

SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL

DOLPHIN/WAHOO COMMITTEE

**Sheraton Grand
New Bern, North Carolina
December 5, 2002**

DRAFT MINUTES

Committee Members:

David Cupka, Chairman
Dr. John Dean
Wayne Lee
Dr. Jim Weaver
Ronald Smith, MAFMC

Dr. Louis Daniel
George Geiger
Pete Pearce
Spud Woodward

Council Members:

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Dr. Roy Crabtree
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Dr. Jim Weaver

Bill Cole
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Roger Pugliese
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Gregg Waugh
Dr. Vishwanie Maharaj
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Observers/Participants:

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Lt. Mark Gordon
Dr. Joe Kimmel
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The Dolphin/Wahoo Committee of the South Atlantic Fishery Management Council convened in the Pamlico Room of the Sheraton Grand New Bern, New Bern, North Carolina, Thursday, December 5, 2002, and was called to order at 10:00 o'clock a.m. by Chairman David Cupka.

Mr. Cupka: If everyone would take their seats, I'd like to go ahead and get started with the Dolphin/Wahoo Committee meeting. I want to go ahead and call the meeting of the

Dolphin/Wahoo Committee to order.

If you will turn to Tab 6 in your briefing book, you will find the agenda for the meeting. The first order of business is approval of the agenda. Are there any additions or modifications to the agenda?

Dr. Daniel: Move adoption.

Mr. Cupka: We have a motion to approve it. We don't really need one. If there are no objections, we'll just go ahead and approve the agenda.

The next order of business will be approval of the September 19th committee minutes, and those were in your full council minutes. You will remember we met as a committee of the whole the last time during the council meeting.

At this time, I'd ask if there are any additions or corrections to the minutes. Hearing none, do I have a motion, then, to approve the minutes?

Dr. Daniel: So moved.

Mr. Cupka: I have a motion by Dr. Daniel, second by Pete Pearce. Any discussion on the motion? Any objection to the motion? Then without objection, the motion is approved.

The next order of business is status of the final Dolphin/Wahoo FMP, and I'm going to ask Gregg and Roger to go over this and bring everybody up to date.

We've got some relatively new council members on the committee. Those of us who have been working on this thing for four or five years, it's a lot to go over, but we do want to kind of bring everybody up to speed on what has transpired before and where we are in the process. So with that, are you going to handle that, Gregg?

Mr. Waugh: Yes. Thank you, Mr. Chairman. Okay, what I wanted to do is just go through a brief overview and sort of orient people, and we tried to pick a nice, soothing pastel color for the slides.

First, in terms of dolphin/wahoo, the Sargassum FMP has to be implemented before the Dolphin/Wahoo FMP, so there is that linkage due to some of the habitat designations.

Then I'll go through just briefly the Dolphin/Wahoo FMP development and review the DEIS review and then where we are now in terms of the NMFS review for structural completeness.

The dolphin regulations were first considered under the Coastal Pelagic FMP in Amendment 5 in 1989 and Amendment 8 in 1996. Some options were taken out to public hearing. Ultimately, we didn't go forward with those.

The Council began work on the FMP in 1997 and we requested designation as lead. We

established a control date of May 21, 1999, for the Atlantic.

We had considerable discussions and work on developing the FMP, and then at the November 2000 council meeting, the council discussed an emergency request from NMFS to take some emergency action to complement the HMS regulatory actions.

In addition, at that time the council discussed requesting a separate Atlantic FMP because it was taking so long to try and get the three-council FMP, including the Caribbean and Gulf moving along.

Ultimately, the decision at that stage was not to go forward with the request for the Atlantic FMP, but a number of the measures that this council wanted to have in place were included within the emergency request. That request was submitted in January of 2001; it was rejected by NMFS on September 12, 2001.

In February of 2001, there was a three-council meeting in the Caribbean to go through the plan and finalize it for submission to the Secretary of Commerce for formal review. That was approved unanimously by the three councils, the NMFS representative at the meeting, and it was with concurrence of NOAA GC present at that three-council meeting, as well.

Shortly thereafter it was discovered that the DEIS was never filed, so we had to have the DEIS filed and accomplish the review on the EIS. So the FMP was revised; it was sent in for the DEIS review July 12, 2001.

The notice of the DEIS was filed on September 10th, and we at that stage received very few comments. I don't believe there were any comments from the public, a couple of agency comments, but then extensive NMFS and NOAA GC comments.

The council discussed these during the December 2001 meeting. In January we had a meeting in Washington between NMFS and council staff and NOAA GC to go over how we would deal with those review comments.

At the March meeting, we reviewed the biological evaluation. This is something Margaret has put together and has had review and input by the regional protected resources staff, and this is what NMFS will use to do the Section 7 consultation.

It's in a format that Margaret has worked out with them so they can just take that and use it for their Section 7 consultation. Also at that March meeting, the council staff was instructed to prepare a separate Atlantic FMP.

We received verbal notification on a conference call on August 23rd with NMFS and NOAA GC that preparing a separate Atlantic FMP was approved. Subsequent to that, we received correspondence that they have to take public notice on that and so that's out for comment.

The separate Atlantic FMP was reviewed, and we held a public hearing on that separate Atlantic FMP during the September 2002 council meeting. The FMP was sent to NMFS on October 23,

2002, for a review to determine whether it was structurally complete.

And here at this December meeting we're to review the complete document. At the last meeting, the council approved the document. According to some of the economic requirements that we have to go through, Vishwanie can't complete the IRFA final analysis until the council takes final action, so this is why at one meeting the council finalizes all the actions and then Vishwanie completes that analysis.

We do the final edits on the document. The proposed rule and all the parts are then brought before the council to review the complete document and package. That's what we're doing here at this December meeting.

You all have copies of the regulations. The proposed rule has also been provided to Rod in the regional office. We received, and all of you have these, extensive comments from NMFS on the FMP, which their feeling is this will improve the clarity and intent of the FMP.

NMFS did not indicate that the document is structurally incomplete, so where we are right now is there are two options. One is to approve the FMP for formal review and give staff editorial license to address the comments as appropriate, and we would submit the document to NMFS for formal review in mid-December of 2002.

If the Magnuson Act review schedule is followed, regulations could be in place for the 2003 fishing season. An alternative option would be to approve the FMP for formal review, still give staff editorial license but not submit the document until after publication of the redesignation notice.

In this case the council would be holding the FMP until that redesignation is published. This would mean that once we submitted it, then it would not be possible to have the FMP implemented for the 2003 fishing season.

That's a quick overview and both Roger and I and Bob would be glad to try and answer any questions.

Mr. Cupka: Thank you, Gregg, for that excellent overview. It didn't take long to cover it here, but if you'd been around working on this for the number of years as some of us have, it covers a lot of territory. At this time I want to open it up and see if anyone has any questions of Gregg relative to his overview.

Mr. Mahood: Gregg certainly gave the short version there of all that's gone on over a period of time, but one of the things that he really didn't cover is that initially when the council was going to manage dolphin and wahoo, we were going to do it with an Atlantic plan, and that's how we first embarked on this.

Then we were asked by the then AA and the Regional Administrator if we would consider doing a three-council plan, including the Caribbean and the Gulf, and we said, no, we wouldn't even consider it because of our experience of working on some other joint plans and we knew it would

be difficult.

We were sweet talked and cajoled and coerced and everything else, and then finally I think the council came around and said, okay, we will work on it as long as we have the true lead on it.

And then later we had to go back and accept the fact we would have the true lead for the Atlantic, but it would be a joint plan with the Gulf and the Caribbean relative to setting up the plan.

But the plan would be set up in such a way that once we established the FMP, the Caribbean would manage separately, the Gulf would manage separately and the South Atlantic would manage the Atlantic, in the cooperation with the Mid-Atlantic and the New England Council.

So there was a lot of up-front things that went on back and forth that took quite a bit of time before we actually got into the FMP development.

Unfortunately, our early premonition that a three-council plan would be impossible to complete came to fruition, and here we are now with an Atlantic plan that we probably would have had in place a number of years ago if we had stuck by our guns initially.

Dr. Daniel: The dolphin/wahoo workshop I think was in '97. It's interesting that all the dolphin that were alive then are dead now. If we can get the plan in place by 2003, I think that would be the way we want to go.

So I would go ahead and keep this nice and make the motion that we take the first motion. I don't have that in my head anymore, but the one that would get it in place for the 2003 fishing season.

Mr. Cupka: Louis, I'd like to stick to the agenda, if we could, and that's really our final action. We do have an agenda item from the National Marine Fisheries Service to give a presentation on the structural completeness. I'd like to kind of keep it in order, if we can.

Any other comments for Gregg or questions relative to the overview? If not, then I want to call on the National Marine Fisheries Service -- I guess Jim is going to handle this -- to discuss the determination of structural completeness before we move ahead and decide what action we want to take.

Dr. Weaver: Thank you, Mr. Chairman. I'd also like to complement Gregg on his recap of the history of the Dolphin/Wahoo FMP. And, as Gregg mentioned toward the end of his summary, October 23rd, the council wrote the agency a letter submitting that version of the Dolphin/Wahoo FMP and asking that we conduct a determination of structural completeness of that document.

We have completed that evaluation, and the document is structurally complete in that it has all the required parts and provisions. In the course of our evaluation, as Gregg also mentioned, we did encounter some areas which in our view the council should modify the document.

It's not a big fix in any of these cases to basically do some fine tuning, improve the clarify and such as that. And those comments are attached, and I believe all the committee members have received a copy of those comments.

And, again, we would encourage the council, on that basis, to seriously consider those comments. I'm available and Monica is available to work with the council staff in this fine tuning to the extent that would prove helpful. And with that statement, Mr. Chairman, that concludes our report on the structural completeness of the Dolphin/Wahoo FMP.

Mr. Cupka: Thank you, Jim. It certainly would be my intent to instruct staff to work closely with your office. And as was indicated in the transmittal letter we got back that it would probably improve the quality of the document and make it a little more clear in different places, we certainly would intend to do that if we decide to move ahead. Monica, did you have anything at this point you'd like to add?

Ms. Smit-Brunello: Yes, I do, actually, and it will require some action, potentially, by the committee and the council. If you will turn to Page 159 of the document -- and I'm looking at Action 10. If you will remember -- well, it's actually 156.

Action 10 is establishing a framework procedure whereby there's a number of items that you all will be able to take action on via regulatory -- in the future be a reg amendment instead of a full plan amendment. It has been a while I guess since these were first put in there.

There has been a number of cases that have been litigated with the Fisheries Service and other things, and I would like to ask that a couple of those items be removed. I think the committee could do this; the council can act on it today. You have a public hearing.

I think it would be better and more defensible and probably smooth the review process when it leaves the region and goes up to headquarters and other people look at what's in the document and what is not in the document, what's in the actions and not.

And I'll tell you exactly what those items are that I'm looking at. On Page 159 there is a Subsection D and it lists a number of -- and this is repeated a couple other places, but we'll just go with this one -- it lists a number of items that you can take framework action on: adjustment of MSY; best estimate of OY; and there is A through Z I believe in here.

The ones I think that are going to be problematic to do via regulatory framework are the following:

Action F, which is establishing or modifying a requirement for on-board observers; Action G, establishing or modifying a requirement for the use of VMS; Action M which is a moratorium on vessels -- and I think that means a moratorium on the number of permits that will be issued in the future, I'm not sure -- and maybe Action L on quotas.

So it's F, G, L and M. I think those are going to be difficult to do via a regulatory framework the

way things are set up now. I think that would require probably a plan amendment to put those kinds of things through.

I'd like the committee to think about it and maybe have some discussion on it. It would be my advice to remove those items from the Action 10 list of items to deal with via framework and just take them out.

Mr. Cupka: Thank you, Monica. Was that the only section that you recommend that there may be a problem?

Ms. Smit-Brunello: No, I have one other section to discuss and then one other item to discuss, but maybe we could just take it.

Mr. Cupka: Yes, well, let's go ahead and see how the committee wants to deal with this.

Dr. Daniel: Mr. Chairman, if this will facilitate getting the document approved and implemented, if it's appropriate for me to make a motion, I'll move that we delete those items as suggested from Monica from the dolphin/wahoo framework.

Mr. Cupka: I have a motion by Dr. Daniel, a second by Mr. Lee. Discussion on the motion?

Mr. Mahood: I would like to point out to those that weren't present, that these were really items that the Gulf Council added that we didn't think were appropriate at the time. I don't think most of the original people that voted on this would have any problem with it.

Mr. Cupka: And I think subsequent court action may have borne that out as well. Further discussion on the motion? Is there any objection to the motion? Seeing none, the motion is approved.

Mr. Waugh: And, Monica, as you indicated, that wording appears several places in the framework, and the intent of the motion is to delete those four items everywhere they appear in the framework?

Ms. Smit-Brunello: Yes, although I do have one question for you, Gregg, on quotas, and maybe we could look at that a little bit.

The FMP, I believe, establishes a trip limit for dolphin. It does have -- on Action 12 there is a cap. Well, it's not a quota, though, I guess. It's a cap of 1.5 million pounds.

So, yes, I was just thinking about whether quotas needed to go out or not, and I think that they probably should go out. And then once you establish them via plan amendment, we can probably work that process back into the framework. So, thank you for letting me think aloud on the record.

Mr. Cupka: Do you want to continue with your next point, Monica?

Ms. Smit-Brunello: Yes, it's on Action 6 and that's on Page 135, and maybe we could get some discussion on that. Action 6 states in the Atlantic include reporting requirements as specified in the Atlantic Coastal Cooperative Statistics Program.

And when I was looking at this, I know we had a presentation by Maury Osborn at the last meeting on ACCSP. And maybe this is something I can deal with staff after, you know, like we said, editorial license to change things around a little bit.

I kind of expected this to be a little bit different. And when you ask me how different, I'm going to have a hard time telling you except that I believe -- well, let's take it in two separate parts. When we're talking about reporting requirements, we're talking about logbooks, I assume, correct, Gregg?

Mr. Waugh: That's a part of the reporting requirements.

Ms. Smit-Brunello: Maybe what we need to do is, if you'll allow, delineate the reporting requirements below, what they would be exactly. You see, here's my problem. There already are reporting requirements in place right now for many of these fishermen who are going to be fishing.

If you have a Coastal Migratory Permit, you're required to report; snapper grouper, required; swordfish, you're required to report and all that. And maybe it's just discussion on the record that we need for my clarification.

But, I would assume it would be the committee's intent that all those reporting requirements would continue to be in place and not just something that is potentially different or subsumed into the ACCSP.

If that's confusing, what I mean is I would not want to lay this whole action on ACCSP, because the council is a separate entity. I know they're a partner in ACCSP, but they're a little bit separate. Maybe it's just simply working on the structure of how this is set out.

Mr. Cupka: It certainly wouldn't be our intent to cover other reporting requirements under other plans. I think that probably can be worked out maybe if you work with staff.

What we have in ACCSP is a methodology set out for reporting particularly things like bycatch that we wanted to implement, but I don't think the intent was that this would in any way diminish any of the other reporting requirements that people have under other plans.

Mr. Waugh: That's correct. I mean, what needs to take place is there needs to be some implementation meetings, and I think we're going to get into some of this discussion at the full council when we talk about this status report on implementation of ACCSP.

What needs to take place is the partners in the southeast that are collecting data need to meet and

coordinate and see how they're going to partition out those responsibilities. Each of the South Atlantic states have a mandatory trip ticket system now.

And what needs to be figured out is who is going to implement the observer portion. We've indicated here that we want the existing logbook requirements to continue until it's determined how that needs to be modified in order to fully implement ACCSP.

And what we've done here in this section -- and I realize that a lot of council members you received this on CD so you don't have it in front of you -- but, we go through the various modules of the ACCSP and talk about what the requirements are for catch and effort data collection and lay out the data that is going to be collected, the registration tracking, the biological sampling, the bycatch and release, so that there is a good bit of detail in here on what specific data are to be collected.

I think as far as the responsibility of the council, it's to outline the plan for the data that are to be collected, and I think we do that here.

What needs to happen now is as the Dolphin/Wahoo Plan is implemented, NMFS needs to meet with the states and determine whether the states are just going to continue with their mandatory trip ticket portion and NMFS is going to implement the other parts.

Similar meetings have taken place in the Northeast, in the Mid-Atlantic, and, Bill, I don't know if we've had any of those implementation meetings in the South Atlantic. David, you may recall, as well, but I think we have to be a little careful in that what we do in the FMP is lay out the plan.

And then it's up to NMFS, as they implement the FMP that contains that plan for data collection, then they determine the specifics of who is going to implement which portions.

My understanding is by then having it in the FMP, if the FMP is approved, then those data collection list of items to be collected and the processes that are described in here then become mandatory.

Mr. Cole: Monica, let me address the implementation. The Ops Committee is trying to budget for and program the implementation for the whole southeast.

The way the program has matured over the years, the four southern states which make up this council, along with St. Pete, are a little bit further ahead than they are to the north of us right now.

And we kind of drug our feet sitting down together but we do propose to do that. The current planning -- I just talked to Maury Osborn this week. We're sort of looking at trying to do it at the March meeting because we will be having the state and federal board meeting at that time, which involves all of the partners, including you all, and begin to lay out some of the longer term strategies necessary for completing -- Gregg calls it the implementation.

This may be a little bit of a misnomer, but what we're trying to do is to -- —we're having to go back and modify, here in the south, a lot of old data collection forms, systems and requirements, if you will, to bring them up to those minimum standards that are inherent in the program.

And I think that may be what that -- I don't have that section you're concerned about right in front of me, but all that Gregg is implying here is that we want to collect data to the standard that's defined in the ACCSP program design, and why not do that?

That's what everybody has agreed is the minimum data needs that we need to manage from, is my point. So the program, when we say "implement", really what we're saying is we're all agreeing to change our collection systems and so forth to where we're all using the same standards. That's all it means.

Ms. Smit-Brunello: Well, right, but what you're talking about is changing things, but they're not changed yet. We're trying to get everything similarly collected but that's not done yet.

And the reason I bring this up is because this dovetails into the whole bycatch issue because this is the place -- I don't know where else in the document but I saw some discussion of bycatch here. One way you're going to deal with bycatch is via reporting. That's one way.

And so I would want to make sure that the council is covered, in effect, so that you're going to have the reporting requirements as they exist now and then I guess work in -- I'll have to think of a better way to phrase this, and by full council maybe we would want to the action to be slightly differently worded, but then work in the ACCSP standard.

You don't want this to rely on some future thing that hasn't been implemented yet totally and that's not totally active yet. I don't know if that makes any sense but.

Mr. Mahood: I think Monica is making two different points. I know in the discussion we had, if you look at the language that's on the board, it basically says what the councils will do until ACCSP is implemented in the plan.

And it talks about existing logbook requirements, which still pertain. I know Monica was concerned about somebody that just fished for dolphin/wahoo that may not have a coastal pelagics permit.

But the intent, I think, is with that language -- and maybe we need to strengthen it a little bit -- is that the existing requirements for anybody fishing out there will continue, whether or not you're in the fishery now or you enter the fishery.

The question I have, Monica, and going back to when you explained some of the lawsuits to us this past June, it appears -- and I think we've talked about this a little bit -- that once the council develops a plan for data collection, it's incumbent on the Secretary to implement that plan.

And if that doesn't happen, then the Secretary is at jeopardy relative to litigation. That's one area. And so I guess the question comes in the council can only develop the data collection plan.

I think what you're saying is what if that data collection plan that the council has put in there is not complete in some aspect or the mechanisms for collecting have not been incorporated into a program or whatever, and I think that's kind of where we are.

I think that's what Gregg was trying to address, that it's going to be incumbent upon everyone involved, upon approval of this plan, that we have held the proper meetings and made these determinations on how this data is going to be collected.

And that's where the coordination is going to have come in. I don't know the council certainly can't -- you know, they can play their part but we know we can't dictate what the Secretary will do.

But I think we've offered up the mechanism that could be used to meet this requirements, and it's going to take an effort of everybody involved to make sure that we have this program.

Ms. Smit-Brunello: Well, I'm thinking that maybe I can come up with slightly different wording by this afternoon that might take care of that by the time we get to full council.

But, also, I think we should have some discussion about the logbooks as they exist now under whatever fisheries that potentially these dolphin/wahoo could be caught under.

But there is that issue, though, of a fisher, whether these people exist or not, that could potentially go out and fish just for dolphin and wahoo.

They don't hold a mackerel permit. They don't hold a snapper grouper permit. They don't hold a swordfish permit. They don't hold any of those. They go out and fish for dolphin/wahoo. We want to make sure that you get their reporting as well in terms of bycatch.

And that's really what I'm leading to, including -- and I guess maybe you all don't have the document in front of you, I thought you did. But there's a section under Action 6 that discusses bycatch.

And you know we have National Standard 9, which I've talked to you about cases that have been litigated involving the Fishery Service and involving National Standard 9.

National Standard 9 says conservation and management measures shall, to the extent practicable, minimize bycatch, and to the extent bycatch can't be avoided, minimize mortality of bycatch.

And my thought is that we need some further discussion of potential bycatch issues in this document. Now maybe you're going to tell me you have that in Section 3 and I missed it somewhere, but maybe we could have some discussion of that.

Mr. Waugh: Yes, that is discussed as a part of the rationale for the other measures. This section addresses the data collection issues of bycatch, but we've got other measures in here that address and attempt to minimize bycatch. Those are those concurrent closures that track the HMS closures.

Ms. Smit-Brunello: Maybe we can throw a section in here that just references some of those and

Mr. Waugh: Under the data collection?

Ms. Smit-Brunello: In the document. I'm not talking about -- if you've them other places where we can just put it together so it's obvious to readers who are reviewing this down the line or up the line that there is a section on here that adequately discusses bycatch.

Mr. Cupka: Well, it sounds to me like this is something that just takes working together to come up with the wording to clarify things. I don't think there's a serious problem here.

And maybe if you could come up with some of that by the time we get to full council to address it, I hope it's not a show stopper, and I don't think it is.

Ms. Smit-Brunello: Well, no, I think we can work together on this. I don't have a problem with that. And, like Gregg and Roger have said, that's within the document.

Maybe they can humor me and we can have another small section that -- it doesn't have to be under the action items. But I do want to, on Action 6, potentially rework the wording of that a little bit differently to encompass some of the ideas I brought up today.

Mr. Waugh: Action 20 on Page 223, which I'll put up here so everyone can see it, this action prohibits the use of surface and pelagic longline gear for dolphin and wahoo within any time or area closure in the South Atlantic Council's area of jurisdiction which is closed to the use of pelagic gear for HMS species.

And part of the discussion under here deals with how this will prevent directed and potential increases in dolphin and wahoo fishing from causing additional bycatch mortality on non-target and undersized HMS species. So we do address it in other places, and we'll be glad to point those out and work with you and make sure it's addressed enough.

Ms. Smit-Brunello: Okay, thank you. Then I have one other item, but we can even discuss that a little bit later or I can discuss it here. You don't know what I'm talking about so why don't I bring it up right here.

Mr. Cupka: Yes, I'd like it because I don't know what it is.

Ms. Smit-Brunello: Well, it doesn't have to do with any of the actions. And this is really somewhat of a housekeeping detail more than anything else, but dolphin, as you know, exist right now under the Coastal Migratory Pelagics FMP.

That's a joint plan you share with the Gulf Council. We're going to make sure that there is an amendment to the Coastal Migratory Pelagics FMP that removes dolphin from that management unit.

I know under Action 1 in the document it says that it's the council's intent to remove dolphin in the Atlantic from the management unit of the Coastal Migratory Pelagics FMP.

To the extent we could consider this as amending the Coastal Migratory Pelagic Plan -- and that would be fine -- the Gulf Council would need to approve that. I don't think this is going to be a big deal but it's just another procedure requirement.

They're going to need to approve that at their next meeting. That's what I would suggest. If we could, we being the lawyers, figure out a way that it would be okay for dolphin to exist right now -- let's say once you get secretarial approval to go ahead and send forth the Atlantic Dolphin/Wahoo Plan, if it could exist in two plans for a while until one was amended, that would be fine, too.

I've just been trying to work that out with other people, other attorneys in NOAA GC, so I just wanted to alert you to that fact that we've got that. And I think I brought it up at the last council meeting, actually.

Mr. Cupka: And we are aware of that. I know staff has had some discussions with the Gulf Council staff already, and, of course, we would have to remove dolphin for the South Atlantic component of that, and they would want to keep it in, but I believe they've indicated that's not a problem to them, and, in fact, they want to add some additional species. But, Bob, you want to comment on that?

Mr. Mahood: Yes. You know, I'm not an attorney, but we certainly disagree with Monica on this case. The Gulf Council has voted, as all three councils did, to vote to submit the plan to the Secretary in February of 2001.

And in that provision it removed dolphin from the Coastal Migratory Pelagics for the Atlantic. Granted, it did it for the Gulf, also.

But, I pointed out to Monica one thing, we've been instructed in e-mails in two things, one, that the Gulf Council would have to vote on our plan, our Atlantic Plan to remove dolphin; secondly, that we should wait until we're designated by the Secretary as true lead on the plan.

I pointed out to Monica once we're designated true lead, the Gulf has no authority to vote on our plan. What is their legal authority to vote on our plan? I don't think they have any legal authority to vote on our plan, anyway.

We worked with the Gulf Council, and the next amendment to mackerel will add blackfin tuna in the Gulf and wahoo in the Gulf, and it will delete Atlantic dolphin from the plan.

During a meeting we had down in the region, we very specifically addressed this issue, and Gregg even brought up the fact that we need to put on the front cover of this Atlantic Dolphin/Wahoo Plan that it's also amending the Coastal Pelagics Plan.

We were told at that time, no, that was not necessary. We just had to express our intent. We were also told the fact that any new regulations that came out of this plan would supersede anything under the Coastal Pelagics.

I went and looked back at the regulations that exist under the Coastal Migratory Pelagics Plan for dolphin. Dolphin is mentioned three times; once as a part of the management unit; second, as allowable gear in the Atlantic.

And the only difference in the allowable gear in this plan and what's in Coastal Pelagics is we allow spear gear in this plan that we didn't have in the Coastal Pelagics Plan. And then the third time dealt with allowable gear in the Gulf.

So there is very little difference, and I can't see any major problem with that. I think we can work it out when we amend the Coastal Pelagics Plan, we just remove it.

I know Monica is working with her people to see if we can't do it this way. I don't see how the Gulf Council has any legal authority to vote on our plan. I don't know where it lies. So that seems the only mechanism that we could use would be to amend the Coastal Pelagics Plan when we do it to remove it.

In the meantime it will exist in two places. I think the rule of law is that new laws have precedence over preceding regulations. That's my legal summary.

Mr. Cupka: Well, do you agree with our back-street lawyer, there, our resident barrister on the council staff? I really don't think that it's a problem. I know there has been a lot of discussions.

I know you've worked on this a lot, Monica, and continue to look into it, but it certainly seems reasonable that it would work that way. But, we're not the attorney.

Ms. Smit-Brunello: I agree with some of what Attorney Mahood said and other parts I don't agree, but rather than get into -- it doesn't really matter that we address it right here.

I just wanted to alert you that is potentially hanging out there. But, again, I don't see it as a big issue, and maybe by full council I can get you a more thorough answer.

Mr. Basco: Thank you, Mr. Chairman, I had a couple of comments. I was going to withhold these until tomorrow, but the Gulf of Mexico Council, our council, will be as cooperative as we can.

A lot of us council members and the majority actually saw the need for you all to proceed with

your plan because you all had a more immediate need than we had because of what was going on and the information that was given to us.

But it kind of reminds me of the story when Lee Iacocca saved Chrysler Corporation, and, of course, the unions then, after they got it going real well, well, the unions pulled a strike on him and he came back and asked the unions, "Why did you do this? I did all this and saved your jobs".

And the union said to him, said, "Well, kind of a story like a guy picks a snake up on the side of the road and he's freezing to death, brings it home and he lays it up on the fireplace. The snake gets well and the snake turns around and bites the guy".

And the guy told the snake, says, "What's going on here?" I saved your life. I brought you in, got you warmed up and even fed you". He said, "Well, you knew I was a snake when you picked me up".

Mr. Cupka: Other comments or questions? If not, before we move ahead on our agenda -- and I guess the next agenda item would be to develop committee recommendations. I know Ken has very patiently been sitting back there. Did you wish to make a comment at this time, Ken, before we move ahead on our agenda?

Mr. Hinman: Thank you, Mr. Chairman. Ken Hinman, National Coalition for Marine Conservation. It's not really a comment, it's a question. I've made comments over and over again, and they seem to be the same comments each time.

Actually, I had a question during Gregg's presentation. I guess you're going to be moving into the action section here on your different options, and this is something that I need clarification on.

And Louis' pending motion I think was to go with the first option because it would enable the plan to be in effect by the 2003 fishing season, which, certainly, I think should be the overall objective of everything you do here today.

But I don't understand how the second option, which is to wait and submit the FMP for secretarial review after the decision on redesignation is published as a notice, how that makes it impossible to get the plan in place for the 2003 fishing season.

And I guess the other question would be since NMFS told you that you should wait for that decision to be published before you submit it, does submitting it in advance of that decision actually move the process along faster, or is the Secretary just going to wait for that decision to be published before they even do any review?

Mr. Cupka: Obviously, we can't speak for the Secretary, but I think part of it is as long as we have it, there are certain things that have to occur before it can be finalized or approved by the Secretary, and those things would not happen or begin to happen.

Now whether they actually will, I don't know, but at least as long as we've got it, then some of those things definitely can't occur. Now if we go ahead and submit it, whether they would occur, I don't know. Gregg, do you want to add to that?

Mr. Waugh: The concern with the second alternative, Ken, is that I think the comment period on the redesignation closes December 23rd. Then they have to process those comments.

Then they have to make their decision, and then they have to publish a notice in the Federal Register. And the concern there is we have no idea how long that process will take.

If that takes until February-March and then we submit the document, there just isn't the sufficient period of time using the review schedule that's laid out in Magnuson for the agency to review it and implement it prior to the start of the season in 2003.

Mr. Hinman: Yes, that was precisely my concern when I read that. But, I guess my question is to the agency, then, if the council does go ahead and submit the plan by its target date of mid-December in order to get things moving rather than waiting for a decision that may not come until some time in the spring, is that going to move things faster at the secretarial level as is obviously the council's intent and desire that it did; or, are things going to be on hold there? I mean, is it just simply a matter of whether it sits on hold here at the council level or in Silver Spring?

Dr. Weaver: Thank you, Mr. Chairman. To that point, Ken, first let me address the timing of the Secretary's decision on the council's request to go it alone with the Atlantic FMP.

As you mention or as was mentioned, the comment period on our Federal Register Notice ends December 23rd, and we'll consider whatever comments we do receive from that notice. I would believe that the Secretary's decision and the notice of that decision would publish in January, possibly even in early January.

It's not a very complicated process once we make it through all the checklists of the Federal Register Notice and canvassing the other involved councils, et cetera, and considering the public comments we receive during that process.

But, I would think we would have a secretarial decision on September -- January. That was a Freudian slip. On that basis, and, again, I don't think this is an absolute show stopper, but we continue to feel it would be most appropriate for the council to await the Secretary's decision prior to submitting but, again, that's simply our viewpoint.

I don't anticipate this happening but were there to be an adverse decision by the Secretary, then the council would have to withdraw or do something different. And, again, I'm not foreseeing that at all. I'm just pointing that out.

We will commence our required reviews and process as soon as we receive the document, and I

believe that was also your second question.

Ms. Smit-Brunello: Yes, to that point, I don't see how a notice of availability could be published in the Federal Register prior to the Secretary putting the comments together and issuing a notice that says -- assuming the Secretary chooses to do this --that the South Atlantic Council is the one to do the Atlantic plan.

So, there is not going to be a notice -- well, I would say or I would argue or urge my clients to follow my advice to not follow a notice of availability of an amendment, which you haven't been given authority to do yet.

Mr. Smith: To that point, then I have something else, it would seem that if the council did submit the document, it's there already to go to the people, and D.C. can prepare the statement; and then when the decision is made about the South Atlantic having that jurisdiction, it can just be sent to press that day instead of -- if the council waits, then you're going to prolong it another month because by the time it gets to Washington, gets distributed, the notice gets published and all, it's going to be a month later.

My original question was of the agency. Realistically, do you think if the decision is made in January and you have the information in the public notices are put out and all, will implementation realistically be possible by June?

Mr. Cupka: Jim or Monica, do you have your crystal ball with you?

Dr. Weaver: The honest answer is in my experience it would be highly unlikely that the FMP would be fully implemented by June. It's coupled with another FMP that has to proceed first. That's an unusual complication but one we certainly can deal with.

But, normally, the agency rule-making process in my and your experience is somewhere in the neighborhood of six months to twelve months, depending on what occurs during the review process, and, in fact, what public comments we need to address during the review process.

Mr. Mahood: My comments were twofold, somewhat along the line of what Ron said, but one of the benefits of going ahead and getting the plan down there to the region is that the region has to do a lot of pre-work.

They have to develop decision memos and this type of thing, and they're not going to start that until they get the document. And that's one thing.

And then the other thing is just the fact that -- and this is unfortunate, and I'm not sure where it's happening, but people are being told that the only reason the dolphin/wahoo plan is not in place is because the council hasn't submitted it to NMFS.

And to some degree that's true, but it's because we had all these complications. So, the political processes that work to get something done can't start until we've officially submitted the document.

I think the timing will be determined more by that process, and the expediency will be determined more by that process than what we've normally seen in the past.

Mr. Hinman: I just wanted to, after that discussion, then make a comment. Based on the discussion, which I realize is still ongoing, but on Jim's comments in particular, given that the agency's commitment over the last year, year and a half to streamline the process of getting this plan approved and implemented and to working with the council, and the fact that you see no reason why the Secretary's decision on redesignation won't be made in January and possibly early January, my comment would be in support of the council submitting the plan in advance of that decision.

And I would want to say, though, that it's a little bit disconcerting to hear that the implementation phase could take six to twelve months for this plan. That doesn't sound like a very streamlined process to me.

And this plan is one that has gone back and forth between the council and the Secretary innumerable times over the last five years. And, really, in substance the plan itself hasn't changed over that entire period.

It's mostly been revisions and clarifications and fine tuning and that kind of thing, so I really can't see why it would take that long. But I definitely support the council in moving ahead to submit this plan in December, if possible. Thank you.

Mr. Cupka: Thank you, Ken. I'll just mention, too, that Ken has been with us the whole time we've been through this process. We certainly appreciate all his support and input. Louis, did you have a question or a comment?

Dr. Daniel: Well, it just appears that in Section 304, in the review of plans and regulations, if they followed what's in here, they could do it in less time and we could get it implemented in the appropriate time.

And I think there is a reasonable expectation that the Secretary is going to approve our request and that we can move forward with it as quickly as we can. But, you know, as Bob said, there is an impression out there that we've been the reason why this plan has been held up.

I just think it's incumbent upon this council and the folks that have been involved with us, like Ken, through this whole process that we do everything we humanly possibly can; and then if it gets implemented in 2003, I think that should be our reasonable expectation. And if it doesn't, it should be explained why it wasn't.

Mr. Cupka: I agree with you, Louis, according to the timelines established in the Magnuson Act, but we haven't really met that very often, plus there is the additional factor, I guess, that it is contingent upon the Sargassum Plan, which has to be approved ahead of that.

Mr. Smith: I was going to say the Mid-Atlantic Council, at their last meeting in early October, took action to request the Secretary approve you having the lead and establishing an Atlantic Coast FMP for dolphin/wahoo.

Mr. Cupka: Yes, I think all the councils have pretty much submitted a letter in support of that, and hopefully that will be considered. Maybe they need to submit another letter during the comment period, I'm not sure.

Mr. Mahood: Well, I have one more reason. It probably doesn't carry much weight in the overall scheme of the political process of dolphin, but one of our goals this year at the council level and the council staff was to get the Sargassum Plan submitted and get the Dolphin/Wahoo Plan submitted, and I sure would like to get them submitted in '02.

Mr. Cupka: That's certainly been one of my goals of things that we accomplish this year. It seems like I've been chairing this dolphin/wahoo thing for half my lifetime. I'd sure like to see us get it behind us, as I know a lot of people would, really.

It's unfortunate that it's taken this long. Any other comments? If not, then we'll move into our next agenda item, which is a committee recommendation for the full council on where we want to go with the plan. Louis, did you want to do something?

Dr. Daniel: I'll move that the committee recommend to the full council to approve the FMP for formal review and give staff editorial license to address comments as appropriate and submit it in December 2002.

Mr. Cupka: Okay, we have a motion; do we have a second?

Mr. Geiger: Second.

Mr. Cupka: Second by George Geiger. Discussion on the motion?

Ms. Smit-Brunello: I assume this is done with the understanding or the -- well, I don't know what else you would call it but with the understanding that this is providing you get secretarial approval -- this is for the record -- secretarial approval to be designated as the council to produce the Atlantic Dolphin/Wahoo Plan.

Mr. Cupka: That's correct. And, as I stated earlier, it's also our intent to give some editorial license to the staff and instruct them to work very closely with the regional office to address some of these comments, these additional comments we've received. At least, that was my intent and I assume as the maker of the motion, that was your intent as well; is that correct?

Dr. Daniel: Yes.

Mr. Cupka: Okay, further discussion on the motion?

Dr. Weaver: I just want to bring up a comment on the mid-December submission requirement in the motion, and I only bring this up from the view point of realities.

I and Joe Kimmel have to attend the Caribbean Council meeting all next week, and so our availability to work closely and productively with the council staff is vastly compromised by that prior commitment.

So, again, to repeat what I said earlier, I think it would be very useful for the council to consider the comments that we offered in our structural completeness evaluation because by addressing those comments, you will speed the review time of that document once submitted. I just wanted to point that out, Mr. Chairman. Thank you.

Mr. Cupka: Thank you, Jim. I'm not sure of the mechanics, but I know our staff, if this is approved by full council, intends to begin work on this next week.

Now, it may be they can go in and address those comments while you're at the meeting; and then when you get back, they can communicate and coordinate things with you, but, certainly, our staff could go ahead and start putting together at least what they think is needed from their standpoint and then get back with you.

Mr. Waugh: And our intent would be, if we have questions or interpretation about those comments, that we will certainly get in touch with them via phone or e-mail down at the Caribbean meeting. I don't believe Monica is going to be down there.

Ms. Smit-Brunello: No, that's what I was going to say is I'm in all next week.

Mr. Waugh: We'll coordinate very closely with them.

Mr. Lee: I have a question, Mr. Chairman, for Monica. I don't want to throw any issues into it or roadblocks, but when we were at the orientation meeting November of 2001 at NMFS Headquarters, one of the issues that they kept bringing up at that meeting was that the council members should have the full completed document in front of them when they vote to send a plan forward.

My question to you is if we move forward with this motion, which allows the staff to do editorial license, is that in any way going to cause a problem with the final approval of this plan as it works its way up the system?

Ms. Smit-Brunello: Yes, that's a good question, and I want to make sure I give you the correct answer because I don't want my answer to be taken as I don't want staff to do any more work on this and you send this document in as is.

And I can see Gregg already smiling, because I think that the comments the Fisheries Service gave were good comments, and some of the ones I gave this morning, of course, I would consider them as good comments and I think you should deal with them.

But, I agree. I mean, Bill Hogarth's direction, and I think it has been proven out in many instances, is that you should have as complete a document as you can before you before you take action.

And I know the Gulf has had some recent problems with this, as I believe we heard at the last meeting with charter boat amendments and other things.

However, on the other hand, since I fully expect that the council will not postpone taking final action on this document until March, this document has been around for quite a while. A lot of the provisions have been reviewed.

I think if the council is not going to put this off until March, I think that it will work out okay, hopefully, that all the provisions will be there and there will be no problem in the review.

You always run the risk, when you don't have a complete document, that something may come up that could have been addressed or you didn't realize was in there or anything like that.

It's a valid point and I know the Fisheries Service has been urging, as well as General Counsel, to have a complete document in front of you. This is pretty complete. I mean, we have a few things to do to it, but I would say that it's pretty complete.

Mr. Cupka: Well, I would just add as far as that's concerned, we have looked over the comments that we received and none of them are what I consider show stoppers.

There are things that need to be addressed, but they certainly don't change any of the management measures, perhaps with the exception of what you gave us this morning, but that's actually, I guess, in a way not liberalizing it, but it's a move in a positive direction rather than further restricting people, so I don't think that would be considered a problem.

And as you say, the document has been around for quite a while. We really aren't changing any of the management measures. I mean, if every time you change a word or something, it's going to be considered an incomplete document, that's not going to be very good.

If it was going to be a change in management measures or something substantial, then I would agree with that but, there, again, we're all trying to be backwoods lawyers here this morning. But at least that's kind of my read on the thing.

Mr. Mahood: We have a complete document. The complete document part means are all of the parts there? That's why we sent it in for determination of completeness. It doesn't have anything to do with the text of the document. You don't have to have the final text of the document.

What was happening is councils were approving plans for submission without the RIR being complete, the SIA being complete. We actually include the rule, which a lot of councils don't,

and that's not even part of the completeness package because in a lot of the regions NMFS does the rule.

So, the complete package that was in the memo that came out dealt with all the different parts, not every typo that's being corrected and this type of thing.

That's why at the last meeting -- as you recall, we used to go ahead, and when we were dealing with DEIS review not being done yet, we would approve plans contingent on no substantial comments on the DEIS.

That was what they meant by complete package. We can't do that any more. We have to have the DEIS complete. The document has to say it's a Final EIS. So that's what's meant by complete package, not just the verbiage. I think we've done that.

At the last meeting we completed, like Gregg explained, so that we could go back, after the final decisions were made, do all the parts -- we've added an extra council meeting to every document to comply with that, and that's what we're doing here.

If you can't ever change language and correct typos because then you have to go back and redo it and put it all in a document and bring it back, you'll never get done with anything. I know that's not the intent of this.

So as far as we're concerned, once we've heard from Monica and from Jim that we have a complete document, that's the package. Making corrections to make the document better and to clarify the document, I don't think that changes the package.

Dr. Dean: Thank you, Mr. Chairman. I appreciate Wayne's bringing this to our attention, and also I think Bob's point of what constitutes a complete document before the council members is very helpful and useful.

And the point that has been made numerous times by members of the committee and staff, and Ken this morning, this is a document that has been intensively and completely reviewed.

And on a personal note, I read the latest set of comments in detail. I, frankly, am puzzled and disappointed that many of those comments from the agency were not given to us on the previous documents that they had the opportunity to review, and it would have made our task at this end quicker and easier.

Some of which are marked as "critical" are simply editorial comments and a choice of words on the basis of an individual. And as one who reviews fairly significant numbers of papers for journals, we understand that each of us has a different way of using the language.

That's not what's going to help us at this point, nor is it going to be helpful to nit-pick about reaction to those. The important point is that there have been no substantive change in management measures since the draft before last.

It is more important that we address our concern for the resource, for the people that utilize the resource, and that we get on with that task, which means getting the actions in place this year when we had done all we could to deliver this to the fishery community last year.

So with that, I argue that we need to focus on the objective of this and give the staff the authority to make the editorial changes in concert with the agency and get this submitted as soon as possible. Thank you.

Mr. Lee: The only comment, Mr. Chairman, was that I just wanted this issue addressed at this point in time on the record so that as we work our way through, and I feel that motion is going to pass, that it doesn't cause us a problem downstream. And so I feel like we've achieved that. Thank you very much.

Mr. Cupka: Thank you, Wayne. Other comments? Okay, the question has been called. All those in favor of the motion, signify by saying aye; opposed. The motion carries.

Dr. Weaver: Mr. Chairman, if I could, the Fisheries Service will abstain on the motion only from the viewpoint we feel it's most appropriate to await the Secretary's decision on the Atlantic FMP.

Mr. Cupka: So noted for the record. Other business to come before this committee?

Mr. Waugh: We had discussed this, and I don't know that we need to have a motion, but is it the wishes that a letter be sent in during this comment period indicating that we support the idea that we have true lead?

Mr. Cupka: I don't think it could hurt anything, and I would hope that the other councils would do likewise, even though I think all of them have commented previously, but that would be part of the record in terms of the Federal Register Notice. And we can certainly do that.

Dr. Daniel: Under other business, I would just like to commend staff for the work that they've put in to trying to wax this jellyfish. I hope that it's going to come to a successful conclusion soon, but I appreciate all the work particularly that Gregg has put in to trying to get us to this point.

Mr. Cupka: I'd like to echo those comments, but I can tell you we're not there yet. We've been to this point and even further a couple times before, so I'm not ready to pop the cork on the bottle yet, but, hopefully, we'll wrap it up this time.

All right, if there is no further business to come before the committee, we are adjourned.

(Whereupon, the meeting was adjourned at 11:20 o'clock a.m., December 5, 2002.)

Tape of Proceedings on File (1)

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SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL

DOLPHIN WAHOO COMMITTEE

**Sheraton Grand
New Bern, North Carolina
December 5, 2002**

DRAFT MOTIONS

DOLPHIN WAHOO COMMITTEE

MOTION #1: DELETE THE FOLLOWING ITEMS FROM THE D/W FRAMEWORK:

- (f) Establishing or modifying a requirement for onboard observers**
- (g) Establishing or modifying a requirement for use of a VMS unit that meets standards published by NMFS**
- (l) Quotas (including zero quotas)**
- (m) Moratorium on vessels.**

APPROVED BY COMMITTEE

MOTION #2: Approve FMP for Formal Rev. & give staff editorial license to address comments as appropriate; submit mid December 2002

APPROVED BY COMMITTEE WITH NMFS ABSTAINING