the Delaware Bay is popular with sportfishermen, without the prohibition against the use of large-size menhaden purse seine vessels in the Delaware Bay, potentially life-endangering spacial conflicts will arise between the large vessels and the much smaller vessels commonly used by recreational fishermen. The purse seine vessels are typically 150 to 200 feet long and frequently use nets that measure 1/2 mile in width. Further, with the end of the weekend and holiday

prohibition against taking menhaden for bait purposes in the Delaware Bay, spacial conflicts between those harvesting menhaden for bait purposes and sport fishermen will be aggravated.

b. Without the seasonal closure of the menhaden fishery, from the third Friday in October to the third Monday in May, as provided in N.J.A.C. 7:25-22.1, the menhaden resource in the Delaware Bay will be subject to depletion from uncontrolled fishing and the State of New Jersey will no longer be in conformity with the Atlantic States Marine Fisheries Commission's coast-wide plan for menhaden, which is designed in part to prevent such resource depletion. In addition, a further consequence of such depletion will be a reduction in available forage for such sport fish as bluefish, weakfish and striped bass which feed upon menhaden. This reduction could adversely affect the local availability of these high-value sportfish with grave consequences for those dependent upon them.

c. Without the prohibition against possession of any fish other than menhaden on a purse seine vessel harvesting menhaden, as provided in N.J.A.C. 7:25-22.2(a)10 and 7:25-22.3(b)8, a significant bycatch of fish having a much greater value than menhaden or a directed fishery towards such species will occur. Such pelagic schooling fish as weakfish, black drum and bluefish are especially vulnerable to overharvest with purse seines during their spawning runs when stocks are congregated or when they school near the

surface and are visible from spotter airplanes. The effect of such catches, unrestricted as to minimum size limits, upon these high-value fisheries and to persons that depend upon them would be devastating.

d. Without the prohibition in the Delaware Bay against the large drifting purse seines commonly used by the large fish meal reduction vessels, the disruption of New Jersey's statutory oyster ground leasing program would be likely to occur. This program is governed by N.J.S.A. 50:1-23 et seq. and N.J.A.C. 7:25A-1 et seq. However, if large, heavy seines are dragged across the substrate upon which the oyster set, there is the potential for irreparable harm to the oyster seed beds and growing grounds. Further, such dragging will damage the markers delineating the leaseholds that are necessary for oystermen to know where to plant and harvest oysters, as well as for the State's enforcement personnel to enforce against poaching.

e. Without, as applied to the Delaware Bay, the prohibition against all pump outlets (except those for normal engine cooling water) discharging below the vessel's water line, the requirement that all discharge from fish pumps be treated with a United States Coast Guard-approved anti-foaming agent, the requirement when taking menhaden for bait purposes with a purse seine that fish be removed from the seines by brailing or dip netting only, the prohibition against releasing from the vessel or its nets

any refuse, litter or garbage of any kind, or any quantity of dead fish, and the requirement that the licensee clean up any such discharge or release, as provided in N.J.A.C. 7:25-22.2(a)4-7 and 7:25-22.3(b)7,9 and 10, pollution and the public perception of pollution from menhaden gurry, scales, slime, blood and decaying fish and fish parts is highly likely. The potential health problems and aesthetic damage to the shore communities with the concomitant economic loss to the State's tourist industry, as well as the potential for waste of the menhaden resource without the incentive for recovery from spills from the seines, is immeasurable.

6. Invalidating New Jersey's laws governing marine fisheries other than the menhaden fishery in the Delaware Bay will result in those marine fisheries being unregulated in those waters. Under these circumstances, marine fisheries vessels engaged in harvesting operations will be unrestricted in the Delaware Bay as to allowable seasons, minimum fish size limits, gear specification, and annual quota.

7. In my professional opinion, the effects of an absence of regulation of fisheries other than menhaden in the Delaware Bay will be devastating to the other valuable commercial and recreational fisheries resources located in the Delaware Bay for the reasons listed above in paragraph 5 as well as for the following reasons:

a. Without the various gill net rules limiting the harvest season, the minimum size of fish and the minimum size of gill net mesh, as set forth in N.J.A.C. 7:25-18.1 at seq., additional pressure will be placed on shad, weakfish and striped bass. Such pressure is likely to devastate these already-threatened stocks.

b. Without the prohibition against the use of such high-efficiency commercial equipment in the Delaware Bay as otter trawls, as provided in N.J.S.A. 23:3-47, it is likely that the equitable allocation between recreational and commercial fisherman of fisheries resources such as summer flounder, bluefish, weakfish and striped bass that has been in force for years in the Delaware Bay will be eliminated. These high-efficiency gears have the capacity to quickly reduce the availability of these resources to the point of virtually eliminating the recreational and small-gear commercial fisheries from the area with disastrous economic consequences to local communities and individuals.

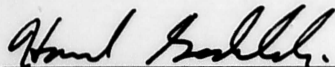
c. Should otter trawls enter the Delaware Bay, important bottom-dwelling biotic communities will be altered or destroyed from the dragging of heavy steel and wooden otter trawl doors and steel chains across the bay floor.

d. Without the various rules affecting participation in the striped bass fishery, as set forth in N.J.A.C. 7:25-18.1(e)-(1), the State of New Jersey will be found to be out of compliance with the Atlantic States Marine Fisheries Commission striped bass plan that incorporates the mandatory coast-wide plan for the rehabilitation of that fishery. Under the federal regulatory scheme, a finding of non-compliance with that plan will result in a mandatory federally-imposed state-wide moratorium on the taking of striped bass until compliance is again achieved.

Institution of a moratorium would result in major reductions in sport fishing activity with resultant adverse economic impacts to sport fishing support industries throughout the State.


Bruce Halgren

Sworn and subscribed before me
this 16th day of April 1991.


Howard Geduldig
Attorney-at-Law
State of New Jersey

~~01158 OLP 1990~~

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 33,704

RECEIVED
JUN 12 1991

SUPREME COURT
OF NEW JERSEY

AMPRO FISHERIES, INC.,)

Appellant-Respondent, and)
Cross Petitioner)

vs.)

JUDITH YASKIN, COMMISSIONER)
OF ENVIRONMENTAL PROTECTION;)
GEORGE HOWARD, DIRECTOR)
DIVISION OF FISH, GAME AND)
WILDLIFE; and BRUCE FREEMAN)
ADMINISTRATOR, MARINE)
FISHERIES ADMINISTRATION)

Respondents-Petitioners.)

CIVIL ACTION

On Petition for Certification
to the Superior Court of New
Jersey, Appellate Division

Sat Below: Pressler, Deighan,
and Baime, J.J.A.D.

CROSS PETITION FOR CERTIFICATION, RESPONSE AND APPENDIX

J EDWARD V. CATTELL, JR., ESQUIRE
CLARK, LADNER, FORTENBAUGH & YOUNG
Attorney for Appellant-Respondent, and
Cross Petitioner
One Centennial Square
Suite 104
Haddonfield, New Jersey 08033
(609) 429-5351

attn

EDWARD V. CATTELL, ESQUIRE
On the Brief

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PRELIMINARY STATEMENT

This cross-petition seeks review of an Appellate Division decision that rejected Ampro Fisheries, Inc's ("Ampro") constitutional and statutory challenge of the Department of Environmental Protection ("DEP") regulations governing the menhaden fishery in New Jersey.

Ampro has also filed a Notice of Appeal, pursuant to Rule 2:2-1(a)(1) as to the substantial constitutional issues decided by the Appellate Division, none of which have previously been the subject of conclusive judicial determination. As is required by Rule 2:12-9, all issues to be raised on appeal are stated herein, in Points I and II.

This cross-petition also addresses, briefly, a reply to the issue presented by the State in its petition for certification.

The Appellate Division held that the menhaden fishing regulations adopted by the DEP, which prohibit menhaden fishing within 1.2 miles of the Atlantic Coast and in Delaware, Raritan and Sandy Hook Bays (N.J.A.C. 7:25-22.2(a)(2)), do not violate the Supremacy and Commerce Clauses of the United States Constitution; and, do not violate Article I of the New Jersey Constitution, being reasonably related to a valid use of the state's police power. Those issues are the subject of the appeal and this petition for certification. The Appellate Division also held that the regulations were not beyond the authority of the DEP under the applicable statute. Review of this issue is sought solely by petition for certification. The appellate court did find that the regulations violated the provisions of the 1905 Compact between New Jersey and Delaware, which requires joint regulation of fisheries in the river and bay. The State seeks review of that portion of the decision by petition for certification.

The Appellate Division has held that there is no conflict between the State's regulation of the menhaden fishery, which, in this case amounts to a virtual exclusion of the menhaden vessels from access to the resource in New Jersey, and the federally issued fishing licenses held by the vessels involved in the fishery, which grant to those vessels the right to fish. The Appellate Division has held that the state's regulation is proper even though motivated by a desire to exclude out of state vessels from access to the resource, while carefully crafting the regulation to assure even greater access by New Jersey fishing vessels. The Appellate Division has held that the state can regulate to exclude menhaden vessels from a 1.2 mile wide zone to avoid collisions between the large menhaden vessels and smaller recreational fishing vessels, despite the fact that avoidance of collisions and navigation on the waters in question is already controlled by federal statute.

The Appellate Division's decisions on these questions are in direct conflict with the applicable decisions of the United States Supreme Court and other federal courts.

The Appellate Division's decision that the state's regulations do not conflict with the requirement of the New Jersey Constitution that the state's use of the police power be reasonably related to and not extended beyond the public need is in direct conflict with decisions of this Court.

Unless the decision of the Appellate Division on these issues is reviewed and reversed, the menhaden fishing industry will be denied access to a significant portion of the resource which, in the opinion of the New Jersey Department of Environmental Protection itself, "will have an effect of greatly reducing the catch or eliminating the

commercial catch entirely." (Pa 115).¹ This result will cause irreparable harm to the menhaden reduction industry. This, in turn, will have substantial adverse impact on the significant health benefits to human beings that are derived from the menhaden resource. (Pa 158-168). On the other hand, other than the State's attempt to supplement the record in this case after the Appellate Division decision with its self-serving affidavit, there is not one piece of evidence in the record of the proceedings before the agency to support its contention that there is a threat to either the menhaden bio-mass, or the recreational fishery, or the tourist industry from the invalidation of these regulations. The resource, the recreational fishermen, and the tourist industry have all grown at a substantial rate over the past years without these restrictive and oppressive regulations.

PROCEDURAL HISTORY AND STATEMENT OF FACTS²

In 1983, an incident occurred involving 16 menhaden vessels and a number of recreational fishing vessels near Manasquan Inlet. As a result, recreational fishing interests pushed for a 2 mile exclusionary zone. A compromise was reached between representatives of the menhaden industry and the recreational fishermen pursuant to which the state adopted the regulations which were the predecessor to the regulations currently in dispute. Those regulations excluded the menhaden industry from a .6 mile wide zone from the beach out to sea. The menhaden industry did not object to those regulations because they were the result of a negotiated compromise.

¹ The appendix reference Pa is to Ampro's appendix in the court below.

² The procedural and factual histories of this matter are indistinguishable and are combined in this brief.

In 1989, the DEP promulgated the regulations at issue herein. Those regulations exclude menhaden vessels fishing for commercial reduction purposes, all of which happen to be out of state vessels, from a 1.2 mile zone. Smaller vessels, fishing for bait, desired by the New Jersey recreational fishermen, and all of which are New Jersey vessels, are not only allowed to continue fishing to within .6 miles of the beach, but are allowed in even closer, to .3 miles, in Raritan and Sandy Hook bays.

The regulations took effect on July 17, 1989. In February, 1990 Ampro brought suit challenging the regulations in the Chancery Division, believing the record to be inadequate to permit determination of the issues. The Chancery Division disagreed and the case was transferred to the Appellate Division.³ Ampro challenged the regulations on the basis of the questions which are before the Court in this petition, and as violative of the provisions of the New Jersey/Delaware Compact of 1905, regarding the regulations in Delaware Bay. That issue was fully briefed and argued. It was never considered to be a "subsidiary issue", as is contended by the State.⁴

On April 3, 1991, the Appellate Division rendered its decision, upholding the regulations in the Atlantic Ocean as to the constitutional and statutory challenges, and holding them invalid in Delaware Bay as violative of the provisions of the 1905 Compact between New Jersey and Delaware.

³ Although the State opposed having this matter heard in the Chancery Division, arguing that the record was complete, the State has twice filed supplemental affidavits in an attempt to add facts to the record that it needed to support its case.

⁴ State's Petition for Certification, p. 5.

Subsequent motions were filed by the State, seeking reconsideration of the ruling invalidating the regulations in Delaware Bay, and a stay of the effect of the ruling pending a Petition for Certification to this Court. The former motion was denied and the latter granted on May 1, 1991.

The State's Notice of Petition for Certification was filed on May 15, 1991, and Ampro's Cross-Petition and Notice of Appeal were filed on May 24, 1991.

Ampro now asks this Court to review the decision of the Appellate Division upholding the regulations because that decision is inconsistent with and contrary to the controlling decisions of the United States Supreme Court, and of this Court, and with the policy of the State of New Jersey as stated in the Marine Fisheries Management and Commercial Fisheries Act, N.J.S.A. 23:2B-1 et seq.

ARGUMENT

- I. **THE COURT SHOULD GRANT CERTIFICATION IN THIS MATTER AND REVERSE THE APPELLATE DIVISION'S DECISION THAT N.J.A.C. 7.25-22.2(a)(2) DOES NOT VIOLATE THE SUPREMACY AND COMMERCE CLAUSES OF THE UNITED STATES CONSTITUTION**

The challenged regulation accomplishes one purpose- it ejects the commercial menhaden fleet, which fishes for reduction purposes, from a 1.2 mile wide zone from the beach out to sea. It does this to eliminate "spacial conflicts", which is the DEP euphemism for collisions at sea. In the administrative record there is no evidence to support any other purpose or goal. Two Marine Fisheries Councilmen stated as much at the time of the vote on the regulations at the Marine Fisheries Council meeting on

April 13, 1989 (Pa 54, statements of Councilmen Giberson and Lick). In the comments to the adoption of the regulations, the DEP first asserted a goal of protecting juvenile menhaden, however, its comments emphasized that the "primary purpose" and the "major purpose" of the regulations was the elimination of "spacial" conflicts. (Pa 12).

The Appellate Division held that the regulations did not constitute "a total prohibition of menhaden fishing in state waters..." (Ra 7)⁵, and that, therefore, the regulations were "only regulatory, constituting a reasonable and nondiscriminatory conservation and environmental scheme..." (Ra 7). Ampro challenged the regulations as invalid under the United States Constitution because the regulations are pre-empted by federal statutes which comprehensively regulate the navigation of vessels to avoid collisions. Specifically, the federal navigation laws, known to mariners as the "Rules of the Road", impose various burdens on vessels with regard to their navigation depending on their direction of travel, relative location vis-a-vis each other, and their occupation. (33 U.S.C. foll. §1602, Rule 18, and Rule 3(d); and, 33 U.S.C. §2018, and §2003(d)). New Jersey impermissibly alters the law by creating a superior right of navigation in the recreational fishery that conflicts with federal law. In doing so, New Jersey excludes federally licensed fishing vessels from navigable waters of the United States which those vessels are authorized and licensed to use in the pursuit of menhaden by the United States government. The appellate panel did not even address these important issues, which are supported by a substantial body of United States Supreme Court precedent cited in Ampro's brief to the Appellate Division. Rather, the panel stated only that they found the regulations to be a "reasonable and non-discriminatory conservation and

⁵ "Ra" refers to Ampro's appendix attached to this brief.

environmental protection scheme." (Ra 7). Since the State itself repeatedly stated, in the regulatory process, that the purpose of the regulations was to prevent collisions, the Appellate Division's holding must be regarded as erroneous and in disregard of the important Constitutional rights at issue, or as having overlooked the import of the argument presented.

Further, the statement of Assemblyman Villane, who introduced the Assembly Bill that prompted these regulations, at the instance of the same recreational fishermen who proposed and pursued these regulations to adoption, indicated the true purpose of these regulations. As reported to the Marine Fisheries Council, by Enforcement Chief Robert Winkel, Assemblyman Villane proposed that the menhaden reduction fleet be pushed to 2.0 miles offshore since there were no longer any New Jersey vessels fishing in that fishery, therefore, no New Jersey vessel would be hurt by that action. (Pa 16-17).⁶ In a long line of cases the Supreme Court has held that one state may not interfere with the rights conferred on a vessel by virtue of its federally issued license. Douglas v. Seacoast Products, Inc., 431 U.S. 265, (1977), Gibbons v. Ogden, 22 U.S. 1 (1824). Although a state may adopt a reasonable conservation law, which incidentally infringes on federally granted rights, there is no such conservation plan here. The appellate panel did not address this conflict, nor assess the evidence before the court, but only announced its holding that the regulation at issue, which has as its goal excluding non-

⁶ The assault continues despite the 1.2 mile regulation. In the current legislature Bills S-2674 and A-3430 are pending. They would extend the 1.2 mile ban to 2.0 miles. At the public hearing on A-3430, Senator Joseph A. Palia, the sponsor of S-2674 stated: "I think it is about time that we started to protect our fishermen in this area, so they will not be raided by people coming up from Virginia and the southern part of our country." Public Hearing before Assembly Conservation and Natural Resources Committee, Assembly Bill No. 3430, May 23, 1990, Belmar, New Jersey.

New Jersey fishing vessels from access to the fishery resource in New Jersey, is a "reasonable and non-discriminatory conservation plan".

The challenged regulation does not have merely an indirect effect on interstate commerce, as the Appellate Division has suggested (Ra 6). Rather, the effect of the regulation is to substantially eliminate the ability of the menhaden vessels to harvest menhaden while they are moving along the coast of New Jersey, as has been admitted by the DEP (Pa 115). Although the state suggests that Ampro could still harvest as many fish by committing more vessels to the fishery, or fishing more days, this argument is illogical for two reasons. First, it ignores the fact that this species has historically remained close along the shore. In 1988, 90% of the harvest was within the 1.2 mile zone and Delaware Bay (Pa 223). Second, it is totally inconsistent with the goal of avoiding "spatial conflict" to suggest that the fishing industry should devote more vessels for more days to the coast of New Jersey. Ampro submits that the real goal of the New Jersey regulation is to eliminate the menhaden fishery entirely from New Jersey waters, since the fishery will no longer be viable in New Jersey waters and the vessels will have to be deployed in the waters of other states which are more hospitable. The fact that some of the other coastal states are even more restrictive than New Jersey merely highlights the extent of the problem. The economic compulsion to restrict fishing effort to an ever smaller area of the coast, with the inevitable result of a diminishing catch, will mean the ruin of this fishery. This is the significant impact on interstate commerce addressed in this appeal, which the Appellate Division has addressed only cursorily.

The court below also held that the regulation at issue was facially neutral, applying equally to ban a New Jersey fishing vessel from the fishery within 1.2 miles as it did a Virginia or any other vessel. The appellate panel, however, ignored the teaching

of the United States Supreme Court that when there is discrimination in practical effect, as there is here, then the court is commanded by the Constitution to search for a discriminatory motive. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951). It is not merely coincidental that this regulation, which purportedly bans all large menhaden vessels from the near shore waters, applies only to out of state vessels. New Jersey waited until it had no more menhaden reduction vessels before it banned them from the 1.2 mile zone. The statements of Assemblyman Villane, and the recorded statements of Senator Palia, regarding the bill currently before the New Jersey Senate, indicate that the precise and specific intent of the state is to eliminate the out of state vessels.⁷ This issue was recently addressed in great detail by the United States District Court for the Eastern District of New York, in a case strikingly similar to this one, which, ironically was brought by a New Jersey fishing trawler challenging the New York law which banned fishing by large trawlers in New York waters. The New Jersey vessel won; the New York law was held unconstitutional. Atlantic Prince, Ltd. v. Jorling, 710 F. Supp. 893 (E.D.N.Y. 1989). The Appellate Division ignored its duty to search for the discriminatory motive in this case. Had it performed its duty, the search would have been a short one, the evidence of the discriminatory intent being found in the record

⁷ See also, the comments of recreational fisherman, Mr. Scheskowsky, of the Jersey Coast Anglers, speaking at the May 10, 1988 meeting of the Marine Fisheries Council. Mr. Scheskowsky did not understand why there was any need for delay, when the Council committee had already taken into account the protection needed for New Jersey "bunker" boats, while the large menhaden boats were from out-of-state. (Pa 34) Mr. Scheskowsky also noted that the large out-of-state boats contribute nothing to New Jersey other than the fees they pay. This point was apparently not lost on Councilman Carlsen, who later commented that the regulations might be changed if the menhaden companies were to create capital investment in New Jersey. (Pa 57-58) It is clear that this regulation exists for no reason other than to deny access to the vast majority of the resource to the "foreign" boats from Virginia.

before the court in the statements of Assemblyman Villane and Senator Palia. This Court should address this issue directly, and not merely gloss over it as did the Appellate Division.

This Court should allow an appeal on this issue and grant certification in this case and give effect to the decisions of the United States Supreme Court, reversing the Appellate Division and enjoining the present infringement on the federal constitutional rights of Ampro, and others similarly situated.

II. THE COURT SHOULD GRANT CERTIFICATION IN THIS MATTER AND REVERSE THE APPELLATE DIVISION'S DECISION THAT N.J.A.C. 7:25-22.2(A)(2) DOES NOT VIOLATE AMPRO'S RIGHTS UNDER ARTICLE I OF THE NEW JERSEY CONSTITUTION

Ampro challenged the regulation as violative of its rights under the New Jersey Constitution, Article I. This Court and other New Jersey courts have held that the state's exercise of its police power is not unlimited. Southland Corporation v. Edison Township, 217 N.J. Super. 158, (Law Div. 1986), aff'd, 220 N.J. Super. 294 (App. Div. 1987). Article I of the Constitution guarantees the right to pursue lawful vocations. Id. at 173. Protection under the New Jersey Constitution may be even broader than under the United States Constitution. Right to Choose v. Byrne, 91 N.J. 287 (1982).

One of the principles guiding the state's exercise of the police power, is that "the exertion of that authority must not go beyond the public need; there cannot be unnecessary and excessive restrictions upon the use of private property or the pursuit of useful activities;...". Katobimar Realty Co. v. Webster, 20 N.J. 114, 122-123 (1955).

In this case the DEP ignored a variety of suggestions preferred by the industry, each of which was designed to mitigate the perceived problem in a way which was substantially less restrictive than the total ban proposed, (Pa 12, 219-230). The DEP refused to consider whether a less restrictive method of accomodating the various competing interests was possible (Pa 12). Ampro argued to the Appellate Division that this action of the DEP violated Ampro's rights as an excessive use of the police power, far in excess of the public need. The Appellate Division failed to even address the issue in its opinion.

This Court should allow an appeal on this issue and grant certification of this matter and address the important issues arising under the New Jersey Constitution, which were ignored by the court below.

III. THE COURT SHOULD GRANT CERTIFICATION IN THIS MATTER AND REVERSE THE APPELLATE DIVISION'S DECISION THAT THE DEP'S ACTION IN ADOPTING N.J.A.C. 7:25-22.2(a)(2) DID NOT EXCEED THE POWER DELEGATED TO THE DEP IN THE ENABLING LEGISLATION, N.J.S.A. 23:2B-1

Ampro challenged the regulation as being beyond the scope of the authority granted to the DEP in the Marine Fisheries Management and Commercial Fisheries Act, N.J.S.A. 23:2B-1 et seq. Specifically, that Act provides a statement of state policy. N.J.S.A. 23:2B-2(b). That policy requires the state to manage fishery resources to maintain and enhance commercial use where a species is the subject of commercial use. N.J.S.A. 23:2B-2(b)(1)(c). The DEP is charged to use the best scientific information available in doing so. N.J.S.A. 23:2B-2(b)(1)(d).

There is no scientific evidence which supports this regulation, (Pa 54, statements of Councilmen Giberson and Lick). Menhaden has always been a commercial species and should be managed to enhance the commercial fishery. This regulation will destroy the commercial fishery (Pa 115).

There is nothing in the Act which authorizes the management of fisheries resources in order to regulate navigation on the navigable waters of the United States.

With this regulation, the state has (a) regulated a commercial fishery without scientific justification; (b) regulated a commercial fishery for the benefit of recreational fishermen, to the exclusion of commercial fishermen; and (c) regulated a commercial fishery for the purpose of regulating the navigation of vessels on navigable waters so as to avoid collisions at sea. Each of these purposes is contrary to and/or beyond the authority of the Act.

The Appellate Division, however, in its opinion, did not address any of these significant issues, other than to state, "Clearly, the regulations are well within the scope of the enabling statutes and consistent with its legislative purpose and policy." (Ra 5). It is submitted that the Appellate Division is wrong and that there is no support, anywhere in the enabling legislation, for these regulations. The Court should grant certification of this question and correct the error of the court below which will work a substantial denial of justice to the legitimate interests of the menhaden industry in general and Ampro in particular.

**IV. THE DECISION OF THE APPELLATE DIVISION
REGARDING THE REQUIREMENT OF JOINT REGULATION**

**OF FISHERIES IN DELAWARE BAY IS CORRECT AND
SHOULD BE AFFIRMED**

The State has filed a Petition for Certification on the question of whether the Compact of 1905 between New Jersey and Delaware, requiring that fisheries in Delaware Bay be jointly regulated, means what it says. The Appellate Division has held that it does.

The State, in its brief, states that this issue was not "extensively briefed by either side, since it was considered to be a subsidiary issue". (Brief, p.5). Ampro did not consider the issue to be subsidiary, but researched and briefed the issue fully. Although it is true that the opinion of the court below discussed this issue in only two paragraphs, that part of the decision comprised two-fifths of the entire opinion, after the recitation of the history of the regulations.

The only support for the State's challenge to the Appellate Division's decision on this issue is an opinion from the Delaware Superior Court which was not even deemed significant enough to publish.

The State suggests in its brief that it is necessary to reverse the Appellate Division decision because otherwise all the fishing regulations pertaining to the Bay and River will be void. While that may be a temporary result, what will follow is what should have happened in 1905- the two states will finally jointly regulate the fisheries and put an end to the current inconsistent and confusing state of the law in the Bay, where two different states are regulating the same waters and the same fisheries individually and inconsistently. The first joint effort between the two states, since 1905, has been the establishment of a Bi-State Weakfish Commission by Executive Orders No.

20 of Governor Florio and the Delaware House Joint Resolution, approved by Governor Castle.⁸ This Commission grew out of the belated recognition by the two states that inconsistent regulation of the fishery resources was ineffective, divisive, and confusing to the public. (Ra 9-11).

The thrust of the State's argument is that passage of uniform laws by the two states was a condition precedent to the effectiveness of the compact. This is a basic misconstruction of the Compact itself. The Compact was a partial resolution of border litigation by New Jersey against Delaware that had been pending in the Supreme Court of the United States for over twenty-seven years at the time the Compact was ratified in 1905. N.J.S.A. 52:28-34. Each state undertook to appoint commissioners to draft uniform laws, and each state undertook to pass them when drafted. On that basis the states resolved their differences, the settlement was approved by the Supreme Court, and was ratified by Congress on January 24, 1907, Chapter 394, 34 Stat. 858.⁹

New Jersey and Delaware each appointed the Commissioners, who did draft the uniform laws. New Jersey enacted the draft in 1907. (L.1907, c. 131, p. 302). Delaware enacted the draft in 1914. (12 Del. Laws, Chapter 74, 1914). Unfortunately, New Jersey did not bother to wait for Delaware, or to consult Delaware when it amended the 1907 law in 1911. See, Historical Note following N.J.S.A. 52:28-38. Thus, viewed in one light, both New Jersey and Delaware complied with the Compact, and did pass the

⁸ Executive Order No. 20, signed by Governor Florio, October 18, 1990, included in the appendix to this Brief at Ra 9-11.

⁹ It is noteworthy that the remainder of the litigation was not resolved in the Supreme Court until 1934. New Jersey v. Delaware, 291 U.S. 361 (1934), Decree Entered, 295 U.S. 694 (1935).

uniform draft, however, they then proceeded to violate the Compact by diverging from the agreed upon uniformity.

From another perspective, however, the entire concept of a condition precedent is misleading. This body of water, the Delaware Bay and River, is the border between two of the United States. It is used extensively for interstate and foreign trade.¹⁰ Whether New Jersey and Delaware consider it to be their private lake, which they are free to manage, or mismanage as inconsistently as they choose, is not the focus of the inquiry. The real focus is the people of the two states, and of other states, who use the resources of the Bay and River and who, according to the Compact, as ratified by Congress, have the right not to be exposed to inconsistent and conflicting laws and regulations.

The State attempts to distinguish Guarini v. New York, 215 N.J.Super. 426 (Ch. Div.), aff'd o.b. 215 N.J.Super. 293 (App.Div. 1986), cert. den. 484 U.S. 817 (1987). In that case the court held that the Compact between New York and New Jersey, establishing the border between the two states, could not be attacked in a suit in state court by a citizen of one of the two states. A state court was without power to set aside or grant relief in such a suit. The State, in the instant matter, attempts to distinguish that decision by pointing out that this is not a suit such as was involved in that case. However, that argument misconstrues the Appellate division's holding, which is that a

¹⁰ In this regard the State's suggestion that the Delaware Bay and River are state, not federal waters, is fallacious. See, State's Brief, p. 11. In this context, federal waters are all those on which there is found interstate or foreign commerce. Only intrastate, that is land locked waters, are beyond the jurisdiction of the federal government. The DANIEL BALL, 77 U.S. 557, 563 (1871). Even landlocked waters are subject to federal jurisdiction if navigable in fact. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940)

state court can not change the terms of a Compact between the states. When New Jersey and Delaware agreed to enact fisheries laws in common, which "shall constitute the sole laws for the regulation of the taking and catching of fish" (N.J.S.A. 52:28-38), they committed to the people of both states, and to the Congress and to the people of the nation, that the interstate feud between the states, which had resulted in confusion and conflict, would be ended. Neither state was free to unilaterally abandon that Compact. Both states remain bound by it. Both states still have the power, and the obligation to bring the worthy goals of that Compact to fruition, albeit, somewhat belatedly. As the establishment of the Weakfish Commission demonstrates, the two states are capable of cooperation in the fisheries area. Both states, moreover, are members of the Atlantic States Marine Fisheries Commission. That Commission has a menhaden plan. Both states agreed to that plan. Both states, however, have enacted legislation or regulations that are in violation of the very plan they agreed to. (Pa 74-79, 159).

The State contends that the New Jersey and Delaware positions on the Compact are consistent and that there is no need to change. This is, however, not completely accurate. Both New Jersey and Delaware have recognized that mutual and consistent regulation of fisheries are necessary for effective management and avoidance of conflict, as is exemplified by Executive Order No. 20 establishing the Joint Weakfish Commission and its work. Moreover, the evils of conflicting and inconsistent regulation are obvious. Varying seasons, or size limits, or regulations regarding gear types can only create conflicts and jealousy between citizens of the two states which have not disappeared, but are only ignored by the two states.

The State also relies on an affidavit, not of record in this matter, which attempts to inject a completely unsupported and insupportable "conservation" motive into these regulations which, even to the Council the drafted them, had no conservation basis. (See, Comments of Councilmen Giberson and Lick, Pa 54). Mere lip service to conservation is not sufficient to legitimate an otherwise invalid law. Douglas v. Seacoast Products, Inc., *supra*.

The State says, relying entirely on the extra-record affidavit, that the regulations are necessary to protect the bottom of the Bay from damage from the menhaden nets (Brief, p. 14), however, this specific issue was researched extensively by the DEP in 1966 in a study which concluded that there was no evidence at all of bottom damage as a result of the menhaden fishing effort. (Pa 122-147).

The State argues that the regulations are necessary to prevent the pollution of the Bay with decaying fish and fish parts (Brief, p. 14). However, there is no evidence in the entire record of the industry having been responsible for such pollution even before these regulations were passed. In fact, the record indicates that the cause of pollution by dead and decaying fish is "fish kills" which occur because of over-population by juvenile menhaden. (Pa 12-13).

The State has, from the outset, been concerned to eliminate "potentially life-threatening conflicts with the very large boats and nets used by the menhaden reduction industry". (Brief, p.15) Yet, these conflicts are already addressed by federal legislation imposing the Rules of the Road on all vessels, including recreational vessels. Foremost Ins. Co. v. Richardson, 457 U.S. 668, rehearing denied, 459 U.S. 899 (1982) (admiralty has jurisdiction over pleasure boat collision, based on need to have uniform set of navigation rules apply to pleasure as well as commercial vessels.)

The courts of this state have consistently upheld the validity of and required compliance with the Compacts between New Jersey and Pennsylvania and New York, the neighboring states. Eastern Paralyzed Veterans v. Camden, 111 N.J. 389 (1988); State v. Federanko, 26 N.J. 119 (1958). The Appellate Division has only required that New Jersey not abandon the provisions of this Compact either. New Jersey and Delaware should, even at this late date, be required to fulfill the terms of the Compact, as they have now begun to do. The Appellate Division decision on this issue should be upheld as entirely consistent with established and controlling law.

CONCLUSION

For the reasons stated, the Appeal of Ampro as to the issues stated in Points I and II should be allowed, the Petition for Certification should be granted as to Points I, II and III, the Appellate Division should be reversed, and the State enjoined from enforcing N.J.S.A. 7:25-22.2(a)(2). As to Point IV, addressing the State's Petition, the Appellate Division should be affirmed.

Respectfully Submitted,

CLARK, LADNER, FORTENBAUGH & YOUNG

By:


EDWARD V. CATTELL, JR.

DATED: June 12, 1991

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4562-89T5

AMPRO FISHERIES, INC.,

Appellant,

v.

JUDITH YASKIN, COMMISSIONER OF
ENVIRONMENTAL PROTECTION; GEORGE
HOWARD, DIRECTOR, DIVISION OF
FISH, GAME & WILDLIFE; and BRUCE
FREEMAN, ADMINISTRATOR, MARINE
FISHERIES ADMINISTRATION,

Respondents.

ORIGINAL FILED

APR 3 1991

Emilie R. Cox, Esq.
Clerk

Argued February 26, 1991 - Decided APR -3 1991

Before Judges Pressler, Deighan and Baime.

On appeal from the New Jersey Department of
Environmental Protection.

Edward V. Cattell, Jr. argued the cause for
appellant (Clark, Ladner, Fortenbaugh & Young,
attorneys; Mr. Cattell and Douglas K. Walker on
the brief; Mr. Cattell on the reply brief).

Rachel Horowitz, Deputy Attorney General, argued
the cause for respondents (Robert J. Del Tufo,
Attorney General, attorney; Mary C. Jacobson,
Deputy Attorney General, of counsel; Ms. Horowitz
on the brief).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

This appeal challenges the July 1989 action of the Division
of Fish, Game and Wildlife, Department of Environmental Protection,
in amending N.J.A.C. 7:25-22.1 and -22.2 and adopting 7:25-22.3 and

-22.4, the regulations governing Atlantic menhaden fishing in New Jersey's territorial waters. More particularly, Ampro Fisheries, Inc., a foreign corporation whose principal place of business is in Virginia, attacks the validity of those provisions of the regulations which prohibit purse seine fishing for menhaden for purposes other than for bait in the Delaware, Raritan and Sandy Hook Bays and within 1.2 nautical miles of shore. N.J.A.C. 7:25-22.2(a)(2). The regulations bar purse seine fishing of menhaden for bait within .6 nautical miles of shore and permit limited incursion for bait fishing into the bays. N.J.A.C. 7:25-23.3.

Ampro, whose purse seine menhaden fishing operation is affected by the 1.2 mile limit and bay preclusion, contends that the regulations, insofar as they affect the waters of Delaware Bay, are invalid because they contravene the Compact of 1905 by which New Jersey and Delaware agreed to joint regulation of fishing in that body of water. See N.J.S.A. 52:28-34, et seq.; Del. Code Ann. tit. 23; 34 U.S. Stat. 858 (1907). Ampro also argues that the restrictions violate the interstate commerce, privileges and immunities, and supremacy clauses of the United States Constitution and that they are ultra vires and constitute an invalid use of the police power.

We agree with Ampro that the 1905 Compact precludes the power of this state unilaterally to regulate fishing in Delaware Bay. The regulations must consequently be modified in that respect. We reject, however, as without merit, its remaining challenges to the regulations.

Our consideration of the regulations requires a brief contextual reference. Atlantic menhaden are a plentiful Atlantic Ocean fish which migrate in schools from North Carolina to Maine. Although they are neither a sport nor a food fish, they are pursued by commercial fishing operators for two primary purposes: bait and reduction. The reduction process produces fish oil and fish meal, which have significant commercial applications. Typically, vessels engaged in obtaining menhaden for reduction purposes are 165 to 220 feet long, weigh approximately 190 tons, and use purse seines which are 1200 feet long by 90 feet deep. They rely on spotter aircraft to locate schools, which are frequently but not exclusively, within 1.2 nautical miles of shore. Historically, New Jersey has issued about 16 menhaden reduction licenses annually. See N.J.S.A. 23:3-51 and -52. There has been no New Jersey-based company taking menhaden for reduction since the early 1980's. Menhaden fishing for bait is undertaken by much smaller vessels, typically less than 90 feet, which use much smaller nets.

According to the record, there is a long history of social and spacial tensions in the near-coastal Atlantic waters between recreational sport fishing boats and commercial menhaden vessels, which have led to the adoption by most Atlantic coastal states of some sort of commercial-fishing restrictions. New Jersey's first regulation of menhaden fishing was responsive to a serious conflict between 16 menhaden vessels and a group of recreational boaters in 1983. The regulation adopted the following year, N.J.A.C. 7:25 22.1 and -22.2, made no distinction between reduction and bait

fishing, barring all purse seine menhaden fishing within .6 nautical miles of shore and on weekends and holidays. Consideration of the regulatory issue continued, however, and in 1987 the New Jersey Marine Fisheries Council which advises DEP, see N.J.S.A. 23:2B-1, et seq., particularly 23:2B-4, appointed a menhaden subcommittee. It was this subcommittee which conceived of the scheme of separately regulating the bait and reduction operations.

Following considerable debate and discussion involving representatives of all affected groups, public and private, the present regulations were proposed, a public hearing held, and the regulations adopted. DEP's comments accompanying both its proposal and adoption, 21 N.J.R. 107 (1989) and 21 N.J.R. 2035 (1989), respectively, indicate that while the regulations would have a negative impact on the menhaden reduction industry, the same quantity of fish could be caught with additional fishing time. On the other hand, the DEP was of the view that the regulations would have the positive effect of removing "large-scale vessels operating large nets from an already crowded near-shore fishing area" and reducing "spacial conflicts with coastal navigation." 21 N.J.R. 107. DEP also concluded that the regulations, in their totality, including their clean-up provisions, would benefit coastal communities, would provide additional protection for the menhaden stock, especially juvenile menhaden, and would enable predatory fish and birds to feed more easily within the protected zone. Finally DEP anticipated economic benefit for other industries.

including commercial crabbers and lobstermen and suppliers of recreational fishing equipment and bait.

Leaving aside for the moment the Delaware Bay problem, we are satisfied that the regulations are otherwise valid and that Ampro has failed in its heavy burden of overcoming the presumptive validity and reasonableness which attends administrative regulation. See e.g., Bergen Pines Hosp. v. Department of Human Serv., 96 N.J. 456, 477 (1984). Clearly, the regulations are well within the scope of the enabling statutes and consistent with its legislative purpose and policy. See N.J.S.A. 23:2B-1 and particularly N.J.S.A. 23:2B-2 and -6. The ultra vires argument is therefore meritless. Moreover, the disparate treatment of bait and reduction enterprises is based upon rational classification supported by the record as is the extent of the restrictions. Moreover, the record supports the reasonableness of the restriction imposed in terms of the problem to be addressed, the extent of the legislative power to address it, and the need to accommodate the panoply of competing interests. We therefore reject Ampro's "police power" argument as well.

With respect to Ampro's privileges and immunities claim, we note first that as a corporate litigant, that argument is not available to it. Corporations have been consistently held to be excluded from the protections of Art. IV, section 2, clause 1 of the United States Constitution. See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656, 68 L. Ed.2d 514, 522-523 (1981). Beyond that, the regulations are, on

their face, resident-neutral. Any New Jersey resident choosing to enter the menhaden reduction business will be subject to the same restrictions as now apply to the present out-of-state fleet.

Nor do we find merit in the commerce clause argument Ampro advances under Article I, section 8, clause 3 of the United States Constitution. We note that this court has recently considered the effect of that clause on the validity of administrative regulations in In the Matter of Allegations of Violations By Recycling & Salvage Corporation, ___ N.J. Super. ___ (App. Div. 1991) (approved for publication February 21, 1991). We need not retread the ground so carefully covered by Judge Michels. It suffices to repeat the principle that "a legitimate nondiscriminatory exercise of police power is not barred by the commerce clause because it might indirectly affect interstate commerce." (slip opinion at 16-17). This is particularly so where the weight and nature of the state's regulatory concerns outweigh the incidental effect of its regulatory scheme on interstate commerce. See Matter of Fiorillo Bros. of N.J., Inc., 242 N.J. Super. 667, 679 (App. Div. 1990). We are convinced that the regulations here constitute a legitimate, nondiscriminatory exercise of police power substantially advancing a legitimate state interest which, particularly in view of the complex of other coastal states' restrictions, affects interstate commerce only indirectly and incidentally.

Ampro's supremacy argument under Art. VI, section 2, is based on federal navigational laws and federal enrollment and licensing laws which, it claims, preempt state regulation of the activities

of federal licensees in coastal waters. While a total prohibition of menhaden fishing in state waters might well run afoul of Ampro's federally licensed rights, see Douglas v. Seacoast Products, Inc., 431 U.S. 265, 52 L. Ed.2d 304 (1977), the regulations here are not prohibitory but only regulatory, constituting a reasonable and nondiscriminatory conservation and environmental protection scheme not substantially inconsistent with Ampro's federally-accorded rights.

We turn now to the Delaware Bay issue. DEP attempts to justify New Jersey's unilateral action in excluding menhaden reduction fishing in that body of water by arguing that the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws. We must reject that argument. The Compact, as we have noted, was enacted by both states and approved by an act of Congress. Not only is it not subject to unilateral abrogation by either state but it is also clear that a state court lacks "the power to abrogate or modify interstate compacts approved by Congress." Guarini v. State of New York, 215 N.J. Super. 426, 432 (Ch. Div.), aff'd o.b. 215 N.J. Super. 293, 294 (App. Div. 1986), cert. denied 484 U.S. 817, 98 L. Ed.2d 34 (1987). It is hence not within the competence of the judiciary of one of the Compact states to rule that the Compact no longer exists by reason of abandonment. That is a matter for legislative action. It is, however, clear that the Delaware Bay provision of the regulation is entirely severable and that its

illegality does not taint the validity of the remaining regulatory scheme.

Insofar as N.J.A.C. 7:25-22.1 to -22.4 affects menhaden fishing in the Delaware Bay, the regulation is invalid. In all other respects the regulation is valid and enforceable.

I hereby certify that the foregoing is a true copy of the original on file in my office

R. S. Miller

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STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 20

WHEREAS, the Delaware Bay is generally divided in the middle by the boundary between the State of New Jersey and the State of Delaware; and

WHEREAS, the State of New Jersey and the State of Delaware have attempted to independently manage the harvest of weakfish in the Delaware Bay through divergent laws and regulations; and

WHEREAS, despite these efforts, the number of weakfish that use the Delaware Bay as their principal spawning area declined dramatically in 1989 and there are indications that this decline will continue in the future; and

WHEREAS, threats to the weakfish population and the environmental integrity of the Delaware Bay are a bi-state concern which, if not addressed, could result in a negative impact upon the recreational and commercial fishing industry, as well as affect the overall economies of the State of New Jersey and the State of Delaware; and

WHEREAS, weakfish have been a significant recreational and commercial fish in the Delaware Bay during the last two decades; and

WHEREAS, the management and protection of the Delaware Bay and its natural resources are of great concern to the governments of both States; and

WHEREAS, the State of Delaware has enacted House Joint Resolution No. 29, approved by the Governor of the State of Delaware on July 26, 1990, which Resolution requested that the State of New Jersey enter into a joint commission to investigate the causes of the decline of the weakfish population and to stem the tide of that decline, and

WHEREAS, it is imperative that action must be taken before the beginning of the 1991 spawning season to ensure the conservation of the weakfish;

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

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NOW, THEREFORE, I, JAMES J. FLORIO, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the statutes of this State, do hereby ORDER and DIRECT:

1. There is hereby established a joint study commission with the State of Delaware, which commission shall be known as the Delaware Bay Weakfish Action Commission with a membership of 22 members. The 11 members appointed from the State of New Jersey shall consist of:

a. The Commissioner of the Department of Environmental Protection or her designee;

b. Two members of the Senate, to be appointed by the Governor, each a member of a different political party; two members of the General Assembly to be appointed by the Governor, each a member of a different political party;

c. Six public members to be appointed by the Governor, two members shall be licensed commercial fishermen who net weakfish in the Delaware Bay, two shall be recreational fishermen who use hook and line to harvest weakfish in the Delaware Bay, and two members shall be boating captains who utilize the Delaware Bay.

2. In addition to the 11 voting members, two non-voting members shall be appointed by the Governor, and both non-voting members shall be employed by an institute of higher education with technical experience in the field of marine studies.

3. The Commission shall convene as soon as practicable after the appointment of its members, to select a co-chairperson who shall serve jointly with the co-chairperson selected by the members of the Commission appointed by the State of Delaware.

4. It shall be the duty of the Commission to investigate the status and management of the weakfish that inhabit the Delaware Bay, as well as the cause of the decline of the weakfish population in the Delaware Bay, and to inquire into ways in which the decline of this weakfish population may be corrected.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

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5. The Department of Environmental Protection and the Marine Fisheries Council shall provide the members of the Commission appointed from this State with whatever staff assistance that the Commission may require in order to properly perform its duties;

6. The Commission shall issue a preliminary report of its findings, conclusions and recommendations to the Governors and the Legislatures of both States by January 15, 1991. The Commission shall issue a final report of its findings, conclusions and recommendations along with any proposed legislation which it may desire to the Governors and the Legislatures of the respective States by March 1, 1991. Recommendations submitted in the final report must be approved by at least 12 voting members of the Commission.

7. Meetings of the Commission shall be held alternately in each State.

8. This Order shall take effect immediately and shall supersede any prior Executive Order with which it may be inconsistent.

GIVEN, under my hand and seal, this
19th day of *October*
in the Year of Our Lord, one
thousand nine hundred ninety, and
of the Independence of the United
States, the two hundred and
fourteenth.

/s/ James J. Florio
GOVERNOR

FILED

OCT 19 1990

JOAN HABERLE
SECRETARY OF STATE

[Seal]

Attest:

/s/ Andrew Weber

Chief Counsel to the Governor

A 62 SEP 1991

A 63 SEP 1991

SUPREME COURT OF NEW JERSEY
DOCKET NO. 33,704

FILED

JUL 19 1991

Stephen W. Leonard
CLERK

AMPRO FISHERIES, INC.,)

Appellant-Respondent,)

v.)

JUDITH YASKIN, COMMISSIONER)
OF ENVIRONMENTAL PROTECTION;)
GEORGE HOWARD, DIRECTOR,)
DIVISION OF FISH, GAME AND)
WILDLIFE; and BRUCE FREEMAN,)
ADMINISTRATOR, MARINE)
FISHERIES ADMINISTRATION,)

Respondents-Petitioners.)

Civil Action

On Petition for Certification
to the Superior Court of New
Jersey, Appellate Division

Sat Below: Pressler, Deighan,
and Baime, JJ.A.D.

BRIEF OF RESPONDENTS-PETITIONERS IN RESPONSE TO
CROSS PETITION FOR CERTIFICATION

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents-
Petitioners
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1509

MARY C. JACOBSON
Deputy Attorney General
Of Counsel

RACHEL HOROWITZ
Deputy Attorney General
On the Brief

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PROCEDURAL HISTORY

On January 17, 1989, the New Jersey Department of Environmental Protection ("NJDEP") published proposed amendments to N.J.A.C. 7:25-22.1 et seq. in the New Jersey Register, solicited comments on the amendments, and gave notice of a scheduled public hearing. The agency then received comments and held a public hearing on February 9, 1989. On July 17, 1989, NJDEP adopted the amendments as a final rule.

Among other things, the final rule prohibits the taking of menhaden (bunker fish) for reduction purposes within 1.2 miles of shore, and within Delaware, Raritan, and Sandy Hook Bays. The rule also prohibits the taking of menhaden for bait purposes within .6 miles of shore in the Atlantic Ocean, within .6 miles of shore in Delaware Bay, and within .3 miles of shore in Raritan and Sandy Hook Bays. In addition, the rule restricts the menhaden bait industry, but not the menhaden reduction industry, by limiting the size of boats and nets that the bait industry can use.

Seven months after the regulations were enacted, on or about February 13, 1990, appellant cross-petitioner Ampro Fisheries, Inc. ("Ampro") filed a complaint in the Chancery Division, Camden County, seeking to invalidate the 1.2 mile restriction. On April 17, 1990, upon the State's motion, the Chancery Division Judge ordered the matter transferred to the Appellate Division.

On April 20, 1990, Ampro filed a notice of appeal in the Appellate Division (Pa22),* and applied for emergent relief from the 1.2 mile restriction. That application was denied on May 3, 1990, on the basis that Ampro had failed to show irreparable injury, despite a specific invitation from the court to submit additional supporting documentation, and had also failed to show a substantial likelihood of success on the merits (Ral).**

On April 3, 1991, the Appellate Division held that the menhaden regulations, N.J.A.C. 7:25-22.1 et seq., were generally valid and reasonable, did not violate the Commerce Clause or the Privileges and Immunities Clause of the United States Constitution, were not preempted by federal law, and were fully authorized by the enabling legislation (RaPC1-RaPC8).*** However, it also held that the regulations were invalid in Delaware Bay, based on a 1905 compact between New Jersey and Delaware.

On April 15, 1991, the State moved before the Appellate Division for reconsideration of its ruling invalidating the regulations within Delaware Bay, and on April 17, 1991, the State moved before the Appellate Division for a stay of this ruling. The motion for reconsideration was denied on May 1, 1991, (PaPC12), and the motion for a stay was granted on that date (PaPC13).

* "Pa" refers to the appendix to Ampro's brief filed in the Appellate Division.

** "Ra" refers to the appendix to the brief filed by the State in the Appellate Division.

*** "RaPC" refers to the appendix to respondents-petitioners' Petition for Certification.

On May 15, 1991, the State filed a Notice of Petition for Certification in this Court and, on May 29, 1991, it filed its Petition for Certification. This petition seeks review of the Appellate Division's ruling invalidating the menhaden regulations within Delaware Bay.

Ampro filed a notice of appeal and a notice of cross-petition for certification on May 24, 1991, and on June 12, 1991, it filed its Cross Petition and response to the State's Petition for Certification. Ampro's Cross Petition challenges the Appellate Division's ruling of April 3, 1991 upholding the validity of the regulations outside of Delaware Bay.

On June 13, 1991, this Court granted the State's request for an extension of time until July 19, 1991 to respond to Ampro's Cross Petition. Nevertheless, before that date arrived, the Court inexplicably granted both the State's Petition for Certification and Ampro's Cross Petition. Accordingly, the State is now filing this response to the Cross Petition so that it may present to the Court its position on the issues raised by Ampro.

COUNTERSTATEMENT OF FACTS

Menhaden is a fish that is used for its oil content, as well as for bait for lobster and crab (Pa9). The boats used to take menhaden for reduction purposes (oil) are very large, typically measuring 165 to 220 feet long, while the nets used measure up to $\frac{1}{2}$ mile in width. However, the boats and nets used by the menhaden bait industry are significantly smaller (RaPC3; Ra31). The oil produced by the menhaden reduction industry competes with soybeans and other commodities (T48; T50).

In 1984, in response to a serious conflict between small recreational fishing boats and 16 large menhaden purse seine boats, NJDEP adopted its first menhaden regulations, N.J.A.C. 7:25-22.1 et seq., on an emergent basis. As initially promulgated, this rule prohibited the taking of menhaden by purse seine within .6 miles of shore as well as on weekends and holidays, prohibited the release of dead fish, and made licensees responsible for dead-fish cleanups. 16 N.J.R. 2172 (1984). The rule was not opposed by the menhaden reduction industry, which at that time obtained less than half of its New Jersey catch within one mile of the New Jersey shore, and was then facing efforts to exclude it totally from State waters (Pa170; Pa26; 16 N.J.R. 2171).

In July 1989, following public comment, a public hearing, and various meetings between recreational fisherman, commercial fisherman, and members of the Marine Fisheries Council, an advisory body to NJDEP, NJDEP amended N.J.A.C. 7:25-22.1 et seq. The

amended rule prohibits the taking of menhaden for bait purposes within .6 miles of shore, and prohibits the bait industry from using boats over 90 feet long and nets over 150 fathoms (900 feet) long. The rule also prohibits the taking of menhaden for reduction purposes within 1.2 miles of shore, but contains no restrictions on the size of the boats or nets which that industry can use. The amended regulations are much less restrictive than those of neighboring states such as Delaware and Maryland, which totally prohibit the taking of menhaden by purse seine within their territorial waters (Pa11-Pa12; Pa20; Pa93-Pa94; Pa97; Pa201; Ra3).

The amended rule had its impetus in 1987, when the Marine Fisheries Council decided to form a menhaden committee in response to various efforts by the Legislature to expand the .6 mile restriction set by regulation to 1.2 or 2 miles (Pa19- Pa20; Pa25-Pa26). It was this committee which met with recreational and commercial fisheries representatives, and which subsequently recommended that a regulatory distinction be made between taking menhaden for bait and for reduction purposes (Pa28-Pa29; Ra34).

When it amended N.J.A.C. 7:25-22.1 et seq., NJDEP expressly stated that the amendments were intended to reduce conflicts in the crowded near shore waters between small recreational boats and large menhaden reduction vessels, and were also expected to help protect juvenile menhaden, to allow predatory birds and fish to feed more easily within the 1.2 mile area, and to make menhaden more readily available as lobster and crab bait. 21 N.J.R. 107 (1989); 21 N.J.R. 2035 (1989). At the time of passage

of the amendments, one or two licenses were being sought annually to take menhaden as bait, as opposed to 16 licenses to take menhaden for reduction purposes.

On June 1, 1989, before the regulations were adopted, the Administrator of the Marine Fisheries Administration, respondent Bruce Freeman, distributed at a Marine Fisheries Council meeting a recent federal court decision holding that the State of New York could not limit the size of fishing vessels to be used in its waters in order to protect State interests. Mr. Freeman also observed at that time that "when we start restricting people to fish state waters you have to make sure you are not favoring one group over the other." (Ra28). Thus, it is clear that in passing the amendments, NJDEP had no intention to favor in-State industry over out-of-State industry, and was in addition well aware of the requirement for even-handed regulation.

Based on these facts and on its examination of the record, on April 3, 1991, the Appellate Division rejected as meritless Ampro's contentions that the regulations were generally ultra vires and unreasonable, that they violated the Privileges and Immunities and Commerce Clauses of the federal Constitution, and that they were preempted by federal law. In doing so, the Appellate Division found that the regulations fell well within the scope of the enabling statute, the Marine Fisheries Act, N.J.S.A. 23:2B-1 et seq., and were consistent with its legislative purpose and policy. The Appellate Division further found that the agency's disparate treatment of the menhaden bait and reduction industries was based

on a rational classification, was reasonable, and was supported by the record (RaPC5).

The Appellate Division rejected Ampro's Privileges and Immunities argument by observing that Ampro was a corporate litigant not subject to that clause and that the regulations were resident-neutral on their face (RaPC5-RaPC6). It also held that the regulations were valid under the Commerce Clause, because they constituted a legitimate, non-discriminatory exercise of police power substantially advancing a legitimate state interest and affecting interstate commerce merely indirectly and incidentally. Similarly, the Appellate Division held that the regulations were not preempted by federal navigational and licensing laws because they were regulatory, not prohibitory, and constituted a "reasonable and nondiscriminatory conservation and environmental protection scheme not substantially inconsistent with Ampro's federally-accorded rights." However, it held that the regulations were invalid in Delaware Bay, based on a 1905 Compact between New Jersey and Delaware (RaPC 7-RaPC 8).

In May, 1991, the State filed a Petition for Certification asking this Court to review the decision below insofar as it affected Delaware Bay, and in June, 1991, Ampro filed a Cross Petition asking for review of the balance of the decision. Since both the Petition for Certification and the Cross Petition have now been granted, and because the Cross Petition was granted before the State's time to respond had expired, the State is now

filing this reply so that it may put its position respecting Ampro's argument on the record.

ARGUMENT

BECAUSE THE APPELLATE DIVISION PROPERLY APPLIED WELL ESTABLISHED LAW TO HOLD THAT THE MENHADEN REGULATIONS DID NOT VIOLATE THE COMMERCE CLAUSE OR THE PRIVILEGES AND IMMUNITIES CLAUSE, WERE REASONABLE AND WERE AUTHORIZED BY THE ENABLING LEGISLATION, THE DECISION BELOW SHOULD BE AFFIRMED EXCEPT INSOFAR AS IT HOLDS THE REGULATIONS ARE INVALID IN DELAWARE BAY.

In attempting to have this Court review the decision below, Ampro has filed both a notice of appeal and a petition for certification. Nevertheless, it is clear that the matters which Ampro claims represent substantial constitutional questions do not in fact constitute such questions, and that consequently Ampro has no appeal as of right respecting them. It is also clear that, with respect to all of the issues present in the case, excluding the issue which is the subject of the State's petition for certification (the regulations' validity within Delaware Bay), the Appellate Division properly applied well settled law to the pertinent facts. Accordingly, there is no need for this Court to reject any aspect of the decision below, apart from the holding which is the subject of the State's Petition for Certification.

Ampro's claim that an appeal as of right exists with respect to its constitutional claims is based on R. 2:2-1(a), which provides among other things that such an appeal to this Court exists in cases involving a substantial constitutional question. It is well settled, however, that a "substantial" constitutional question does not arise in a case where facts are applied to established constitutional and statutory criteria. Piscataway Associ-

ates, Inc. v. Piscataway, 73 N.J. 546, 549 (1977). Pursuant to this standard, no appeal as of right exists in this matter.

In rejecting Ampro's Commerce Clause argument, the Appellate Division relied on two of its recent decisions, In re Recycling & Salvage Corp., 246 N.J. Super. 79 (App. Div. 1991), and In re Fiorillo Brothers, 242 N.J. Super. 667 (App. Div. 1990). Both of these cases articulate the long settled standard that a nondiscriminatory exercise of police power is not barred by the Commerce Clause, where the effect on interstate commerce is incidental or indirect and the State's regulatory concerns outweigh those effects. See Recycling, supra, 246 N.J. Super. at 94-95; Fiorillo, supra, 242 N.J. Super. at 677-79. See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1980); Pike v. Bruce Church, 397 U.S. 137, 142 (1970); and Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960).

Clearly, the Appellate Division properly applied that standard in this case. First, the menhaden regulations at issue are completely nondiscriminatory in purpose or effect. The regulations make no distinction between in-State and out-of State entities competing in the same industry, but instead rationally distinguish between two non-competing industries, the menhaden reduction industry and the menhaden bait industry. Second, there is in this instance no in-State menhaden reduction industry to favor. Thus, as the United States Supreme Court has determined, the regulations do not impermissibly discriminate against interstate commerce. See

Exxon Corp. v. Maryland, 437 U.S. 117, 125-26 (1978); Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 473-74.

Last, as the Appellate Division correctly concluded, the regulations' effect on interstate commerce is only incidental. As an initial matter, Ampro has to date totally failed to substantiate its undocumented claims that this State's regulations make its operations in New Jersey infeasible. Next, the regulations do not prohibit the taking of menhaden to or from New Jersey waters, and do not require the menhaden reduction industry to use any type of special equipment in those waters. In addition, the menhaden reduction industry is regulated differently by each coastal state, and is regulated much more restrictively by states such as Maryland and Delaware than it is by New Jersey. Thus, while all of the various state regulatory schemes may cumulatively effect the menhaden reduction industry, no significant effect can be imputed solely to New Jersey's rules.

Because the regulations do not have a discriminatory effect on the interstate menhaden reduction industry, the Appellate Division was under no obligation to search for a discriminatory motive, and to thereby go beyond the agency's clearly articulated rationale for adopting the rules. In addition, despite Ampro's argument to the contrary, the lower court was also not obliged to infer a discriminatory motive from statements made by a State Assemblyman, a State Senator, or a member of the public, none of whom are employed by or advise NJDEP. Rather, the Appellate Division's reliance on and acceptance of the agency's stated

purpose was entirely consistent with well settled law, and Ampro is wrong to contend otherwise. See Atlantic Prince Ltd. v. Jorling, 710 F. Supp. 893, 902 n.19 (E.D. N.Y. 1989) (a court should search for an ulterior legislative motive only after it finds a statute is discriminatory and should defer to Legislature's statement of purpose).

The fact that the regulations do not address spatial conflicts by restricting recreational craft also does not render them invalid. The majority of such boats use the near-shore waters, 21 N.J.R. 107 (1989), and accordingly, the 1.2 mile restriction on the menhaden reduction industry will clearly reduce conflicts between that industry and recreational fishermen. Furthermore, NJDEP was not obliged to take action to limit conflicts entirely, assuming such action is even possible. Cf. Robbiani v. Burke, 77 N.J. 383, 392-93 (1978).

Similarly, the Appellate Division also properly applied well established precedent interpreting the Supremacy Clause to the facts of this case to conclude that the menhaden regulations were not preempted by federal law respecting licensure of vessels. The regulations do not eliminate Ampro's right to use its federal license - they merely restrict Ampro's use of the license to 1.8 miles of the State's 3 mile-wide territorial waters so as to promote local safety and conservation interests. Moreover, the regulations do not favor the in-state menhaden reduction industry over the out-of-state industry, and advance a legitimate conservation purpose -- the protection of juvenile menhaden and of predatory

birds and fish within the near shore area. Thus, as was held below, no federal preemption exists by virtue of federal licensing laws, and Ampro's reliance on Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), is misplaced.

Likewise, the regulations are also not preempted by federal navigational laws. As is more fully set forth in the State's brief filed in the Appellate Division, the United States Congress has consistently recognized the right of each state to regulate the taking of fish within its territorial waters. See Rb at 17-18. The federal "rules of the road" cited by Ampro do not purport to abridge this right in any way, or to preclude a crowded state such as New Jersey from passing regulations intended to promote local safety interests by designating the time, place, and manner by which fish may be taken. Cf. Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978). Thus, the federal rules do not preempt New Jersey's menhaden rules, because they are not intended to eliminate the State's police power to promote public health and safety, or its jurisdiction over State fisheries. See Pacific Gas & Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203-204 (1983). Rather, the federal rules are simply intended to establish general traffic standards, assuming certain vessels concurrently use the same waters.

Ampro's final constitutional claim, that the regulations violate this State's constitution, is also meritless and does not present any type of "substantial" constitutional question. As was held below, the menhaden regulations substantially advance legiti-

mate State interests -- the protection of smaller craft and juvenile menhaden -- and appropriately attempt to accommodate a "panoply of competing interests" including the menhaden reduction industry, the menhaden bait industry, the recreational fishing industry, and the lobster and crab fisheries. (RaPC5). There is therefore no basis whatsoever to Ampro's claim that the regulations are not authorized by this State's police power and thus represent a state constitutional violation, or to its allegation that the Appellate Division failed to address this issue.

Finally, Ampro's claim that the Appellate Division erred in concluding that the menhaden regulations fall within the enabling statutes should also be rejected. As established by this Court, the regulations are presumptively valid if they fall within the ambit of delegated authority and are not shown to be arbitrary or contrary to legislative intent. New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79-80 (1980); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978).

The menhaden regulations clearly meet this standard. First, it is eminently reasonable to conclude that restricting the area within which the large boats and nets used by the menhaden reduction industry can operate will promote the safety of the smaller craft generally found in near shore waters and will also help protect the younger menhaden there. Second, the enabling legislation, the Marine Fisheries Act, N.J.S.A. 23:2B-1 et seq., explicitly recognizes the need to allocate fisheries resources, N.J.S.A. 23:2B-2(a)1, and allows the agency's advisory body, the

Marine Fisheries Council, to study "social" data relating to fisheries programs. N.J.S.A. 23:2B-5(h). Moreover, the Act also explicitly provides for the adoption of regulations specifying, among other things, the types of fishing gear that may be used; the size, number of quantity of fish that may be taken; the time and manner of their taking; and the areas to be opened or closed to their taking. N.J.S.A. 23:2B-6(a).

Given these provisions, and particularly N.J.S.A. 23:2B-6(a), it is obvious that the regulations fall squarely within the ambit of delegated authority. Thus, Ampro's claims that the court below improperly concluded that the regulations are unauthorized are absolutely baseless. Its arguments should therefore be rejected, and this court should affirm the conclusions of the Appellate Division respecting the regulations' validity outside of Delaware Bay. In addition, for the reasons stated in the State's Petition for Certification, this court should reverse the court below insofar as it concluded that the regulations were invalid within Delaware Bay.

CONCLUSION

For all these reasons and for the reasons stated in the State's Petition for Certification, this Court should affirm the Appellate Division's ruling that the menhaden regulations are valid, reasonable, fully authorized by the enabling Legislation, and violate no constitutional provision, and should reverse its ruling that the regulations are invalid within Delaware Bay.

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By:

Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

Dated: *July 19, 1991*

A 62 SEP 1991



State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 083
TRENTON 08625

EDWARD J. DAUBER
ASSISTANT ATTORNEY GENERAL
DIRECTOR

BERT J. DEL TUFO
ATTORNEY GENERAL

FILE

(609) 633-8119

FEB 18 1992

February 13, 1992

Stephen Townsend
CLERK

Honorable Justices of the Supreme Court
of the State of New Jersey
Richard J. Hughes Justice Complex
CN 970
Trenton, New Jersey 08625

Re: Ampro Fisheries v. Yaskin
Docket No. 33,704

Dear Honorable Justices:

On February 10, 1992, Stephen Townsend, Clerk of the Supreme Court, forwarded to me the Court's request that the parties provide copies of any regulations of the State of Delaware pertaining to menhaden purse/seine fishing in Delaware Bay.

The State of Delaware prohibits, by statute, all menhaden fishing within 3 miles of shore in any State waters. 7 Del. Code §919. This prohibition does allow some menhaden fishing to occur within Delaware's portion of Delaware Bay, since those waters extend beyond 3 miles of shore at certain

February 13, 1992

Page 2

points. However, pursuant to 7 Del. Code §927, fishing by purse seine is generally prohibited in Delaware's tidal waters.

I have attached a copy of the Delaware statute governing menhaden fishing, 7 Del. Code, § 919. I have also attached a copy of the Delaware statutes governing fishing by purse seine in tidal waters, 7 Del. Code §927 and 7 Del. Code §911. It is my understanding that the State of Delaware does not have any regulations pertaining to menhaden fishing, whether within or outside of Delaware Bay.

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

RH:lb

c: Edward Cattell, Jr.

February 13, 1992

Page 3

CERTIFICATION

I hereby certify that on this day, I forwarded a copy of the attached letter to counsel for Ampro Fisheries, Inc., by mailing the letter to him, first class mail, at One Centennial Square, Suite 104, Haddonfield, New Jersey.

Rachel Horowitz
Rachel Horowitz

Dated: February 3, 1992

CERTIFICATION

I hereby certify that on this day, I forwarded a copy of the attached letter to counsel for Ampro Fisheries, Inc., by mailing the letter to him, first class mail, at One Centennial Square, Suite 104, Haddonfield, New Jersey.

Rachel Horowitz
Rachel Horowitz

Dated: February 2, 1992

costs. (Code 1915, § 2520; 28 Del. Laws, c. 203; Code 1935, § 3008; 7 Del. C. 1953, § 914; 64 Del. Laws, c. 251, § 1.)

§ 927. Fishing with trawl nets, purse seines, run around gill nets; penalty; exceptions.

(a) No person shall fish with or use in the tidal waters of this State any type of trawl net that is operated in any manner by wind or sail power, motor power, hydraulics, pulleys, by being pulled by a power vessel or other mechanical advantage, or any purse seine operated in any manner, or any run around gill net or any gill net utilizing rollers or reels operated either manually or by power, except as provided by §§ 911 and 919 of this title.

(b) Any person who is determined to be in violation of this section shall be fined not less than \$2,000 and not more than \$5,000, plus the payment of costs, and/or imprisoned for up to 6 months; and for any subsequent violation of this section the person shall be fined not less than \$5,000, plus the payment of costs, and/or imprisoned for up to 6 months.

(c) Any authorized employee of the Department who has probable cause to believe that there is or has been a violation of this section may seize the following items under the following conditions:

(1) Any finfish located, found, retained, taken and/or caught in violation of this section; or

(2) Any other item to be used as evidence in any case to be brought for violation of this section.

(d) Any authorized employee of the Department who has seized finfish pursuant to this section shall comply with § 935 of this title.

(e) Any authorized employee of the Department who has seized any finfish or other items pursuant to this section may seek to have said finfish or items forfeited, in which case the Superior Court shall have jurisdiction over the alleged violation if the fair market value of the forfeited finfish or other items exceeds \$100, and any forfeiture of the finfish or other items shall be in accordance with the rules of procedure for the Superior Court. The Justice of Peace Courts shall have jurisdiction over any violation in which the forfeiture sought is of finfish or other items of \$100 or less in fair market value. (64 Del. Laws, c. 251, § 1; 65 Del. Laws, c. 193, §§ 11, 12.)

§ 928. Interstate transfer of finfish.

(a) No person who catches food fish outside the jurisdictional boundaries of the State shall land and/or transfer said food fish from said person's vessel to a shore or any facility located in the State for the purpose of transporting, selling, packing and/or processing said food fish, except for taxidermy purposes, unless said person has been issued by the Department a valid commercial food fishing license in accordance with § 913 and § 914 of this title.

(b) Any person who catches food fish outside the jurisdictional boundaries of the State and then has said food fish transported into this State by means other than by a vessel for the purpose of transporting, selling, packing and/or

costs. (Code 1915, § 2520; 28 Del. Laws, c. 203; Code 1935, § 3008; 7 Del. C. 1953, § 914; 64 Del. Laws, c. 251, § 1.)

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(b) Any person who is determined to be in violation of this section shall be fined not less than \$2,000 and not more than \$5,000, plus the payment of costs, and/or imprisoned for up to 6 months; and for any subsequent violation of this section the person shall be fined not less than \$5,000, plus the payment of costs, and/or imprisoned for up to 6 months.

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(b) Any person who catches food fish outside the jurisdictional boundaries of the State and then has said food fish transported into this State by means other than by a vessel for the purpose of transporting, selling, packing and/or

(j) Notwithstanding subsection (d), a person may fish in the Nanticoke River with a drift net that extends more than one-third the distance measured perpendicular from shore to opposite shore provided the drift net does not obstruct navigation. (64 Del. Laws, c. 251, § 1; 65 Del. Laws, c. 106, § 1; 66 Del. Laws, c. 193, § 6.)

§ 918. Interfering with fishing equipment.

No person shall, except in an emergency, interfere with, break, damage or destroy any fishing equipment that is being used in the tidal waters of this State for the taking of any finfish in a manner provided for by this chapter or any regulation promulgated or permit issued by the Department pursuant to this chapter. (Code 1915, § 2510; 28 Del. Laws, c. 203; Code 1935, § 2998; Del. C. 1953, § 911; 64 Del. Laws, c. 251, § 1; 65 Del. Laws, c. 193, §§ 7, 8)

§ 919. Menhaden fishing; penalties.

(a) Menhaden fishing will not be permitted in any state waters on any Saturday, Sunday or holiday between the Friday before Memorial Day and the Sunday following Labor Day.

(b) Menhaden fishing will not be permitted within 3 miles of the shore in any state waters.

(c) All pump outlets, except normal engine cooling water, must be discharged through the bottom of the vessel.

(d) [Repealed].

(e) All menhaden vessels must be equipped with refuse and garbage cans and all such cans must be emptied at the plant when the vessel docks. Garbage, refuse or litter shall not be thrown overboard at any time.

(f) Dead fish shall not be released at any time. Should there be more fish in the net than can be handled, the captain shall immediately call another vessel to take the excess fish.

(g) At the end of each set, the fish which the pump will not transfer to the vessel's hold must be loaded aboard manually. No loose fish are to be thrown overboard at any time.

(h) Every vessel over 65 feet in length shall obtain a license before fishing for menhaden in the territorial waters of this State. The fee for such license shall be \$100 and shall be payable to the Department or its duly authorized agent.

(i) Whoever violates this section shall be fined \$2,500 for the first offense and \$5,000 for each offense thereafter. (59 Del. Laws, c. 418, § 1; 64 Del. Laws, c. 115, §§ 1-3.)

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(i) Whoever violates this section shall be fined \$2,500 for the first offense and \$5,000 for each offense thereafter. (59 Del. Laws, c. 418, § 1; 64 Del. Laws, c. 115, §§ 1-3.)

permit. The content of said report shall be determined by the Director at the time the scientific permit is issued.

(e) Each applicant that is issued a scientific permit shall comply with the marking requirements that are set forth in § 920 of this title.

(f) Each applicant that is issued a scientific permit shall be assigned an identification number by the Division and this number shall be attached and maintained in a legible manner on the fishing equipment in the same manner that is required of fishermen under § 921 of this title.

(g) Each applicant that is issued a scientific permit shall not be classified a commercial finfisherman for purposes of this chapter, or any Department regulation, provided that the applicant submits all reports to the Director that are required by this chapter and any Department regulation promulgated pursuant to this chapter or any permit condition. (64 Del. Laws, c. 251, § 1.)

§ 912. Sale, trade and/or barter of game fish.

(a) No person who catches or takes any species of game fish from or out of the tidal waters of this State shall sell, trade and/or barter said game fish, unless the Director has authorized such sale, trade or barter by issuing the person a permit.

(b) No person who catches or takes any species of game fish from or out of the tidal waters of this State shall attempt to sell, trade and/or barter said game fish, unless the Director has authorized such attempted sale, trade or barter by issuing the person a permit. (64 Del. Laws, c. 251, § 1.)

§ 913. Sale, trade and/or barter of food fish.

(a) No individual who catches or takes any species of food fish, from or out of the tidal waters of this State shall sell, trade and/or barter said food fish, unless said individual has been issued a valid commercial food fishing license by the Department.

(b) No individual who catches or takes any species of food fish from or out of the tidal waters of this State shall attempt to sell, trade and/or barter said food fish, unless said individual has been issued a valid commercial food fishing license by the Department.

(c) No individual shall purchase, trade for or barter for any food fish, from another individual who catches or takes food fish from or out of the tidal waters of this State unless said other individual who catches or takes food fish from or out of the tidal waters of this State possesses a valid commercial food fishing license.

(d) No individual shall fish with a drifting gill net unless said individual has been issued a valid commercial food fisherman's license and appropriate fishing equipment permits by the Department.

(e) No individual who catches or takes any species of food fish from or out of the tidal waters of this State shall give or transfer said food fish without compensation to another individual for subsequent sale, trade or barter unless the individual giving or transferring said food fish has been issued a valid commercial food fishing license by the Department.

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§ 910. Types of fishing equipment and methods used for fishing for food fish.

Unless otherwise authorized by this chapter or the adoption of any Department regulation or issuance of Division permits subsequent to April 27, 1984, it shall be illegal for any person to fish for food fish in the tidal waters of the State with any fishing equipment or by any method, except:

- (1) A hook and line;
- (2) A troll line;
- (3) A dip net;
- (4) A lift net operated without the use of power;
- (5) A push net;
- (6) A cast net operated without the use of power;
- (7) A spear or harpoon;
- (8) A common haul seine operated without the use of power;
- (9) A bait seine;
- (10) A bag net;
- (11) A hoop net not exceeding 72 inches in diameter;
- (12) A fyke net not exceeding 72 inches in diameter and with wings or leaders not exceeding 180 feet in length;
- (13) A fish pot or fish trap not exceeding 125 cubic feet and with an escape panel constructed of biodegradable netting and measuring at least 8 inches x 8 inches; and
- (14) A gill net being fished in more or less a straight line. (Code 1915, § 2510A; 28 Del. Laws, c. 203; 30 Del. Laws, c. 180, § 1; Code 1935, §§ 2989, 2996; 7 Del. C. 1953, §§ 908, 909; 57 Del. Laws, c. 146, § 3; 61 Del. Laws, c. 256, § 4; 64 Del. Laws, c. 251, § 1.)

§ 911. Scientific permit; issuance; information; expiration; report; equipment marking and identification requirements.

(a) For purposes that are scientific or for the propagation of finfish, the Director may issue a scientific permit to any scientific or educational institution, consultant, organization and/or person enabling them to fish, possess and/or transport finfish into or from the tidal waters of this State by the use of fishing equipment and/or methods, during times, and at certain locations, that would normally be considered illegal according to this chapter or any Department regulations.

(b) Prior to the issuance of a scientific permit the applicant shall provide the Director with all the information that is requested by any application supplied by the Division to said applicant.

(c) Each scientific permit shall expire on the date set forth in the permit, or on the last day of the calendar year during which the permit was issued, whichever date is earliest.

(d) Each applicant that is issued a scientific permit shall file an information report with the Director within 30 days after the expiration date of said

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FEB 18 1992

SUPREME COURT
OF NEW JERSEY

ATTORNEYS AT LAW

ONE CENTENNIAL SQUARE ■ HADDONFIELD, NJ 08033 ■ (609) 429-5351 ■ Cable: CLARKLAD Telex: 83-1462 ■ Fax: (609) 428-0238
Administrative Partner: William L. Mueller

Edward V. Cattell, Jr.
Also Member Pennsylvania Bar

February 14, 1992

PHILADELPHIA OFFICE
One Commerce Square
2005 Market Street
Philadelphia, PA 19103
(215) 241-1800

OUR FILE NO. 08885/39379

Stephen W. Townsend, Clerk
Supreme Court of New Jersey
CN 970
Trenton, New Jersey 08625

Re: Ampro Fisheries, Inc. v. Yaskin, et al.
(A-62/63) 33,704

Dear Mr. Townsend:

In accordance with the Supreme Court's inquiry whether the State of Delaware has any regulations in respect of menhaden purse seine fishing in Delaware Bay, we provide the following response.

Title 7 of the Delaware Code Section 103 authorizes the Department of Natural Resources and Environmental Control, Division of Fish and Wildlife ("DNREC"), with the power and duty to promulgate rules and regulations pertaining to, *inter alia*, menhaden purse seine fishing in the Delaware Bay. The only way that DNREC regulations can be assessed is to communicate directly with DNREC. To that end, we communicated with Roy Miller, the Program Manager for the Fisheries Section of DNREC and inquired as to whether there were any regulations pertaining to menhaden purse seine fishing in the Delaware Bay. Mr. Miller advised that no such regulations exist, although Title 7 of the Delaware Code Section 919 specifically pertains to menhaden fishing in the Delaware Bay.

CLARK, LADNER, FORTENBAUGH & YOUNG

Stephen W. Townsend, Clerk
February 14, 1992
Page 2

Accordingly, we have enclosed a copy of Section 919 of Title 7 of the Delaware Code. We have requested a letter from Mr. Miller confirming our discussion, and will forward the letter upon receipt.

We hope this satisfies your inquiry, and remain available to assist in any way.

Very truly yours,

CLARK, LADNER, FORTENBAUGH & YOUNG

BY: 

EDWARD V. CATTELL, JR.

EVC/dml
Enclosure

cc: Rachel J. Horowitz, Esquire

§ 917. Taking of food fish from Delaware Bay by nonresidents or aliens; penalty.

No nonresident of this State, nor any alien, shall at any time take or attempt to take edible or food fish of any kind by means of any net of any character or any device or contrivance whatsoever, except with rod, hook and line or handline, or a speargun and spear, from the waters of the Delaware Bay within the jurisdiction of this State. Chapter 18 of this title shall govern eel fishing, anything in this section to the contrary notwithstanding.

The possession of such prohibited net or device by any nonresident or alien on or near such waters shall create a presumption of violation of this section.

For the purposes of this section all unnaturalized foreign-born residents of this State shall be classed as nonresidents of this State, and any person, not an alien, who has resided not less than 12 months within this State, shall be deemed to be a resident of this State.

Whoever violates this section shall be fined not less than \$100 nor more than \$500, and costs, and shall forfeit all nets, boats and other appliances used or possessed. If any person fails to pay any fine and costs imposed under this section such person shall be imprisoned not more than 90 days or until such fine and costs are paid. (Code 1915, § 2525A; 33 Del. Laws, c. 194, § 1; Code 1935, § 3037; 7 Del. C. 1953, § 917; 51 Del. Laws, c. 265, § 1; 57 Del. Laws, c. 146, § 4; 61 Del. Laws, c. 256, § 6.)

Cross reference. — As to taking of food fish from waters other than Delaware Bay by nonresidents or aliens, see § 1115 of this title.

§ 918. Use of spearguns and spears.

Wherever fishing is permitted by use of spearguns and spears under this chapter, the use shall be limited to areas of the Delaware Bay and Delaware River only as far north as Liston Point. (7 Del. C. 1953, § 918; 57 Del. Laws, c. 146, § 6.)

§ 919. Menhaden fishing; penalties.

(a) Menhaden fishing will not be permitted in any state waters on any Saturday, Sunday or holiday between the Friday before Memorial Day and the Sunday following Labor Day.

(b) Menhaden fishing will not be permitted within 3 miles of the shore in any state waters.

(c) All pump outlets, except normal engine cooling water, must be discharged through the bottom of the vessel.

(d) [Repealed].

(e) All menhaden vessels must be equipped with refuse and garbage cans, and all such cans must be emptied at the plant when the vessel docks. Garbage, refuse or litter shall not be thrown overboard at any time.

(f) Dead fish shall not be released at any time. Should there be more fish in the net than can be handled, the captain shall immediately call another vessel to take the excess fish.

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(g) At the end of each set, the fish which the pump will not transfer to the vessel's hold must be loaded aboard manually. No loose fish are to be thrown overboard at any time.

(h) Every vessel over 65 feet in length shall obtain a license before fishing for menhaden in the territorial waters of this State. The fee for such license shall be \$100 and shall be payable to the Department or its duly authorized agent.

(i) Whoever violates this section shall be fined \$2,500 for the first offense, and \$5,000 for each offense thereafter. (59 Del. Laws, c. 418, § 1; 64 Del. Laws, c. 115, §§ 1-3.)

Effect of amendment. — 64 Del. Laws, c. 115, effective July 8, 1983, substituted "3 miles of the shore in any state waters" for "one-half mile of any heavily populated beach or fishing pier" in subsection (b), repealed subsection (d), and substituted "\$2,500" for "\$500" and "\$5,000" for "\$2,500" in subsection (i).

Subchapter II. Regulations Applying to Specific Varieties of Fish

§ 931. Carp fishing.

Carp may be caught and taken from the waters of the Delaware River or Bay at any time and with any kind of net. (28 Del. Laws, c. 203; Code 1935, § 2992; 7 Del. C. 1953, § 931.)

Cross references. — As to carp fishing with hook and line, see § 1117 of this title. As to carp fishing in meadows and ditches of New Castle County, see § 1118 of this title.

§ 932. Herring fishing; penalty.

No person shall catch and take, or attempt to catch and take, from the waters of the Delaware River or Bay, any herring with a net of any character the meshes of which are less than 3 inches stretched measure.

No person shall catch and take, or attempt to catch and take from the waters aforesaid, in any manner whatsoever, any herring between the 10th day of June in each year and the 15th day of January thence next ensuing.

Whoever violates this section shall be fined \$100, and shall forfeit all nets, boats and other appliances used. (28 Del. Laws, c. 203; Code 1935, § 2995; 47 Del. Laws, c. 346, § 1; 7 Del. C. 1953, § 932.)

Cross reference. — As to closed season for herring fishing in waters other than Delaware River or Bay, see § 1104 of this title.

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FORTENBAUGH & YOUNG

ATTORNEYS AT LAW

FILE

FEB 26 1992

Stephen W. Townsend
CLERK

ONE CENTENNIAL SQUARE ■ HADDONFIELD, NJ 08033 ■ (609) 429-5351 ■ Cable: CLARKLAD Telex: 83-1462 ■ Fax: (609) 428-0238
Administrative Partner: William L. Mueller

Edward V. Cattell, Jr.
Also Member Pennsylvania Bar

February 24, 1992

PHILADELPHIA OFFICE
One Commerce Square
2005 Market Street
Philadelphia, PA 19103
(215) 241-1800

OUR FILE NO. 08885/39379

Stephen W. Townsend, Clerk
Supreme Court of New Jersey
CN 970
Trenton, New Jersey 08625

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Mar 3 10 26 AM '92
SUPERIOR COURT
CLERK'S OFFICE

Re: Ampro Fisheries, Inc. v. Yaskin, et al.
(A-62/63)

Dear Mr. Townsend:

In response to your request, by letter dated February 14, 1992, we represented that the Delaware Department of Natural Resources and Environmental Control, Division of Fish and Wildlife ("DNREC") has advised that there are no regulations which exist that pertain to menhaden purse sein fishing in the Delaware Bay.

We have enclosed a letter dated February 19, 1992 from DNREC confirming such representation.

Very truly yours,

CLARK, LADNER, FORTENBAUGH & YOUNG

BY: *Edward V. Cattell, Jr.*
EDWARD V. CATTELL, JR.

EVC/pgm
Enclosure

cc: Rachel J. Horowitz, Esquire



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF FISH AND WILDLIFE
89 KINGS HIGHWAY
P.O. BOX 1401
DOVER, DELAWARE 19903

FEB 24 1992

OFFICE OF THE
DIRECTOR

February 19, 1992

Lynne Parker
Clock, Ladner, Fortenbaugh & Young
1 Centennial Square
Suite 104
Haddenfield, ND 08033

Dear Ms. Parker:

In response to your recent telephone call, there are no other regulations pertaining to menhaden other than what is contained in Chapters 9 and 11, Title 7. If you have other questions please call me at (302)734-3441.

Sincerely,

Marie Hand
Senior Secretary
Fisheries Section

MH

Delaware's good nature depends on you!

~~4562-89T51~~

FILED
APPELLATE DIVISION

JUN 14 1991

A 62 SEP 1991

A 63 SEP 1991

R. Emille Cox
Clerk

FILED
SEP 9 1991
Stephen M. ...
CLERK

ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By: Rachel Horowitz, Deputy Attorney General
Richard J. Hughes Justice Complex, CN 112
Trenton, New Jersey 08625
(609) 984-1473

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4562-89T5

AMPRO FISHERIES, INC.,)

Appellant,)

v.)

JUDITH YASKIN, Commissioner,)
Department of Environmental)
Protection, State of New)
Jersey; GEORGE HOWARD,)
Director, Division of Fish,)
Game and Wildlife, State of)
New Jersey; and BRUCE FREEMAN,)
Administrator, Marine Fish-)
eries Administration, State of)
New Jersey,)

Respondents.)

STATEMENT OF ITEMS
COMPRISING THE RECORD ON APPEAL

TO: R. EMILLE COX, CLERK
Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

EDWARD CATTELL
Clark, Ladner, Fortenbaugh & Young
One Centennial Square
Haddonfield, New Jersey 08033

R

PLEASE TAKE NOTICE that the State of New Jersey, Department of Environmental Protection ("DEP"), hereby certifies and files pursuant to R. 2:5-4(b) a Statement of Items Comprising the Record on Appeal in the above matter. The items comprising the record are as follows:

1. Notice of Proposed Rule-Making, including Summary, Social Impact, Economic Impact, Environmental Impact and Regulatory Flexibility Statement, published in New Jersey Register on January 17, 1989.

2. Minutes of the New Jersey Marine Fisheries Council, for meetings held May 7, 1987, July 9, 1987, September 10, 1987, November 5, 1987, January 14, 1988, March 10, 1988, May 10, 1988, July 12, 1988, September 1, 1988, November 3, 1988, December 29, 1988, February 17, 1989, April 13, 1989, and June 1, 1989.

3. Summary of Relevant Public Comments received at February 9, 1989 public hearing and Agency Responses on Proposed Menhaden Regulation.

4. Proposed changes to N.J.A.C. 7:25-22.2(a), based on public comments.

5. Certificate of Proposal, Adoption and Promulgation for N.J.A.C 7:25-22, dated June 23, 1989.

6. New Jersey Marine Fisheries Council Summary of Menhaden Subcommittee Meeting, dated January 12, 1988.

7. Memorandum from Douglas Vaughan, National Marine Fisheries Service, to AMAC Members, dated March 21, 1985, with attached Tables 1, 2, 3 and 4 regarding 1983 fishing season.

8. Publication of Rule-Making regarding N.J.A.C. 7:25-22, including Summary of Public Comments and Agency Responses, published in New Jersey Register on July 17, 1989.

9. Transcript of public hearing on proposed menhaden regulatory amendment, held February 9, 1989.

10. Letter of Steve Jones, Zapata Haynie Corporation, to Martin McHugh, Division of Regulatory Affairs ("DRA"), undated, with attachments.

11. Letter of Thor Lasser, National Fish Meal and Oil Association, to Martin McHugh, DRA, dated February 15, 1989.

12. Letter of James Heinold, Cape May County Party & Charter Boat Association, to Martin McHugh, DRA, undated.

13. Letter of Louis Rodia, Cape May County Department of Public Affairs, to Martin McHugh, DRA, dated February 15, 1989 and containing comments on proposed regulations.

14. Letter of Louis Rodia to Martin McHugh, dated February 15, 1989 and containing support for comments on proposed regulations.

15. Written Statement of Atlantic States Menhaden Council, with attachment.

16. Letter of Nicholas Scheskowsky, New Jersey Coast Anglers Association, to New Jersey Marine Fisheries Council, undated, with attachments.

17. Letter of Victor Klima, Jr. to Bruce Freeman, sent February 13, 1989.

18. Letter of Bob Matthews, Spring Lake live liner fishing club, undated.

19. Letter of John P. Doyle, Assemblyman, to Martin McHugh, DRA, dated January 30, 1989.

20. Letter of R. A. Christie, Fish Hawks Saltwater Anglers, to Martin McHugh, DRA, dated February 3, 1989.

21. Letter of Sergio Radossi, Hudson River Fishermen's Association, to Martin McHugh, DRA, dated February 3, 1989.

22. Letter of Timothy Newman, Berkeley Striper Club, to Martin McHugh, DRA, dated January 11, 1989.

23. Letter of Charles Szulczewski to Martin McHugh, DRA, dated February 14, 1989.

24. Letter of Walter Chew to Martin McHugh, DRA, dated February 10, 1989.

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: *Rachel Horowitz*
Rachel Horowitz
Deputy Attorney General

DATED: *June 14, 1990*

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for New Jersey Department
of Environmental Protection
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Rachel Horowitz
Deputy Attorney General

REC'D
APPELLATE DIVISION
JUN 14 1990
R. Damiani
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4562-89T5

AMPRO FISHERIES, INC.,)

Appellant,)

v.)

JUDITH YASKIN, Commissioner,)
Department of Environmental)
Protection, State of New)
Jersey; GEORGE HOWARD,)
Director, Division of Fish,)
Game and Wildlife, State of)
New Jersey; and BRUCE FREEMAN,)
Administrator, Marine Fish-)
eries Administration, State of)
New Jersey,)

Respondents.)

Civil Action

CERTIFICATION OF SERVICE

Catherine Damiani, hereby certifies as follows:

1. I am a legal secretary in the Division of Law, New Jersey Department of Law and Public Safety.

2. On June 14, 1990, I caused two copies of the Department of Environmental Protection's Statement of Items Compr-

sing The Record On Appeal and Civil Case Information Statement in
this matter to be mailed by regular mail to:

Edward Cattell, Esq.
Clark, Ladner, Fortenbaugh & Young
One Centennial Square
Haddonfield, New Jersey 08033

3. I hereby certify that the foregoing statements made
by me are true. I am aware that if any of the foregoing statements
made by me are willfully false, I am subject to punishment.

Catherine Damiani
Catherine Damiani

DATED: June 4, 1976



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW

RICHARD J. HUGHES JUSTICE COMPLEX
CN 112
TRENTON 08625

(609) 984-1473

June 14, 1990

KENNETH S. LEVY
ASSISTANT ATTORNEY GENERAL
DIRECTOR

REC'D
APPELLATE DIVISION

JUN 14 1990

Emille Cox
Clerk

ROBERT J. DEL TUFO
ATTORNEY GENERAL

Emille R. Cox, Clerk
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Re: Ampro Fisheries, Inc. v Judith Yaskin,
Commissioner, Dept. of Environmental
Protection, State of New Jersey;
George Howard, Director, Division of
Fish, Game and Wildlife, State of New
Jersey; and Bruce Freeman, Administrator,
Marine Fisheries Administration, State of
New Jersey
Docket No. A-4562-89T5

Dear Mr. Cox:

Enclosed for filing please find the original and four
copies of the Statement of Items Comprising The Record On Appeal in
the above matter. Also enclosed is a Civil Case Information
Statement. Thank you very much for your attention to this matter.

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: *Rachel Horowitz*
Rachel Horowitz
Deputy Attorney General

RH:ced
Enclosures
cc: Edward Cattell, Esq.

A 62 ~~SEP 1991~~

A 63 SEP 1991

FILED
SEP 9 1991

Stephen W. ...
CLERK

REC'D
APPELLATE DIVISION

JUN 18 1990

R. ...
Clerk

EDWARD V. CATTELL, JR., ESQUIRE
CLARK, LADNER, FORTENBAUGH & YOUNG
ONE CENTENNIAL SQUARE
HADDONFIELD, NJ 08033
(609) 429-5351
ATTORNEYS FOR **PLAINTIFF**

FILED
APPELLATE DIVISION

JUN 18 1990

R. ...
Clerk

AMPRO FISHERIES, INC.

Plaintiff-Appellant,

vs.

JUDITH YASKIN, COMMISSIONER,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
COUNTY

APPELLATE DIVISION

Docket No. A-4562-89T5

TRANSCRIPT OF PUBLIC HEARING HELD FEBRUARY 9, 1989

12

CERTIFICATION OF SERVICE

I certify that I caused a copy of the foregoing "Transcript of Public Hearing held February 9, 1989" to be served upon the following on June 14, 1990:

By First Class Mail, Postage Prepaid

Rachel Horowitz, Esquire
Deputy Attorney General
CN-112
Trenton, New Jersey 08625

CLARK, LADNER, FORTENBAUGH & YOUNG
Attorneys for Defendant

BY:


EDWARD V. CATTELL, JR.

1
2 PUBLIC HEARING ON PROPOSED MENHADEN REGULATORY AMENDMENT

3 FORSYTHE NATIONAL WILDLIFE REFUGE

4 February 9, 1989 - 3:00 p.m.
5 - - - - -

6 In attendance:

7 Bruce L. Freeman, Administrator, Marine Fisheries Administration
8 Bruce Halgren, Chief, Bureau of Marine Fisheries
9 Martin McHugh, Legal Representative, Div. of Regulatory Affairs
10 Ronald J. Sickler - Monmouth Beach Cartoppers
11 Jim Herbert - Cartoppers
12 John J. Rowland - CMC Party and Charter Boat Association
13 Jim Heinold - CMC Party and Charter Boat Association
14 Steve Smith - CMC Party and Charter Boat Association
15 Art Wolf - CMC Party and Charter Boat Association
16 W.J. Palmer - CMC Party and Charter Boat Association
17 Walt Chew - Netter
18 Lewis Haubois
19 Mike Runyan
20 Walt Hender
21 John A. Bennett, Jr. - Spring Lake Live Liners
22 Nick Scheskowski - J.C.A.A.
23 Bob Lutz
24 Gil Ewing
25 Joe McTomoney
Tom Fote
Ted Layton
Stew Tweed - N.J. Sea Grant Marine Advisory Service
Raymond Szrkyewski
John J. Horn - Director, Atlantic Menhaden Counsel
Thorr Lassen - National Fish Meal Corp.
Charles Williams, III - Chief Pilot, Zapata Haynie
Mark Silva - Consultant, Ampro Fisheries, Inc.
Steve Jones - Plant Manager - Zapata Haynie
John Barnes - Vice President, Ampro Fisheries, Inc.
Kevin Ward - Gillnet Boats
Richard Issacson - run tidelands for Zapata Haynie
Jim Brinley
Jack Smith
Everett Giberson - Marine Fisheries Council
Robert Lick - Marine Fisheries Council

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1 BRUCE L. FREEMAN: Ladies and gentlemen, my name is
2 Bruce Freeman. I'm the Administrator of Marine Fisheries for
3 the State of New Jersey, Department of Environmental
4 Protection. To my left is Bob Lick, Chairman, or the council
5 member for the New Jersey Marine Fisheries Council. And to my
6 right is Bruce Halgren, who is the Chief of Marine Fisheries of
7 the Department of Environmental Protection, Division of Fish,
8 Game and Wildlife.

9 The purpose of this meeting is to solicit comments
10 concerning the proposed rule changes for the taking of Atlantic
11 menhaden in New Jersey waters. The Department will accept oral
12 comments this afternoon. It will also accept any written
13 comments through February 16th of this year. These comments in
14 writing should be sent to Mr. Marty -- Martin McHugh, Division
15 of Regulatory Affairs, Department of Environmental Protection,
16 CN 402, Trenton, New Jersey. There are copies of the proposed
17 regulation at the back of the room. Also on those regulations
18 are several pieces of information, one of which is the mailing
19 address for any written comments. Anyone wishing to submit
20 written comments in addition to their oral comments, they
21 certainly are welcome to do so.

22 (At this time, Mr. Freeman gives opening remarks and summary of
23 proposed rule changes.)

24 JOHN J. HORN: Mr. Chairman, and members of the
25 Marine Fishery Council, my name is John Horn. I represent the

1 Atlantic States Menhaden Council, including Ampro Fisheries
2 and Zapata Haynie, and may I thank you for the opportunity to
3 present our views in opposition to the proposed regulations
4 endorsed by you at your meeting of July 12th, 1988. It was at
5 the July 12th meeting that I was prevented from speaking on
6 the subject of menhaden commercial fishing, and from
7 submitting to council, information and a film pertinent to the
8 issue.

9 The fact remains that had the Atlantic States
10 Menhaden Council been given the opportunity to participate
11 in the discussions, early in the process, our comments and
12 proposals would have benefited all involved.

13 Atlantic States Menhaden Council always considered
14 it a matter of high priority to generate and improve relations
15 between sports fishermen, commercial fisherman, and the
16 menhaden industry. The exchange of ideas and information is
17 the best way to bring about a better understanding of our
18 interest, and it is through the New Jersey Marine Fishery
19 Council that we expected to attain this goal.

20 We, of the menhaden industry, would now propose that
21 menhaden fishing be in line with the 1966 study, "Evaluation of
22 the Menhaden Fishery in Delaware Bay." Copy attached.

23 The legislation proposed the in moving the line
24 from 0.06 nautical miles to 1.2 nautical miles was embodied in
25 Senate Bills 1372 and 3395. Former representative of the

1 Atlantic States Managing Council, Captain David H. Hart, Sr.,
2 in a letter dated February the 11th, 1986, copy attached, from
3 Paul Hamer, Chief of the Bureau of Marine Fisheries, was
4 advised that the present set of regulations put in place in
5 1983 was sufficient to control the menhaden fishing industry,
6 and that 1.2 nautical miles from shore was unnecessary. It
7 might be well to point out at this time that as a result of
8 the 1983 regulations, Zapata Haynie and Ampro Industries
9 issued a code of ethics, copy attached, to its menhaden boat
10 captains.

11 To date, there's only been one alleged incident of a
12 violation of this code. And this incident was never proven.
13 You might ask the question, "Why do I bring this up at this
14 time?" Only to indicate that the menhaden industries, mainly
15 Zapata Haynie and Ampro Corporation, has lived up to the letter
16 of the law, and we see no reason nor incident that calls for
17 the changing of the regulations at this time.

18 Another statement about the Division of Fish and
19 Game and Wildlife states that on May the 2nd, 1983, the
20 Department of Environmental Protection promulgated rules that
21 regulated purse seine fishing, and that they oppose moving the
22 line from 0.6 nautical miles to 1.2 nautical miles. Copy
23 attached. See the statement concerning taking of menhaden,
24 Senate Bill 3395.

25 You also have before you a synopsis of a historical

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and scientific survey initiated in the summer of 1966 by the New Jersey Division of Fish, Game, to study the menhaden fishing in Delaware Bay. Copy attached.

Also attached is a copy of New Jersey Rod and Gun, Archery, Fishing, Hunting, Shooting, Skin Diving, and Conservation newspaper, of July 1967, volume 2, number 19, with a heading, "Sportsmen examine menhaden fishing." I solicit you to read their findings.

Comments on Fish and Game Council public hearing on menhaden fishing in Delaware Bay, November the 24th, 1964. Copy attached. And also attached, the abstract of a final report on Phase 2 of project 32-R-1, Evaluation of Menhaden Fishery in Delaware Bay and Adjacent Waters.

Evaluation of the menhaden, final report project 3-2-R-2, January the 30th, 1968, by the Division of Fish and Game, Bureau of Fisheries, Marine Fisheries Section.

Also attached is a copy of a letter from William N. Feinberg for the Asbury Park Fishing Club dated August 21st, 1981, in opposition to the legislation calling for 1.2 nautical miles from shore. I trust that each member of the Fish and Game Council was given the benefit of, and made aware of, the results of all of these studies and findings prior to the decision to adopt any new regulations.

Since many man hours and monies were expended in the past to examine all charges, accusations and complaints, to come

1 up with the final result of the present regulations, we believe
2 these regulations should stand.

3 It is our learned opinion, that being a regulatory
4 body, that New Jersey Marine Fishery Council should have had
5 available all of the above facts before being called upon to
6 change any of the present regulations. If this hasn't been
7 done, I respectfully recommend, that number one, no changes be
8 made in the present regulations until a full public hearing is
9 held with the department providing each of the council members
10 with factual reasons for any recommended change.

11 Number two, that a representative committee of
12 sport and recreational fishermen are appointed. Along with a
13 representative of the menhaden industry, including bait
14 menhaden fishermen and commercial fisherman, to meet for the
15 purpose of exchanging views and discussions that can be
16 presented to the council members for the council's
17 considerations.

18 To do otherwise would be discriminatory. It
19 therefore baffles us, and we wonder why, after all of the
20 studies, all of the testimony, recommendations by division
21 heads, including the statement of former Commissioner Robert
22 Roe, the industry's complete adherence to the code of ethics,
23 and the lack of any scientific studies, listing of any
24 complaints, or any relative information calling for a change in
25 what we believe to be workable regulations.

1 In view of the factual information that we provided
2 you with today, I would recommend that the present regulations
3 continue in effect with out change.

4 Let me summarize, if I may, why we of the menhaden
5 industry feel that reconsideration of your action of July 12th,
6 1988, is necessary. One, the menhaden industry was never
7 invited to participate in the original meetings considering
8 changes in the present regulations, where we could have had the
9 opportunity to make proposals that could have possibly enhanced
10 the feelings between the menhaden industry, the sports
11 fisherman, and the commercial fisherman.

12 Two, the members of the New Jersey Fishery, to my
13 knowledge, were never made aware of the studies, and
14 information pertaining to the fishing of menhaden by the New
15 Jersey Department of Environmental Protection's Division of
16 Fish and Game and Wildlife.

17 Three, the complete compliance with the code of
18 ethics since 1984.

19 Four, the statements made by the Division of Fish
20 and Game and Wildlife in opposition to Senate Bill 3395,
21 enclosed, should have been brought to your attention before
22 being called upon to vote on this issue.

23 I can't help but feel that the Marine Fishery
24 Council members were not properly informed in this matter.

25 Five, also comments of the public hearing on

1 menhaden fishing in Delaware Bay, November the 24th, 1964, and
2 may I quote from that report? "It's highly significant that
3 menhaden fishing was the first to be licensed in the State of
4 New Jersey in 1896." And since that time, there has been only
5 one conviction for violating this law by menhaden boats. This
6 is in spite of the fact that there had been hundreds, and
7 possibly thousands, of boardings of these vessels.

8 The report also discloses, "As a further result of
9 this hearing, the Fish and Game Council, and Commissioner Roe,
10 recognized the need of a complete and thorough study of the
11 menhaden industry."

12 Now, this is the basis from which the Marine Fishery
13 Council Members should have begun their approach to the
14 menhaden question. Commissioner Roe stated, and properly so,
15 "Until the results of this study are known, it is not
16 considered in the best interest of this fishery, or the State
17 of New Jersey, to enact restrictive legislation at this time."

18 An up to date of that study -- an update of that
19 study of the menhaden industry is needed at this time to
20 determine based upon facts, not emotional situations, any
21 changes that may be necessary.

22 Now, why do I raise this at this point? If this
23 situation was handled properly, a public hearing should have
24 been held, inviting all persons involved, including menhaden
25 industries, sport fishing persons, commercial fishing industry,

1 and the public, with proper notice to all parties. To do
2 otherwise would not provide the members of the Marine Fishery
3 Council with the necessary information from which to make
4 proper findings. We are all aware that this procedure was not
5 followed. The public hearing, at this point, is therefore one
6 attempt to correct your past mistakes.

7 The question of sportsmen must be raised, and may I
8 quote from a long-standing organization, the New Jersey Rod and
9 Gun newspaper, "I came away from my visit amazed at the charge
10 which had been made in my opinion of menhaden fishing. I would
11 strongly suggest that the saltwater fishermen and boatmen who
12 come upon these vessels, ask to be allowed to board and examine
13 the catch. I'm sure that you will come away as I did knowing
14 that you were giving examination and treatment prior to naming
15 them guilty of ruining your sport."

16 Seven, evaluation of Fish and Marine -- menhaden
17 fishing in Delaware Bay, final report. I might be asked, "Why
18 a study at Delaware Bay?" In the first paragraph of that
19 report, and I quote, "Members of the sport fishing community
20 had accused the menhaden boats of taking large amounts of
21 sport fish and oysters, and were demanding closure of the Bay
22 to all modern purse seiners."

23 I could go on, but I would hope now that you, the
24 members of the Marine Fishery Council, have all of these facts
25 and studies to support the continuation of the present

1 regulations and the best interest of all parties, and to
2 prepare a method of handling this matter in a proper way.
3 Hearings in the like, facts in the like, studies in the like,
4 to result in a sensible resolution.

5 It is with the utmost importance that you, the
6 members of the Marine Fishery Council, take the time to read
7 the material that I provided you with today, prior to making
8 any final decisions. You must remember this decision should be
9 made on the facts and data before you, not on any emotional
10 grounds.

11 I want to thank you for that opportunity. You have
12 all of this information before you, so there's no need for me
13 to go through it all. You can read it, and I hope you do. And
14 we will be following this report up with a written statement to
15 the Marine Fishery Councils, the council members, so that
16 they'll be able to judge these proposed regulations on a very
17 sensible matter. And with that, if you have any questions,
18 I'll try to answer your questions. If not, you can go on to
19 the next speaker, who I think would be Thorr Lassen, from the
20 National Institute of Fisheries, and I would appreciate if you
21 have any questions, feel free to ask me.

22 MR. FREEMAN: We do not, Mr. Horn.

23 MR. HORN: Thank you very much.

24 MR. FREEMAN: Thank you very much.

25 The next speaker I have is Thorr Lassen,

1 representing the National Fish Meal Corporation.

2 MR. THORR LASSEN: Thank you, Mr. Chairman. My name
3 is Thorrr Lassen, and I'm with the National Fish Meal and Oil
4 Association. We're a non-profit trade organization that
5 represents mennaden companies that are operating both on the
6 Atlantic and the Gulf.

7 Just to start off, I wanted to kind of give you a
8 little bit of the National perspective in terms of the
9 importance of fishery overall. You're all probably familiar
10 that it is the most important commercial species in terms of
11 the quantity of fish that's landed in the U.S., accounting for
12 about 40 percent of U.S. Fishery Landings.

13 At the same token, fish meal and oil is the second
14 largest fishery export product in the U.S., contributing about
15 \$31,000,000 to the U.S. economy, and that's a 1986 figure.

16 You're familiar with it in terms of its industrial
17 use, and its use as a feed for other food industries, but it's
18 also important in terms of a source of Omega-3 fatty acids, and
19 that, I'm sure, you're very familiar that that's been
20 recognized as, and associated with health benefits and the
21 prevention of coronary diseases and heart attacks. And I think
22 that this particular aspect with regard to fish oil is
23 going to be an important part in the future of what we eat, and
24 how Omega-3's are used in our diet, whether it's used directly,
25 or whether it's used in chickens to lower their cholesterol.

1 We are expecting in the very near future that the
2 FDA is going to recommend that partially hydrogenated menhaden
3 oil be given -- generally recognized a safe status for human
4 consumption in the U.S. It's long been used in Europe, and
5 just as vegetable oil is in the U.S. We expect that fish oil
6 is going to be acceptable for U.S. consumption. That kind of
7 gives you the picture, and you can see that we're really on
8 the verge of changing how fish oil is used in the U.S., and
9 really directing its use more towards some of the healthful
10 benefits associated with Omega-3.

11 So, it's an important fishery for the industry
12 itself, and it's important for consumers that are health
13 conscious, and it's important for us all, really, to keep the
14 industry going. And that's why we're here today. Obviously,
15 we need to maintain some access to the resource. We need to
16 make sure that the stocks are properly managed.

17 You all, I think, are familiar with the stock. It
18 is one stock that has a coast-wide migration. In 1981, the
19 Atlantic States Marine Fisheries Commission adopted a coast-
20 wide management plan to protect both the resource and the
21 users.

22 At that time, the plan recommended that commercial
23 fishing on pre-spawning menhaden, the younger year classes,
24 zeros to twos, should be reduced and enhanced through the
25 survival of menhaden to sexual maturity as well as increase the

1 yield per group.

2 The plan established fishing seasons along the East
3 Coast, in order to protect the pre-spawners, and shift the fishi
4 efforts, so that aged three menhaden would make up a greater
5 percentage of the catch.

6 The long term objectives really consisted of two
7 parts in the plan. One, it was to achieve the greatest
8 continuing yield for each area by determining optimal harvest
9 age. And the other was to eliminate restrictions, statutes,
10 regulations, which don't contribute to that goal.

11 Let me touch on that latter point first. In a
12 recent review of the plan, the Fisheries Commission's Advisory
13 Committee reported that the trend in recent years to close
14 fishing has really taken off. And this is often for political,
15 social, rather than conservation reasons.

16 It pointed out that it was contrary to the goals of
17 the fishery management plan. Closure, such as the one that's
18 being proposed here in Jersey, closures, such as the one that
19 took place in Delaware, partial closures in North Carolina, a
20 total closure in South Carolina, partial closures in New York,
21 New Hampshire, really has reduced the area that's available
22 for the industry to fish, regardless of the stock conditions.

23 And it really has an impact on the industry, and it
24 threatens the industry -- continuation of the industry. For
25 those of you that have been around for a long time have seen

1 the plants along the Atlantic Coast, closing of the earth, and
2 we're down to really two in Virginia, and I think, one or two
3 in North Carolina.

4 In terms of the objective that deals with biology,
5 we feel that the regulation that's being proposed here is also
6 contrary to the coast-wide management plan.

7 In the summer, menhaden spread out along the East
8 Coast, just by age and by size. The smaller and the younger
9 fish concentrate in the South Atlantic and Chesapeake Bay
10 areas. The larger and older fish, concentrating in the Mid-
11 Atlantic, and North Atlantic areas.

12 If the menhaden vessels are pushed out of New Jersey
13 waters, and for the most part they would be, you're talking
14 about reducing their harvest by, you know, it can be up to 45
15 percent of what they've traditionally taken in that quarter
16 that you're talking about today. If they're pushed out of New
17 Jersey waters, then they're going to be forced to concentrate
18 their fishing in those waters where they're allowed to fish,
19 and that's Virginia and North Carolina, and that's a different
20 age composition. That's totally contrary to the goals and
21 recommendations of the plan to reduce fish and increase
22 spawning menhaden.

23 And it has an impact on the plan's objectives. It
24 has an impact on the ability of the industry also to maximize
25 the yield per group. The farther up north you get, there's a

1 better oil content. You're maximizing the use of the resource,
2 and I think that's from any fishery manager's point of view,
3 that's one of the objectives that you want to do with regard to
4 using the resource. *

5 The menhaden resource really is best protected
6 through consistent management strategies throughout the range,
7 as opposed to each state taking what it feels is in the best
8 interest for the local situation.

9 The state actions that are inconsistent with the
10 objectives, really only undermine the well being of resource
11 and the long term interest of the users, all the users,
12 commercial and recreational.

13 We all depend on the same stock, and our interests
14 are going to be best served if we work together, if we manage
15 the stock as a unit, because it is a coast-wide unit, and if
16 the activities of the users don't conflict with each other, and
17 we work together to make sure that they don't conflict with
18 each other.

19 The current fishing in New Jersey does not adversely
20 impact the condition of the menhaden stock. There may be a
21 perception that it does. It does not impact the availability of
22 other species as well. In fact, with regard of menhaden, the
23 present year class, as reported by the National Marine Fishery
24 Service, is relatively strong and abundant. Stock is in good
25 condition, and that was reported at one of the latter meetings

1 by the National Marine Fishery Service.

2 The current controversy that we have here in New
3 Jersey, or maybe I shouldn't say current, because it's been
4 going on for so many years, but it appears to stem from the
5 conflict that occurred in 1983 between purse seining vessels
6 and recreational fishermen.

7 These conflicts can be avoided, and I think since
8 that time in '84, there were some code of ethics devised, and
9 changes in practices, and I'm not sure that there have been
10 conflicts since that time. That's a question that I'll, you
11 know, ask when we get to the technical questions dealing with
12 the regulations. But they can be avoided with communication.
13 I don't think the menhaden companies are aware of any conflicts
14 themselves. No one has -- well, I'll let them speak for
15 themselves, but I don't think anyone has contacted them saying
16 "There's a conflict. You guys have really messed up this
17 time." I think in '83 they were aware of it, because I think
18 Bruce Spreeny came down and talked to them. but since that
19 time, there hasn't been that communication. They're not out
20 there to cause trouble. I think they want to live with their
21 neighbors that are using the same ocean resources.

22 The issue of menhaden by-catch has also been raised
23 in the past. Catch records, I think they're well documented,
24 have proven that the menhaden fishery is clean, with less than
25 one percent of catch of food fish. It's all been said that if

1 you go in the hold, there's not enough fish there to feed the
2 crew.

3 Concern on the impact on the availability of sport
4 in fish has also been raised. And I point to an example to try
5 to address that, the closure in the Delaware waters. In 1982,
6 weakfish didn't show up in Delaware Bay. The recreational
7 fishery in Delaware collapsed, the commercial fishery was
8 blend. Calls for the elimination of menhaden fishery
9 followed.

10 The Delaware Fish and Game Department testified
11 that there was no evidence to show menhaden fishing had any
12 effect on the availability of recreational fish. This was
13 confirmed by the reemergence of strong recreational fishing
14 years in 1983 and '84, despite continued commercial harvest of
15 menhaden.

16 Unfortunately, there was another incident, I think
17 it involved fish spill at the time, and in 1984, the
18 legislature prohibited menhaden fishing in State waters. I
19 guess, to summarize the general statement that I wanted to
20 make is that it seems that we're here today because there
21 hasn't been a lot of communication between the menhaden
22 fishery and the recreational fishery. We're both users of
23 the resources, and I don't think either one of us wants to do
24 the other party in, and I think that these concerns can be
25 addressed, if we had a little closer communication between the

1 two groups rather than taking action that would push the
2 vessels off shore. They don't spend a lot of time in the
3 area, but it is important to them.

4 With regard to the regulations, I did want to ask
5 for the record, and I guess I can also follow this up in a
6 letter with comments that we will submit. But I think it's
7 important to -- for the record -- to have an understanding of
8 what the conflicts are, or have been. The record's fairly
9 clear on what happened in 1983, but since then, the record's
10 not very clear in terms of what sort of conflicts have
11 occurred between the user groups. I don't think the industry
12 -- the menhaden industry's been contacted, or charged, or
13 called up by the State or other groups saying, you know, "You
14 guys are causing problems."

15 So, what is the conflict that we're trying to --

16 Under the economic impact, there's a statement that
17 deals with the positive economic impact on suppliers of
18 recreational fishing equipment. As conflict between
19 recreational large scale vessels are mitigated, and this gets
20 back to the question of conflicts, but the question I really
21 wanted to ask is, is it the feeling that these regulations
22 will increase the availability of recreational fish, or
23 increase recreational fishing. That's what's a little unclear
24 in terms of what positive economic impact will be.

25 That was a question that I had when I looked at it.

1 I'm not sure that the correlation is near 10. Get rid of
2 menhaden, and recreational fishing will be better.

3 On the other -- on the following page, I think that
4 there already are regulations in place that -- and commitments
5 by the companies to clean up any spills that they're
6 responsible for. I'm not sure that that's a new regulation,
7 or even that's an additional benefit.

8 Under environmental impact, it speaks about
9 additional protection provided to the menhaden stock. And I
10 guess I go back to my prior point, that on the overall basis,
11 you know, you could very well end up with an adverse impact on
12 the stock as a whole in the coastal -- if you think about the
13 entire stock, and what this regulation is going to do to the
14 fishing pressure on the Atlantic.

15 Additional protection provided would be especially
16 beneficial to juvenile menhaden, which tend to remain in near
17 shore waters. I think the near shore waters where juvenile
18 fish are located are in tidal streams, as opposed to this area
19 that we're talking about, 0.6 to 1.2. And the distribution of
20 adults and juveniles is really more a north-south distribution
21 in any sort of east-western, or near-shore-off-shore
22 distribution, is not going to be affected by moving the line
23 from 0.6 to the 1.2, so I guess I would ask what sort of
24 information is available. That addresses that.

25 And the other point that I did want to mention is

1 -- has to do with possession of other fish. You know, this is
2 a menhaden fishery, and it's as clean as fisheries go. I
3 think the track record's fairly strong. Less than one percent
4 catch, anything but menhaden. It's typically recognized that
5 from time to time, something else may come in. And a one
6 percent provision, I think would be appropriate. By-catches are
7 established in many fisheries in the East Coast, even in the
8 menhaden fishery, I think there's a one percent allowance in
9 Virginia. If you look at the different states, there are
10 allowances for those very rare occasions when something else
11 just happens to be in the net, but it is very minor. And to
12 say that you're 100 percent efficient, I'm not sure anybody's
13 100 percent efficient. I don't know what our human efficiency
14 is, but I think that that should be addressed.

15 That's the only thing that I wanted to raise, and I
16 do expect to be submitting written comments. Thank you.

17 MR. FREEMAN: Thank you, Mr. Lassen.

18 Charles Williams, from Zapata Haynie.

19 CHARLES WILLIAMS, III: Thank you, Mr. Chairman,
20 members of the council. My name is Charles Williams. I'm
21 with the Zapata Haynie Corporation in Virginia, and my
22 occupation is a spotter pilot, fly the waters of the
23 Atlantic and the bays in search of menhaden.

24 I've been doing this for about 17 years now, and my
25 family, my father and grandfather before me, have been in this

1 business and we used to live in Cape May, when there was a
2 menhaden industry there, and we're down in Virginia now.

3 It deeply concerns me that this action is being
4 proposed to restrict the menhaden fishery, push it further off
5 shore. We catch a good percentage of our fish in that
6 corridor that is being proposed to restrict us from.

7 The -- we would love to fish off shore, out of
8 everybody's way. Out of the way of boatists, wrecks,
9 obstructions, what have you, away from other recreational and
10 other users, but due to the species that we're after, and
11 where we find them, they're a costal species. They stay
12 close. Just like crabs, clams, oysters, and other fish, they
13 like the edges and the contours where the nutrients are. They
14 stay in these areas. So, consequently, we have to work these
15 areas if we're going to survive.

16 I'd just like to say that we are probably the most
17 studied, researched, and regulated fishery in the United
18 States. The Russians included. This is a list of what we've
19 done in New Jersey, and this list -- our captain fills out a
20 captain's fish report every day. You're familiar with that.
21 It gives the name of the vessel, the date, when the net was
22 put in the water, when it was retrieved, the amount of fish
23 that were caught, what airplane was involved in that
24 transaction, that set, the location, what geographic location
25 in the State of New Jersey it was in. There's another code

1 here; that's for the weather, I think, what the weather was
2 that day. And the miles, and directions to shore. And
3 there's another -- other remarks when the boat anchored,
4 (Indiscernible - papers rustling) and unloaded. We're trying
5 to do our part. We're trying to be good guys. We don't know
6 of any evidence that we're harming the species, or any other
7 species. We have not, to my knowledge, had any problems in
8 the State of New Jersey, and well, since the incident in 1983.
9 And I will say that it was probably some bad judgment in the
10 density of the amount of boats that were in that area at the
11 time. And as a result of that problem that we had, we have
12 been very sensitive to that happening again, and to our
13 knowledge, we just haven't had any problems.

14 And Bruce, you came down to talk to us several
15 times. You talked to our captains, our spotter pilots, both
16 companies, the management, and explained the issues. As far,
17 as I knew, we didn't have any problems. We weren't having any
18 problems. Now, all of a sudden, you're on the commission to
19 restrict us from off-shore. We would (end of tape number
20 one).

21 UNIDENTIFIED SPEAKER: Do you dispute the
22 statement that's contained in the economic impact -- that
23 theory that you could catch the same amount of fish just by
24 fishing longer? Do you dispute that?

25 I know that you wouldn't bring a boat up here if

1 the fish weren't here, but given the fact that you normally
2 come up to a fisher here -- it's that time of the year, etc.,
3 etc., etc., in that 25-day time frame, if you had to stay 35
4 days, would you have caught the same amount of fish, is what
5 I'm saying.

6 MR. WILLIAMS: Possibly. Let me say this: We
7 would catch more fish if we stayed off of the coast of New
8 Jersey more than what we had. If we stayed off there 50 days
9 last year, I don't think it's fair to say we would have
10 doubled their catch.

11 UNIDENTIFIED SPEAKER: No. Staying 1.2 miles.

12 MR. WILLIAMS: Pardon?

13 UNIDENTIFIED SPEAKER: Staying out to 1.2.

14 MR. WILLIAMS: Staying out to six-tenths is what I
15 was talking about, what we did last year.

16 UNIDENTIFIED SPEAKER: Okay.

17 MR. WILLIAMS: I don't think it would be fair to
18 say if we stayed up here twice as many days, we would have
19 caught twice as many fish, because it's hit them when they're
20 running, that thing. They've got to be in good shape, and
21 it's a lot of fish around, but if they're not in good shape, I
22 have a problem with our captain. We've got one of our
23 captains here from New Jersey. I don't have too much problem
24 with this one, but some of the captains on the bay will run up
25 and down the beach in the airplanes looking for fish, and if

1 you spot a fish off of Atlantic City, say, it's coming out of
2 Virginia, he has to get his crew ready on Sunday morning, all
3 in all, they have to leave their families, get aboard the
4 boat, and they have to seine for something like 15, 16 hours,
5 I guess. To run up here for fish that myself or someone else
6 has reported that I said they were there, you can come up
7 here, and we could have a good catch Monday. If you're on
8 station Monday.

9 Monday morning, the boat's on station, the pilot is
10 on station, and the fish are no where to be seen. Or they're
11 in small bunches. I reported bunches of fish with 50 or 100,
12 200,000, per each -- fish in these schools, and they're
13 spread out in small bunches, or wild, or it's a lot of things
14 that enter into these fish that we have no control over. And
15 the thing of it is, we have to hit them when they're right.
16 We've got to be there when they're at their best. The best
17 time to catch fish is when they're showing and in good shape.
18 If we're there any other time, it doesn't pay us for that boat
19 to run. It burns a lot of fuel, and it's a lot of energy,
20 effort, and expense involved in running up here, so, we like
21 to come up here when it's a down cycle in Virginia, up cycle
22 in New Jersey, or along the coast, and there's a lot of things
23 that enter into it. The weather -- the fresh water, the rain
24 run-off, the moon. So many things enter into it, but even
25 though we know that, it's hard to sit down and predict what

1 you're going to do. There's so many variables in it.

2 UNIDENTIFIED SPEAKER: One other question. Do you
3 have any data, any of these people from the company, have any
4 data as to looking at your total catch, what percentage was
5 caught in the bay regions, and what percentage is caught in
6 the open ocean?

7 MR. WILLIAMS: Due to the way that the net logs are
8 designed, it pretty much says we fill out in Delaware Bay, it
9 seems to be just a Delaware Bay block of geographic data that
10 we collect. It's not broken down into Delaware or New Jersey.
11 We could guess that it would be 50 percent, if we could say
12 that New Jersey owns 50 percent of the bay for 50 percent of
13 our catch -- that we catch in Delaware Bay comes from there.

14 UNIDENTIFIED SPEAKER: So, it's Delaware Bay and
15 Sandy Hook Bay, as compared to the ocean?

16 MR. WILLIAMS: And -- beg your pardon? In Sandy
17 Hook Bay?

18 UNIDENTIFIED SPEAKER: Well, taking any in-shore
19 water in New Jersey versus the coastal waters of New Jersey,
20 what percentage do you catch in-shore, as opposed to off-
21 shore?

22 MR. WILLIAMS: I think as far as the --

23 UNIDENTIFIED SPEAKER: Is there any data like that?

24 MR. WILLIAMS: You're talking the net logs? Yes,
25 we can give you that. The 45 percent, I believe, you said was

1 on the sixth-tenth to about 1.2, 45 percent of our catch would
2 be in that area. And I can't stress the importance of that
3 coastal strip enough that -- and it's the same thing down in
4 the -- we have areas in the Chesapeake Bay that they're just
5 hot spots. They're good fishing places there. They're good
6 fishing holes. They're places that fish like to school and
7 gather, where we can do good with them. And other areas,
8 there's no need to even look, because fish just don't like to
9 school in these other areas.

10 So, it's -- believe me -- I'm telling you, we would
11 love to fish away from conflict with other users, gear,
12 obstructions. Our nets cost oh, \$5,000 each, something like
13 that. We have, by accident, set on blue fish before, and
14 they will destroy your net. And if that happens, they turn
15 their boats loose. They don't want to catch blue fish. We
16 can't afford to work on anything but these things. And the
17 thing that it's hard for a lot of people to believe -- and I
18 guess if I was not in the industry and haven't worked on the
19 boats as a youngster and been involved with the fishery, I
20 would find it hard to believe, too -- that you can't tell me
21 that these nets are being set in the water, that they're not
22 catching everything; they're not scooping everything up off
23 the bottom. And they're not -- that it's just menhaden that
24 they're catching.

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CORRECTION

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20 would find it hard to believe, too -- that you can't tell me
21 that these nets are being set in the water, that they're not
22 catching everything; they're not scooping everything up off
23 the bottom. And they're not -- that it's just menhaden that
24 they're catching.

25 It's kind of like canvasbacks, or brant, or

1 Canadian geese. They all fly in the same flock, that
2 species, and menhaden do the same thing. And the nets, I'll
3 be honest, we haven't done as good a F.R., an educational
4 program as we should, and we would like to get involved with
5 that to try to educate people as to the way our nets work, and
6 why it is that the fish that we catch are just the menhaden.

7 The fact that the menhaden, when it gets scared,
8 and starts to break up in the net, it charges out laterally.
9 Whereas the other fish, the bottom fish, the hook and line
10 fish, they will sound, and our net, by design, when it's set,
11 the net hangs down straight like this, but as soon as it
12 started to purse, it gets a bow in it. And there's a big hole
13 in the bottom like a donut. And these fish, the other fish,
14 don't come to the top. They sound to the bottom, when they
15 first notice they're being scared. So, the menhaden charge
16 out, they go in the net, and they're caught in the web, and
17 they we gradually close this hole, and you know, that's the
18 fortunate thing for us that we don't catch these other species
19 that may be laying on the bottom.

20 So, I would hope that we would get the opportunity
21 to continue fishing as we have in the past, keep our nose
22 clean, and to do a better job of working with the recreational
23 and other users in the State of New Jersey, because we enjoy
24 working up here, and we would rather not have this conflict.
25 So, I hope you will give us that consideration.

1 MR. FREEMAN: Thank you.

2 UNIDENTIFIED SPEAKER: Thank you.

3 MR. FREEMAN: Mark Silver, for the Ampro Fisheries,
4 Incorporated.

5 MARK SILVER: My name is Mark Silver, and I come
6 from a generation -- three-generation -- fisherman families,
7 boat builders, up in Bedford, Massachusetts. And I work for
8 Ampro Fisheries, and I'm proud to work for them.

9 And my grandfather would always say, "You've got to
10 talk among fishermen from notes, and you've got to go back and
11 do your homework." So, I'll tell you a story about -- kind of
12 a simple story -- about where the word "menhaden" comes from.
13 It comes from Pokehaden, the Indian word. This fish is not
14 any one user group's fish. It's a living trust in a kind of a
15 strange way, because the Indians gave it to the Pilgrims to
16 stick along next to their corn, and try to fertilize their
17 corn, and probably made it possible for us to develop this
18 country.

19 We're finding now, uses for this fish, which have
20 gone far beyond what we originally had foreseen. We were able
21 to take menhaden oil, purify it, put it into poultry, put it
22 into eggs through the poultry, lower the cholesterol level,
23 increase the content of Omega-3 fatty acids, and poultry flesh,
24 and keep the cost of poultry in the United States down.

25 I once heard a commercial fisherman -- and menhaden

1 fishermen are commercial fishermen -- talk quite eloquently at
2 a meeting one time, and he said, "I represent not just one
3 user group. I represent all the people." He said, "I fish
4 for all the people who don't have boats, and don't have
5 fishing gear. All the people that need the benefits of fish
6 in their diet."

7 And clearly today, the trend toward elimination of
8 cardiovascular disease, and possibly in the future, if our
9 hopes come true, to eliminate some forms of cancer by the
10 incorporation of Omega-3's into the diet, will bring that into
11 a reality.

12 This is a living trust, and there are people that
13 cannot bring their views forth to this meeting, cannot be
14 represented here today. And I think we have to look at their
15 rights to enjoy fresh fish. Fresh fish is not just -- now has
16 become sort of a luxury item. If we can find a vehicle to put
17 this, the benefits, the health benefits, of eating fresh fish
18 into diets which people not of rich means can afford, I think
19 that we've done a benefit for all of society. And I regret
20 the fact that in reading this proposal, I did not see a single
21 mention of this.

22 This fish was not our fish. This fish was a living
23 trust that was given to us to benefit all the people, and I
24 know that the people in this room being fishermen,
25 irregardless of whether they're commercial fishermen, or

1 recreational fishermen, are a very generous group of people,
2 and that they would not deny the benefits of the ocean to any
3 user. Thank you, gentlemen, for your time.

4 MR. FREEMAN: Thank you.

5 Mr. Tom Fote.

6 TOM FOTE: My name is Tom Fote. I'm representing
7 the Fish Hawks of Forked River, which consists of 300 members.
8 Also the Berkeley Striper Club of New Jersey, which has about
9 a hundred sport fishing members.

10 I've been sitting here listening to a big
11 dissertation of how the bunk industry has had no problems along
12 the coast, and it's strange to me that why other states go
13 back through Maryland, Delaware, North Carolina, South
14 Carolina, New Hampshire, have all restricted the boats to two
15 miles off shore. We took this into careful consideration with
16 the totals I worked on in getting these regulations put in
17 place. And we took that into consideration. We didn't want
18 to eliminate the bunk industry from our shores. But we knew,
19 because they are so closed out of other states, that a lot of
20 the pressure comes on our State from this industry.

21 We are not worried about the game fish being caught
22 in the nets. I mean, yes, it is a small part of the catch,
23 and it happens by accident. We understand they're not setting
24 the nets purposely to catch game fish in this State.

25 But the fact is, is when they come into an area,

1 which could be heavily fished, and all -- there's been striped
2 bass, weakfish, and bluefish in this area for a long period
3 of time, feeding on the bunkers when the boats come in, and
4 reduce this in-shore bunker school to nothing, then there's no
5 longer any bluefish, there's no longer any striped bass, and
6 there's no longer any weakfish. Well, there's nothing else for
7 them to feed on. So, the fish depart the area. I mean,
8 that's a simple fact. If there's nothing for them to feed on,
9 they're going to leave.

10 When you have boats that close and that large, the
11 sport fishermen, and we are very crowded -- I mean, New
12 Jersey's coast line is growing, and growing in the fact that
13 the amount of boaters in this State is growing astronomically
14 in the last couple of years. Everybody has a boat.

15 So, in order to keep these conflicts adamant, and
16 make sure these problems do not arise, most of these boats
17 fish in the 1.2 mile -- nautical mile -- corridor along the
18 coast. So they won't have a conflict with the big boats, we
19 are trying to eliminate this problem by pushing the bigger
20 boats 1.2 miles off shore.

21 Now, Delaware recognizes that. They've kept them
22 two miles. New Hampshire, the same thing, two miles.
23 Maryland, I think it's three miles. I mean, these are the
24 states that are bordering this industry, and they're keeping
25 them further out than we are. They must have reasons for

1 doing this. I mean, John Horn sat here for a long time
2 expressing his concern that he could not be with sport
3 fishermen. Well, I've been involved with this bunker
4 regulation going on about six years, some of us here have been
5 involved ten years going on. There's been numerous contacts
6 going back and forth over the years, and numerous proposals.
7 This is the final compromise come out. We've worked hard on
8 this regulation. Fish Hawks, all 300 members, voted unanimous
9 to support this. We're not looking to eliminate the bunker
10 boats from our coastal paths. What we're looking for is a
11 safe corridor to keep the conflicts, the spacial conflict,
12 down to a minimum. So the Fish Hawks voted unanimously to
13 accept these regulations as posted, and so did the Berkeley
14 Striper Club. They -- both clubs will be sending letters,
15 have already sent letters, and recommend that these
16 regulations be approved as written. I mean, it will eliminate
17 the problem. It might be a little tough, but it will keep the
18 conflicts that do occur -- and they do occur -- I've been out
19 there on my boat, and there's nothing more enlightening than
20 to see these boats show up, and you know you've had fish for a
21 week in-shore, and all of a sudden, there comes the big bunker
22 boats from Virginia, and all of a sudden, all of the fish are
23 gone. Because the bunker have left, and there's nothing for
24 them to feed on, so they're going to go someplace else.

25 That's all I wish to say, if anyone has any

1 questions.

2 MF. FREEMAN: Thank you.

3 Mr. Nicholas Scheskowsky.

4 NICHOLAS SCHEKOWSKY: Good afternoon, gentlemen.
5 My name is Nicholas Scheskowsky, and I represent the Jersey
6 Coast Anglers' Association. The Jersey Coast Anglers'
7 Association is made up of 42 fishing clubs throughout New
8 Jersey. Our membership is in the area of 20,000 sport
9 fishermen, a party boat, and charter boat captains.

10 The Jersey Coast Anglers recognizes the need for
11 these regulations to be put in place to protect the 2,000,000
12 sport fishermen in New Jersey that compete for space along
13 side the large menhaden purse seining vessels.

14 It's ludicrous to think that these two factions can
15 compete on the same level. Sport fishermen in New Jersey
16 contribute \$600,000,000 to the economy in New Jersey, while
17 menhadening vessels, not indigenous to our State, pay a fee of
18 \$1,500 per vessel for the largest gross tonnage vessel.

19 The 14 vessels licensed at \$1,500 per year come out
20 to \$21,000 a year. Not enough to cover the salary of one
21 enforcement officer in New Jersey.

22 These large purse seining vessels are so efficient
23 with their long nets, and spotter aircraft and fish bunks,
24 that when they are done raping the resource, there's no
25 menhaden in the -- for the in-shore sport fish to feed on,

1 such as blues, weaks, and striped bass.

2 New Jersey sport fishermen, and party boat
3 captains, and tackle shops are left holding an empty bag.
4 There is need for an unrestricted corridor for menhaden to
5 complete their migratory route. Each and every state along
6 the eastern seaboard has some kind of regulation on the taking
7 of menhaden by purse seining, because of conflicts. The
8 Jersey Coast Anglers feel that the regulation keeping the
9 large purse seining vessels from Delaware to Sandy Hook, and
10 Raritan Bay, along with the 1.2 miles from shore, would
11 increase a safe and fair zone that both sides can live
12 together with.

13 If the menhaden fleet does not violate the proposed
14 regulations, New Jersey Coast Anglers feel that there's no
15 need to ask for any other mileage regulations other than the
16 1.2.

17 In closing, I'd like to point out that I do have
18 signatures of 10,000 sportsmen in New Jersey who initially
19 would like to see a two-mile zone.

20 Also, the code of ethics that was drawn up by the
21 menhaden industry, number 13, each vessel, captain and crew
22 will be charged to pursue all reasonable means to cooperate
23 use of waters with fellow users. The fact that a vessel may
24 have a legal right to operate in a given area will not excuse
25 the captain in going the extra mile for peaceful coexistence.

1 I know this is only used in terminology, but that's all we're
2 looking for is that one moment. Thank you.

3 MR. FREEMAN: Thank you.

4 Mr. Ron Sickler.

5 RONALD J. SICKLER: My name is Ron Sickler. I
6 represent the Monmouth Beach Cartoppers, as well as being a
7 member of the New Jersey Coast Anglers' Association. I have
8 here in my possession, a document, Fisheries Management Port
9 Number 8, of the Atlantic States Marine Fisheries Commission.
10 This is a 1986 supplement to the Atlantic Menhaden Fisheries
11 Management Plan. I bring this to your attention. I believe
12 you had this in your possession as we discussed this
13 regulation at various stages.

14 One of the things that I wanted to quote from this
15 is a fact in here concerning an area of the commercial
16 fishery. In 1984, and this is after the supposed problems we
17 had in 1983, they took -- according to this table, 1.4 in this
18 article here -- 1.294 million fish in 1984, that were less than
19 one-year-old. One-year-old fish, they took one million and
20 some odd thousand fish one-year-old. This so far has
21 surpassed the rest of the catch as to make the balance at the
22 end of the year come up to an approximate average that has
23 existed for the past ten years, indicating that if, indeed,
24 there were concern over these fish, and the concern being to
25 keep this a viable fishery, you certainly don't remove that

1 number of juvenile fish before they've had a chance to spawn.

2 We don't come into this thing on an emotional
3 basis. Years ago, perhaps in 1983, it was emotional. But we
4 have been forced to gather our facts, and we have presented
5 these facts at State hearings, at meetings we've had with Fish
6 and Game, and at no time were any of these meetings back door
7 meetings. These meetings were announced in the paper.
8 Certainly the fisheries in Virginia should have been aware of
9 discontent that existed insomuch as we, the sports fishermen
10 as a user group, felt that we were not getting our fair share
11 of these fish, and the benefits that derived from these fish
12 being in our local waters. As it's been stated by a friend of
13 mine, Nick Scheskowsky, when these fish are gone, our sports
14 fish have no reason to stay in these waters.

15 We have, in the past, seen the very effective
16 nature of the commercial industry. We just would like to see
17 this 1.2 mile zone go into effect insomuch as everyone would
18 benefit from it. Because surely, in the migratory patterns of
19 these fish, as is evidenced by the commercial industry's own
20 reports, their primary zone along the shoreline is listed as
21 three miles wide. Not as one, or 1.2, again, we use this to
22 indicate we're not greedy. We're not looking to completely
23 shut him down. We're just looking for a percentage of that
24 primary zone to keep the sports fishermen in this State in the
25 enjoyable habit of catching fish.

1 In response to how we feel towards the commercial
2 men, I think that's further evidenced by the fact that Chris
3 Anthopolus and his boat, he saw the need to request that he be
4 allowed to operate a little closer to shore in the bay. And
5 we, as a user group, had no problem with this. And you know
6 this from being at the various meetings we held trying to set
7 this regulation up. I believe this regulation to be a
8 completely viable and workable regulation with very limited
9 hardship to the commercial sector. Thank you very much.

10 MR. FREEMAN: Thank you.

11 Mr. Joseph McTomoney.

12 JOSEPH MCTOMMONEY: My name is Joseph McTomoney,
13 Cape May County Party and Charter Boat Association. I
14 represent approximately 160 of my members. Our main concern
15 at this time is the stock in the Delaware Bay. We're mainly
16 concerned with the Delaware Bay, concerned with the stock
17 depletion in the Delaware Bay, and we're also concerned with
18 the food chain. A link in the food chain in Delaware Bay,
19 being depleted. So, all I have to say at this time is, we do
20 back this proposal, and we'd like to see it go through, and
21 that Delaware Bay be closed to purse seining for menhaden.
22 Thank you.

23 MR. FREEMAN: Thank you.

24 I would ask for anyone else who would like to speak
25 to please raise their hand, and I'll recognize them. Yes, sir?

1 KEVIN WARD: Yes, my name is Kevin Ward, and I'm
2 from Barnegat Light, and I think I can represent all the
3 gill net boats there to say that we don't have any problems
4 with these guys. You know, for their fishing, you know, we
5 never have any conflicts with them, and I don't believe that
6 they harm the fish when they catch these, you know, like when
7 the man said, when the fish are schooled up, they take them,
8 but, you know, bunkers are -- they're very scattered fish, and
9 they're along the beach. There's miles of them just, you
10 know, just a few fish, and you can't -- I just can't believe
11 that they think that they scoop all these bunkers up and all
12 the good fish leave. Because if that were true, I'd be
13 screaming. You know, it's not the way it is. And these
14 fellows have always, you know, I'm out there every day nine
15 months of the year, and I've never had any trouble with these
16 guys, and as far as I can see, I can't see pushing them off
17 shore. It's not just not right, just because, you know,
18 there's a million more outboards this year. You know, these
19 guys got to suffer. It's just not fair.

20 MR. FREEMAN: Would you give me your name again?

21 MR. WARD: Kevin Ward. W-A-R-D.

22 MR. FREEMAN: Thank you. Yes, sir?

23 RICHARD ISSACSON: Richard Issacson, from Belford,
24 New Jersey. I run the tideland for Zapata. And I've been
25 fishing all my life. I'm 55, and all we ever had was

1 problems. Ever since I was a little kid, all they wanted to do
2 was push off-shore. That's all they every did. They'd come
3 down, and they don't really know what they're talking about.
4 The man here says he's going to push us out. The 1.2 miles,
5 can live with that.

6 Well, about four years ago, there was a guy in
7 Richmond County. He went and he had that part over there
8 closed, so they got the moss bunkers up there, and bring all
9 the fish in and everything else. Well, that didn't help him
10 at all. There's no improvement in the fishing, because he
11 wouldn't let the Greek fish over there, and he wouldn't let
12 nobody. And if you push us that far out, you stand in the
13 mast head, and you look in-shore, and see the fish all in on
14 the beach. And you sit there and wait, and say, well, maybe
15 tomorrow it will come out. May you can catch some. So, you
16 call the airplane pilot. He says, "Yeah, it looks like it
17 might be started out." And you call and say, "Claude, how far
18 did they go?" He says, "Ah, they're not moving. They stopped
19 now. They're going back up in there again." So you lay
20 there, and there ain't no fish. They're in there. Everybody
21 else can fish on them, but we can't.

22 And it goes on to say, when the moss bunkers leave,
23 that everything else leaves. Well, when there is no moss
24 bunkers, how come they're out there fishing? Why ain't they on
25 the beach? Why ain't they got the boats up there? How are

1 they catching anything, if the moss bunkers bring everything?
2 All these people shouldn't have nothing to do then. They
3 should be sport -- just riding around instead of fishing. So,
4 it just goes to prove that what he's saying is partly true, but
5 not fully true, and like they say, there's not enough
6 communication for them to talk to the commercial man and get
7 to know him. They see you there with a big net, they say,
8 "Man, he got all the fish. That's why we can't catch none
9 today." And they do that all the time. And like he says, he
10 got under 20,000, 50,000 and they want -- sure, they want you
11 out. They don't want to see you there at all, because you
12 might catch a fish that they could have. If they can't have
13 it, you're the had guy. You took them all home. And you
14 thought everything about our moss bunkers. So, I got three
15 sons that's fishing. And they keep just on legislating.
16 They're going to have to go up the road and get a job
17 someplace. It's all they want to do is run everybody out of
18 business. So, that's all I have to say. Any questions?

19 MR. FREEMAN: No. Thank you very much.

20 MR. ISSACSON: You're welcome.

21 MR. FREEMAN: Is there anyone else? Yes, sir.

22 JIM BRINLEY: Yes, I'm Jim Brinley. I'm from
23 Barnegat Light also. I've been fishing full time for the last
24 ten years, and I just like to say as far as the moss bunker --
25 well, I don't fish for bunker, but, I notice when they're

1 schooled up, you know, the boats come in, they may get them,
2 but there's also a large amount of bunker that are there that
3 they can't catch. So, when the sport fishermen say that
4 they're catching all the bunker, it's just not true, you know,
5 there's large amounts that are scattered, because we had
6 problems with them also, and I just can't believe that they
7 think that, you know, that there's a problem eliminating the
8 sport fish leaving because of the few bunkers that the bunk
9 boats catch, you know. So, I would just like to say that.

10 MR. FREEMAN: Thank you. Bub?

11 EVERETT GIBERSON: I would like to ask
12 (Indiscernible) a question if it's alright.

13 MR. FREEMAN: Yes. Just recognize Bub Giberson,
14 member of the Marine Fishery Council.
15 (Speakers are not at microphones. Where inaudible, only
16 phrases that are clear will be transcribed.)

17 MR. GIBERSON: I just wanted to know, how many times
18 have you seen, or do you make a catch outside of a mile, or
19 three miles, or whatever, what's the percentage of your catch
20 that are inside of a mile? Do you ever come off a set
21 like two miles, or three miles, or (inaudible).

22 UNIDENTIFIED SPEAKER: We catch fish off shore six-
23 tenths of a mile, half mile or two, it's right along the shore.
24 We have caught some fish ten miles off shore, which is not the
25 norm. The norm and the probability in catching menhaden is

1 getting in closer, you get the better -- (inaudible -- too far
2 from microphone, and others talking.)

3 UNIDENTIFIED SPEAKER: What did you say is the
4 percentage that you're getting inside the mile?

5 UNIDENTIFIED SPEAKER: Inside a mile?

6 UNIDENTIFIED SPEAKER: Yes.

7 UNIDENTIFIED SPEAKER: What I looked at
8 was the State (indiscernible) Service. They have all the
9 statistics on where menhaden are taken by distance from shore.
10 And since, I guess, I don't know whether it was three or eight
11 or more -- it was when the 6.6 came into effect. We can go
12 back to '83, when we -- subject .61, 0.2, and that was -- and
13 -- 45 percent, in a couple of years, and some of the other
14 years, it's lower than that. At the most, close to 45 percent
15 in that area would vary from year to year.

16 UNIDENTIFIED SPEAKER: Probably the most productive
17 strip of fishing around --

18 UNIDENTIFIED SPEAKER: Yes, when the waters were all
19 open, it was for a larger percentage coming from inside around
20 -- (inaudible)

21 MR. FREEMAN: Yes, sir.

22 JACK SMITH: Yes, my name is Jack Loden Smith, I'm
23 a commercial fisherman from Cape May. I basically bunker fish
24 almost from the beginning of March on into December, through
25 the fall. I have no problem with bunker boats, catching

1 menhaden in the Delaware Bay, or along the beach. I've done
2 this for years. I see no depletion of the stock. I can see
3 no way that there will be a depletion in the stocks. In order
4 for these big boats to exist, they have to seine from Virginia
5 to New Jersey. It's unfeasible for them to take any small
6 groups or bodies of menhaden. They cannot catch them when
7 they're spread out, and they are here, as far as my knowledge,
8 and I can prove it, at least nine months of the year, when the
9 bunker boats certainly are not. As for taking them, every
10 other species is fished upon, taken. Sport only want the
11 bunkers in the water for something for their fish to feed
12 upon.

13
14 If you don't take some of the bunkers, what happens
15 after they start to increase over the years, because there is
16 no fishing pressure. And sooner or later, if every state
17 closes the waters, there will be no one taking bunkers, except
18 for crab bait, there will be no big commercial companies, and
19 there will be a terrible overgrowth of bunkers, I am positive.

20 When this happens, a fish is not even going to think
21 about taking an artificial lure for a sports person to dangle,
22 because there's going to be too many bunkers. Or, they will
23 compete for them for the food gain, and literally overstock
24 them and wipe them out, in my opinion. Thank you.

25 MR. FREEMAN: Thank you. Anyone else? Yes.

UNIDENTIFIED SPEAKER: Bruce, there was a very

1 viable question asked by Bob Lick today and some of the members
2 from Virginia, and it wasn't answered. I think it's very
3 right, and Bob Lick asked what percentage of the menhaden
4 caught in the bay areas of New Jersey versus the percentage of
5 fish caught along the costal -- what is that percentage
6 breakdown? Fish caught in the back bays such as Raritan Bay,
7 Delaware Bay, Sandy Hook Bay, versus the percentage of fish
8 caught along the coast in ocean waters. That was your
9 question, Bob?

10 MR. LICK: Yes.

11 UNIDENTIFIED SPEAKER: I think that's very vital to
12 our situation in Delaware Bay, and if we do not have an answer
13 now, try to find an answer, and then make a viable decision.

14 Also, another issue here, the number of days fished
15 in each area, no mention was -- how many days they fished in
16 Delaware Bay. They said Cape May, seven days, but we'd like to
17 know for our own records, how many days -- purse seining
18 menhaden boats fished in Delaware Bay last year.

19 MR. FREEMAN: Well, the question has been asked, and
20 it wasn't the responsibility of the representatives to answer
21 that if, in fact, you do have that information, can provide
22 it, would be happy to. It's obviously not a requirement of a
23 public hearing.

24 (Indiscernible question - unidentified speaker)

25 MR. FREEMAN: Sure. Yes. If you -- this is

1 certainly voluntary. It's not a requirement, but if you could
2 provide it, we'd be certainly happy, and we'll pass it.

3 UNIDENTIFIED SPEAKER: We'd like to answer it, but
4 we won't (Indiscernible).

5 MR. FREEMAN: Do you plan to provide, in addition to
6 John's testimony, do you plan to provide the written comments?

7 UNIDENTIFIED SPEAKER: Yes.

8 MR. FREEMAN: Additional written comments?

9 UNIDENTIFIED SPEAKER: Yes, sir.

10 MR. FREEMAN: I have a couple of other questions,
11 and I don't expect you to answer them now, but I would like --
12 I would appreciate it if they would be in your written comments.
13 (a) The question is to the differential between bay waters
14 versus coastal waters, what that catch was in the last couple
15 years, and also, Mr. Williams, you talked with your computer
16 printout, where the boats were, with specific times of Barnegat
17 and Atlantic City? I'd like to see you, if you could provide
18 that data going back a couple years as to what days, how many
19 days in certain areas, just so that I and the other councilmen
20 have an idea of density, if you will.

21 UNIDENTIFIED SPEAKER: Like boat density?

22 MR. FREEMAN: Yes, like boat density. How many
23 boats did you have in that location on that particular day.

24 UNIDENTIFIED SPEAKER: Like a couple years previous
25 to that information that you've already got. We'll do it for

1 the last two or three years, whatever.

2 MR. FREEMAN: Quite frankly, what we -- here -- saw
3 us here, all those boats out there all the time. You know,
4 well, that's the catch that --

5 UNIDENTIFIED SPEAKER: I think the facts will show
6 otherwise, I really do. It's the perception that's the
7 problem.

8 MR. FREEMAN: Well, that's what we need. I'd like to
9 see facts. It's important data.

10 UNIDENTIFIED SPEAKER: I'd be glad to do that.

11 MR. FREEMAN: Thank you. Anyone else? Yes, sir.
12 Ron?

13 RON: Well, I believe it would be a question for
14 the industry people if they would. How many plants are
15 operating along the Atlantic Coast today? Still in operation.

16 UNIDENTIFIED SPEAKER: Three.

17 RON: (Inaudible). So, there's a total of three?

18 UNIDENTIFIED SPEAKER: Four.

19 RON: Four. Four plants -- could you possibly tell
20 me how many plants have closed since, say 1980?

21 UNIDENTIFIED SPEAKER: I think that's in the --
22 somebody had the -- typed up the amendment to the fishery
23 handbook plan. I think they had a table in there. Well, you
24 have it right there. It's in
25 there. It shows the number of plants that have closed over a

1 time frame. Yes, well, according to this, since 1981, you
2 have one, two, three, four, five, six, seven, eight plants
3 closed, and as you stated, you have, what would you say, only
4 three main plants and one small one? So, in the last, say,
5 less than ten-year period, eight of these plants, major
6 plants, as this article shows, have closed, and yet you stated
7 that the bunker population is still as good as it ever was.
8 Could you perhaps enlighten me as why these plants have
9 closed?

10 UNIDENTIFIED SPEAKER: (Inaudible, except for some
11 phrases). They say the economics -- and we're in direct --
12 meal and oil, and we're in direct competition with soy beans.
13 That's why we reached -- FDA approval for the oil, so we can
14 get everything -- that's the only way the three plants managed
15 to survive -- the resource is there -- say, ten years ago you
16 had eight plants, you had plants in Jersey -- those not here.
17 It's just the economics and the economy, so many, there's so
18 many products, and there's just so many, they're just going
19 out of business. And we might be aided by buying special
20 products -- in business. And by shoving us off-shore, that's
21 just another -- area where (Indiscernible) -- profits come to
22 15 percent of the very income. And these fish, the day we
23 fish -- (indiscernible) --

24 RON: Well, I have the trouble understanding, when
25 you refer to the economics of the fishery, certainly some of

1 these plants would be far more economical for them to operate
2 within their own waters, and yet they propose to include
3 plants north and south.

4 UNIDENTIFIED SPEAKER: A lot of them have been
5 there -- very well received by the public -- probably the only
6 reason that we have survived in the industry is that we've
7 been established there approximately for 108 years now. A lot
8 of people in that area have grown up and followed their
9 grandfathers. So, the people accept us there as being --
10 we're being developed in our community now as well as along
11 the coast -- including changes in environmental air pollution
12 control -- that's our major problem. That has driven a lot of
13 plants -- it don't pay them money -- the money hasn't been
14 coming in the last several years -- to the investment into the
15 air pollution --

16 RON: So, in other words, you're reasoning that
17 it's the odor of the plants themselves that shut them down and
18 not the economics of it?

19 UNIDENTIFIED SPEAKER: That's one of them.
20 (inaudible) -- resource has been there, but there's no use --
21 just like soy beans, you don't plant a certain amount of acres
22 -- without getting price -- (inaudible)

23 MR. FREEMAN: Yes, sir.

24 MR. JOHN BARNES: I'm John Barnes, and I would just
25 like to add one more thing just with the economics.

1 We've encountered the same thing as the farming industry,
2 well, for the last several years, and additional prices
3 plummeted two to three years ago to below a \$200 sum, and this
4 past summer, reached way back up to \$500 a bunker. And I
5 compared -- it's the same thing as the farmer who grows crops,
6 where he has the same costs of planting and harvesting his
7 crops, and he gets a dollar a bushel versus three dollars a
8 bushel. And that's what is happening in the industry through
9 the years the market has been down so low and is so depressed
10 -- some small plants, these plants that are closed, they're
11 small abandoned operations that did not have the resources to
12 weather a long time of economic stress.

13 RON: Yes, could you relate that to
14 the price of the soy beans. In other words, this country last
15 year faced severe drought, pretty much nationwide, which
16 dropped the soy bean crop way down. All right? Which made
17 your fish meal much more attractive. All right. It wasn't
18 really that all of a sudden the fish itself had a greater
19 value other than the fact that the soy bean increased in it's
20 value, and was no longer that much of an attractive
21 alternative as opposed to fish meal for food supplement for
22 various farm animals, chickens, cows, and whatever. Is that
23 correct?

24 UNIDENTIFIED SPEAKER: That price definitely does
25 fluctuate up and down in the commodity market.

1 UNIDENTIFIED SPEAKER: Right. In relation to the
2 soybeans.

3 In other words, my point being, given an average
4 year, in the year coming, should the soybean profits be up,
5 what would you anticipate would happen to the price of your
6 fish meal?

7 UNIDENTIFIED SPEAKER: It would go down.

8 MR. FREEMAN: Gentlemen, let me just cut this off.
9 I don't think it's germane to the issue. I think it may be of
10 interest to a number of people, and I would suggest that if it
11 needs additional conversation, do so after the hearing. I'd
12 like to remain on the topic of the regulations, and quite
13 frankly, the commodities market really shouldn't enter into our
14 decision making process at this stage.

15 Are there anyone -- anyone else who would like to
16 voice a comment? Yes, sir.

17 (Tape change)

18 UNIDENTIFIED SPEAKER: I believe that with the line
19 of demarkation across the mouth of the Delaware Bay, (Tape
20 fast forwarded on playback) Sandy Hook Bay, that's a proven fact
21 that those areas, Delaware Bay and Raritan Bay, are homes of the
22 prime breeding stocks of major game fish. Mainly the striped
23 bass. Now, I think as part of the public trust, anything that
24 can be done to protect those rebounding industries by helping
25 assure that there's better bait fish in the form of menhaden in

1 Delaware Bay and the other bays, they're enhancing the
2 breeding grounds. And the bottom line is, I don't think you're
3 destroying the menhaden industry. It may make it a little less
4 convenient for them, but you're not being as restrictive as any
5 of the other states have along the East Coast. And I think
6 there's room for everybody to use that public trust for the
7 menhaden industry. Everybody can still benefit from the
8 menhaden industry without any one group suffering tremendously.

9 MR. FREEMAN: Thank you. Anyone else? Yes, sir.

10 JOHN A. BENNETT, JR.: My name is Jack Bennett.
11 I'm representing Spring Lake Life Liners Association, 60
12 members. And I've heard a lot of talk about referring to the
13 menhaden laws of 1966 and 1967, and the technology
14 advancements that have been made in the last 20 years. I
15 can't see where moving the menhaden fishery out to 1.2
16 nautical miles is going to impose that much of a hardship on
17 them.

18 With the advancements -- like I said they have made in
19 technology -- they can fish as well outside the 1.2 limit as they
20 can 20 years ago, when there were fish in the 0.6 nautical
21 miles. And I've just been authorized by my fishing club, like
22 I say of 60 members, to come down here and state that to this
23 commission. Thank you.

24 MR. FREEMAN: Thank you, sir. Is there anyone else?

25 Mr. Chew?

1 WALTER CHEW: Yes, I'm Walter Chew, 311 Netter and
2 Bait Fishermen, and I'd like to know, is the council open now
3 for the discussion of the technical points of this law if it
4 were to be passed, or are you still contemplating whether the
5 whole thing is going to be scrapped or accepted?

6 MR. FREEMAN: Well, we'll accept any questions you
7 have on the technical aspect.

8 MR. CHEW: On the technical aspect of it, I feel as
9 if I'm simply fixing a flat tire on a large bus, which I'm not
10 sure where it's going. But as a bait fisherman, and a small
11 bait fisherman at that, I -- on page six of the proposal which
12 I got, it states that, "Any vessel engaged in the fishery for
13 bunker for bait under the provisions of this section, shall
14 display on both sides of his vessel, mid-ship, a yellow capital
15 letter "E" not less than five feet in height on a black square
16 background, not less than six feet on a side."

17 Prior to this item 13, it states that fishing will
18 be defined as anything having to do with a purse seine. There
19 is one vessel in my area, Cape May, which uses a 16-foot vessel
20 as "a seine boat" to pull the net off the stern of the main
21 boat. That boat under this definition would be required to
22 carry two six-foot signs, and I don't think that was the intent
23 of whoever put these proposals together.

24 My personal situation is that I own a 31-foot
25 vessel, and do not use a small seine boat as a helper boat.

1 However, on a 31-foot vessel carrying a seine and prepared to
2 handle the fish once I get them, there is no safe place in
3 which to put two six-foot signs without either obscuring my
4 vision, or being in the way of handling the fish once I get
5 them. My objection then, is to item 13 as it states simply a
6 six-foot by six-foot sign. I think it's absurd to apply to all
7 fishermen, or all bait fishermen, under this proposal.

8
9 I would suggest that the State begin to implement
10 something which I am led to believe is in effect in Maryland,
11 where within the state, the state designate a waterman's I.D.,
12 which would cover all the activities that an individual
13 fishermen would be engaged in, i.e., crab dredging, gill
14 netting, elling, crabbing, oystering, bunker seining.
15 Apparently, a large number of these activities require that you
16 display on your vessel, and on your gear, the license under
17 which you're licensed by. Making the assumption that not all
18 vessels are dedicated vessels to one fishery, and certainly in
19 small vessels, that's not true, we are dedicated to more than
20 one thing. In other words, I have a multipurpose vessel. And
21 with this multipurpose vessel, it's become evident to me
22 that I will eventually have to display a whole series of
23 numbers down the side of the boat. I'm not sure that this is
24 where the State wants to go, and I'm not sure it's going to
25 help the enforcement people to see a long number, or a long
series of digits and letters and whatever, down the side of my

1 boat. --Certainly some procedure whereby a waterman's I.D. is
2 issued, and required to be displayed on the side of the vessel,
3 in letters and I suggest not less than one-half the distance
4 from the waterline to the rail. That would leave this
5 gentlemen with his 16-foot boat who has one foot of free board,
6 it would leave him with six-inch letters on his boat, and to
7 someone who I assume is up north who has possibly a 90-foot
8 vessel, he might have five or six foot of free board, he would
9 have three-foot letters.

10 So, taking this whole item 13 and just replacing it
11 with a waterman's I.D., and displaying that on the side of the
12 vessel, rather than giving our game wardens and marine police
13 something else which they can come out and harass us with,
14 looking for six-foot signs.

15 Secondly, again on the proposal which I have, it's
16 item eight and item nine.

17 Item eight begins the possession of any fish as
18 defined by blah, blah, blah, menhaden on a purse seine vessel
19 harvesting menhaden for bait is prohibited.

20 Item 9, it seems to me, says exactly the same thing.
21 The simultaneous possession of any fish, other than a bunker,
22 and a purse seine aboard a vessel of any person holding an
23 Atlantic menhaden bait license, or any vessel conducting the
24 fishery shall constitute prima facie evidence of this
25 subchapter.

1 The only difference which I can determine between
2 eight and nine is that nine says you must have the purse seine
3 either in your possession, or in your control in order to
4 constitute a violation. If that's true, then item eight,
5 stating that the possession of any other fish than a bunker on
6 a purse seine vessel, would imply that a purse seine vessel
7 doesn't have to have a purse seine. And a purse seine vessel,
8 then would be any vessel which is licensed to conduct a
9 fishery whether or not he has the purse seine. Following that
10 logic, any vessel which is a multipurpose vessel such as mine
11 would then be in violation at some other time of the year were
12 I to harvest bunker for bait in the process of doing something
13 else, i.e., I do a lot of gill netting in the upper bay.
14 During that process, I may harvest eight or nine hundred
15 pounds of bunker per day for every two or three boxes of
16 weakfish.

17 Since I would be defined as a purse seine vessel,
18 i.e., I have a license to also purse seine, I would then be in
19 violation of item eight constantly. And I think that this is
20 not what the State intended to happen. I would assume that this
21 might also happen to draggers or other boats which are licensed
22 for more than one purpose. I would suggest then, that item
23 eight and item nine be stricken in -- and be replaced with the
24 following clause. The possession of any fish other than an
25 Atlantic menhaden on board any vessel using a purse seine in

1 the State waters is prohibited; i.e., if you are using the
2 same, whether you are licensed or not is irrelevant from the
3 State's point of view, you simply do not want food fish harvest
4 with a purse seine.

5 I think this would accomplish that fact, although it
6 would make it a little more difficult for your enforcement
7 personnel, since they wouldn't be able to simply stand on the
8 fish dock, and wait for any boat to come in and assume that he
9 is now guilty.

10 Secondly, although I don't think there is much of a
11 fishery here, there may be an off-shore fishery in food fish,
12 in which a purse seine would like to participate.

13 The way that the regulation is now stated, if any of
14 these in-shore vessels who are licensed to harvest bunkers in-
15 shore for bait were to go off shore and participate in any food
16 fishery in the FCZ, and return to the State, they would
17 immediately be in violation, because they would have their
18 purse seine, they would have some other fish than a bunker, and
19 they would be right here in the State, i.e., a possession law.
20 I don't think it was the State's intent to lock their in-shore
21 vessels out of anything which would be going on in the FCZ.

22 By replacing these two sections, eight and nine,
23 with that proposal that you'd actually be using that net in
24 State waters in order to be in violation, I think the State
25 would have accomplished what it wants to accomplish to protect

1 its food fish. Thank you.

2 MR. FREEMAN: Thank you. If you would stay, Mr.
3 Chew, I would like Mr. Halgren to answer the technical aspect
4 of 13 and then eight and nine.

5 BRUCE A. HALGREN: I think basically, the letter
6 "B" had nothing to do with identifying the licensed holds. As
7 far as the waterman's license with a single number, I think we
8 really addressed that pretty thoroughly a couple of years ago,
9 when we started computerizing our license lists, and everybody
10 with a license I.D. number, which we now require on any kind of
11 license, whether it's on any kind of gear, whether it's a gill
12 net, or a crab pot, we're using the same numbers.

13 So, as long as we don't have a joint, you know, a
14 one category license like a bayman's license, we do have one
15 I.D. number, I hope.

16 The letter "B" was really meant for the larger
17 vessels, not the tenders. On the other hand, it is a good
18 technical point I think we'll address the size of the vessel
19 along with the size of this number, or letter "B," which was
20 really a P.R. thing, so that people along the shore, when they
21 saw a vessel come in, wouldn't get all upset if they thought
22 they were breaking the law, and we wouldn't get a lot of call
23 outs for our enforcement people with a vessel operating
24 legally.

25 Eight and nine are not redundant. The possession of

1 a fish -- eight basically says that when you're taking
2 menhaden, because it just doesn't just say anybody with a
3 license, but it says, "possession of fish on an Atlantic
4 menhaden, other than menhaden on a purse seining vessel
5 harvesting menhaden." In other words, in the act of fishing.

6 And in nine, gives us a mechanism by which that is
7 enforced. And again, it doesn't restrict like you going up in
8 the bay -- you have a menhaden permit and license -- you go up
9 in the bay, and you're taking them with gill net. The only
10 way then that you would be subject to violation of those laws,
11 if you still had your purse seine in your vessel. Okay? Then
12 you would be. But if you didn't have your purse seine in
13 vessel, you could have your permit, you could have your
14 license, you could have food fish, and you could have bunker,
15 and you would not be in violation. Okay?

16 MR. CHEW: Are you stating then, on public record,
17 which I could get my hands on, that a purse seine vessel is
18 only a purse seine vessel when he has a net?

19 MR. HALGREN: Oh, no. That's why we're defining
20 nine on what constitutes evidence in violation of the subject.
21 Okay? We defined it carefully that you would be guilty only if
22 you had menhaden, other fish, and a purse seine.

23 MR. CHEW: Then you're stating just for my
24 clarification, that I could not be written up on an offense of
25 item eight. In other words, I mean I could not sit down and

1 write---

2 MR. HALGREN: If you didn't have a purse seine --

3 MR. CHEW: --7:25-22.3.8. He could not write me
4 under that. Although it seems to me it says it is prohibited,
5 in which case --

6 MR. HALGREN: That's what nine does. That nine
7 defines how we can do eight. Okay? In other words, we don't
8 have to catch you in the act of fishing for menhaden with a
9 purse seine --

10 MR. CHEW: Right.

11 MR. HALGREN: -- to make that violation stick.
12 That's why it was written that way. Okay?

13 MR. CHEW: Might I ask then, that nine be put as a
14 sub-item of eight, rather than list it as a separate item?
15 Since they're currently listed as a separate item --

16 MR. HALGREN: A sub-item instead? Probably by
17 verbal agreement.

18 MR. CHEW: Okay. Thank you. Because as separate
19 items, it looks like they're two distinct violations, and that
20 confusion occurred.

21 MR. FREEMAN: It's a valid point, and we'll take
22 that into consideration.

23 MR. CHEW: Thank you.

24 MR. FREEMAN: Mr. Fote?

25 MR. FOTE: All I want to do is comment on that

1 régulation, and what it was, the sport fishermen -- on the "B"
2 on the side -- want to know, if they see a purse seine in the
3 bay, as long as there's a "B" on there, we know that the only
4 thing they're purse seining for is bunkers, so we wouldn't be
5 calling law enforcement saying, "Somebody's out there gill net
6 fishing." So, we're looking -- so you don't get the time
7 wasted, somebody boarding your boat, and it's really to save
8 you time.

9 The reason that eight and nine are in there,
10 because some people are unscrupulous. We know that. And we
11 were looking to protect the fish in the bay, and you know, you
12 might not do it, and a lot of people might not do it, but there
13 was always that one person out there that would take a purse
14 seine and try and net weakfish, striped bass or whatever in the
15 bay. And what this is eliminating is, when you're actively
16 fishing for bunker, and that's what you're doing, you're out
17 there when you're purse seining getting the bunker. As Chris
18 goes out and gets his bunker, then there would be no problem.
19 All you're supposed to have on the boat is bunker, and that's
20 when he has a purse seine on that boat. I think that's how
21 that regulation was written.

22 CHRIS: I'd like to ask you a question.

23 MR. FOTE: Sure.

24 CHRIS: (Away from microphone) Now, as far as I got
25 a skate, when you bail a fish, a skate comes there, and he's in

1 the fish. He goes into the fish, and you don't see him, and
2 then the law officer comes, and says you got a skate, that's
3 for bluefish.

4 MR. FOTE: Well.

5 CHRIS: Like a little snap, like that. How are you
6 going to see --

7 MR. FREEMAN: Well, I hope the law enforcement
8 would look the other way.

9 MR. FREEMAN: That issue, Chris, it shouldn't be
10 directed to Mr. Fote, but --

11 CHRIS: Well, I mean you were referring to this.

12 MR. FOTE: Well, what I'm talking about is when you
13 go in the boat, and there's nine, ten-pound weakfish, that's
14 not a mistake in the net.

15 CHRIS: Well, he had a ban out on this one time, and
16 a newspaper ban, he had the weakfish, and he was taking them
17 and throwing them back overboard, and he said, "What are you
18 throwing overboard?" I said, "The weakfish." He said, "You're
19 throwing them away." But that's the fish. We saw the fish.

20 MR. FREEMAN: All right.

21 UNIDENTIFIED SPEAKER: I think it would be possible
22 for Chris's concern, I have the same concern, and we all have
23 the same concern with regulations eight and nine. And I think
24 that in verification of New Jersey Statute 23:2B-3e specify
25 the types of fish while (inaudible).

1 MR. HALGREN: That defines fish as basically
2 anything. So, what we're saying is, and that includes, you
3 know, clams, oysters, anything that lives in the water other
4 than marine mammals and water fowl. So, fish, according to our
5 laws, our statutes, is very vague. I mean, it just includes
6 absolutely everything. The point was brought up earlier, and I
7 really don't recall by whom, within your industry, that a
8 tolerance should be included. And a tolerance of one percent,
9 when you're talking, you know, literally tons of menhaden,
10 would be unacceptable. On the other hand, I believe that our
11 law enforcement officers would certainly not violate somebody
12 for having a small fraction of a percent like of skates or sea
13 robins, or even bluefish, or weakfish or striped bass,
14 provided that was really a low percentage.

15 I really can't answer what the council would do
16 about a tolerance. I don't believe the tolerance will show up
17 in it, however, I think you can talk to the summer flounder
18 draggers and stuff. When we took their tolerance away, which
19 was a way that they really subverted our laws with that
20 tolerance, they are not violated for having, you know, a
21 handful of short fish. It's only when those fish are in large
22 amounts.

23 So, I think that what you're talking about is
24 discretionary practices on the part of the law enforcement
25 agent.

1 CHRIS: Well, what would your tolerance be? One
2 percent, a half of a percent, or what?

3 MR. FREEMAN: Chris, the regulation right now does
4 not allow any percent.

5 CHRIS: There's no tolerance.

6 MR. FREEMAN: There's no tolerance. It's the way
7 the regulations are.

8 CHRIS: Yeah, but you don't see the fish.

9 MR. FREEMAN: All right. If you want to make a
10 comment to that, Chris, we'll take that into consideration. Are
11 you suggesting a tolerance?

12 CHRIS: We're going to make a comment to it.

13 MR. FREEMAN: All right. Very good. All right.
14 Anyone else that hasn't spoken, that would like to speak at
15 this time? Any other --

16 MR. LICK: One question on one point.

17 MR. FREEMAN: All right, Mr. Lick.

18 MR. LICK: Yeah, I'd like to ask the Zapata people
19 that when you send your written comments that are relative to
20 what I asked for -- vessels, so many vessels on such and such
21 days, is it possible that that be a combination effort with
22 Ampro, so that we get a true picture of what was going on?

23 UNIDENTIFIED SPEAKER: We could do that.

24 MR. LICK: You understand what I'm after?

25 UNIDENTIFIED SPEAKER: We also (inaudible) this

1 information (inaudible) --

2 MR. FREEMAN: Any other questions relative to any
3 technical points? All right.

4 I want to thank everyone for coming, and this
5 hearing is officially closed.

6 MR. HALGREN: Thank you.

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