

<i>NATIONAL MARINE FISHERIES SERVICE PROCEDURE 01-124-01</i> Effective on: October 22, 2024	
To be reviewed on: October 22, 2027	
Fisheries Management Federal Noncompliance Review Process under the Atlantic Coastal Act, 01-124	
Procedures for the Atlantic Coastal Fisheries Cooperative Management Act Federal Noncompliance Review Process	
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Author name: Max Appelman Office: Sustainable Fisheries	Certified by: Kelly Denit Office: Sustainable Fisheries
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I. Introduction

The Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.*, was approved by Congress in 1993 to establish federal support for the Atlantic States Marine Fisheries Commission (ASMFC), and to encourage the development, implementation, and enforcement of effective interstate fishery management plans (FMPs). The Atlantic Coastal Act includes a provision that the ASMFC shall (1) determine a state or jurisdiction (hereafter state) is not in compliance if the state has failed to implement and enforce any mandatory provisions of an Interstate FMP established by the ASMFC under its Interstate Fisheries Management Program (ISFMP) Charter, and (2) notify the Secretaries of Commerce and Interior of such determination. If following review, the Secretary of Commerce concurs with the ASMFC's determination and finds that the measures the state failed to implement and enforce are necessary for the conservation of the fishery in question, the Secretary must declare a moratorium on all fishing for that species in the waters of the noncomplying state. The authority to make a finding and declare a moratorium under the Atlantic Coastal Act lies solely with the Secretary of Commerce; this authority has been delegated down to the National Oceanic and Atmospheric Administration (NOAA) National

Marine Fisheries Service (NMFS), although the Secretary retains final discretion.

II. Objective

This procedure describes the process NMFS will use to review and act on any ASMFC noncompliance determination referred to the Secretary of Commerce (hereafter Secretary) under Section 5106 of the Atlantic Coastal Act. This procedure also describes the information NMFS will consider when making a finding in consultation with the Secretary. This procedure is consistent with statutory procedures and timelines, promotes efficient review, and establishes consistency and transparency in the review process.

III. Guidance

A. Atlantic Coastal Act Statutory Procedures, Timelines, and Authorities

Section 5105 of the Atlantic Coastal Act stipulates that if a *state has not implemented and enforced*¹ any mandatory provision of an interstate FMP, the *ASMFC shall determine that state is not in compliance and notify the Secretaries [of Commerce and Interior] within 10 working days of such **determination***.² Under Section 5106 of the Act, *the Secretary shall make a **finding** on the following criteria within 30 days after receiving a notification of state noncompliance from the ASMFC:*

- (1) whether the state in question has failed to carry out its responsibilities under Section 5104 of the Atlantic Coastal Act; and*
- (2) if so, whether the measures that the state has failed to implement and enforce are necessary for the conservation of the fishery in question.*

*In making a finding, the Secretary shall give careful consideration to the comments of the state in question and provide such state, upon request, the opportunity to meet with and present its comments directly to the Secretary. The Secretary shall also solicit and consider the comments of the ASMFC and the appropriate [Regional Fishery Management] Councils.*³

For the purposes of these procedures, a **positive finding** means that following review, the Secretary has concluded that both of the above statutory criteria (1) and (2) have been met. Upon making a positive finding, the *Secretary shall declare a **moratorium on fishing in the fishery in question in the waters of the noncomplying state***.⁴ The Secretary must also specify the moratorium's effective date, *which shall be any date within six (6) months after declaration of the moratorium*. A **negative finding** means that one or both of the statutory

¹ *Italics signify statutory language.*

² The [ASMFC Interstate Fishery Management Program Charter](#) specifies that in addition to addressing the required measure the state failed to implement or enforce, a species management board recommendation to the Policy Board that a state be found out of compliance shall also include a statement of how that failure "jeopardizes" the conservation of the resource.

³ The ASMFC works in partnership with NMFS and the New England, Mid-Atlantic, and South Atlantic Fishery Management Councils to sustainably manage Atlantic Coastal fishery resources.

⁴ The Atlantic Coastal Act defines "fishing" as the catching, taking, or harvesting of fish, or any other activity that can be reasonably expected to result in the catching, taking, or harvesting of fish.

criteria have not been met and, therefore, a moratorium on fishing will not be implemented. If the Secretary is notified by the ASMFC that it is withdrawing its determination of noncompliance after a moratorium has been declared, *the Secretary shall immediately determine if the state is in compliance with the applicable FMP. If so, the moratorium shall be terminated.*

The Under Secretary of Commerce for Oceans and Atmosphere and Administrator of NOAA, as authorized by Department Organizational Order 10-15, re-delegated authorities of the Secretary under the Atlantic Coastal Act to the Assistant Administrator for Fisheries (i.e., NMFS) on June 4, 1996 (see Transmittal Number 41). The only stipulation is that the Secretary retains final discretion before any action is taken by the agency with respect to declaring a moratorium under Section 5106 of the Atlantic Coastal Act. The intention of NMFS, as outlined, is to notify the Secretary as soon as practicable following receipt of an ASMFC noncompliance determination letter, and to formally advise the Secretary with an intended finding. Additional communication with the Secretary not described in these procedures may be pursued as needed.

B. Procedures for Conducting the Atlantic Coastal Act's Federal Noncompliance Review Process

For the purposes of these procedures, the term “**Parties**” refers to the entities identified in Section 5106(b) of the Atlantic Coastal Act. More specifically, the Parties defined in this procedure are: (1) the Executive Director of the ASMFC; (2) the Governor of the noncompliant state; (3) the Director of the Fisheries Management Agency of the noncompliant state; and (4) the Chair of the appropriate Regional Fishery Management Council(s). The Department of Interior and U.S. Fish and Wildlife Service are not considered a party under the Atlantic Coastal Act. However, NMFS will inform and engage the U.S. Fish and Wildlife Service in making a finding, as appropriate, and as outlined in these procedures.⁵

The NMFS Office of Sustainable Fisheries (OSF) is responsible for coordinating the development of all materials and correspondence described in this procedure, including correspondence to the Secretary, letters to the Parties, and notices for the *Federal Register*. OSF will work in close collaboration with other applicable NMFS offices, especially the relevant Regional Offices and Science Centers, and the Office of General Counsel-Fisheries. The NMFS office that represents the agency on the ASMFC management board for the species in question, or the lead office, should develop the intended finding (as described in Step 5 below) to ensure subject matter expertise is relied upon in the decision-making process.

NMFS, under its delegation of authority, conducts the Atlantic Coastal Act's Secretarial noncompliance review process by informal adjudication as set forth in the case law and treatises interpreting and analyzing the Administrative Procedure Act 5 *U.S.C.* 555.

⁵ It is important to note that the Atlantic Coastal Act requires the ASMFC to inform both Secretaries of Commerce and Interior of its noncompliance determination. However, the Act does not require NMFS to engage with, or solicit comment from, the Department of Interior or U.S. Fish and Wildlife Service in making a finding.

Action on the part of NMFS begins the first working day after receiving written notification from the ASMFC that it has determined a state is not in compliance with the provisions of an Interstate FMP consistent with the Atlantic Coastal Act. The notification letter should contain all of the information the ASMFC considers relevant to the two statutory criteria for making a federal finding, including but not limited to:

- The specific violation or act of noncompliance with respect to the provisions of the relevant FMP, including timing, reasons, and background, along with any unsuccessful state efforts to comply with the provisions;
 - Whether the fishery in question is currently determined to be overfished, experiencing overfishing, or undergoing stock rebuilding. These factors are potential indicators of poor stock or fishery conditions, and that conservation is warranted.
 - Explanation for why Secretarial action is necessary for conservation of the fishery or species in question. This may include factors related to the role of the species in the marine environment, such as food web and trophic-level dynamics, stock structure, recruitment, habitat interactions (e.g., species impacts on water quality or nutrient dynamics), or any other biological or ecological factors and issues that the measures in question are designed to consider or address;
 - Potential actions available that the state in question could take to comply with the provisions of the FMP, including any alternative measures the state is authorized to implement by the species management board through the ASMFC adaptive management or conservation equivalency processes, as well as the alternative preferred by the ASMFC and why;
 - Depending on the ongoing efforts of the noncompliant state, any recommendation that the effective date of a potential moratorium be delayed for up to six months, as afforded by statute;
- and
- Any other information the ASMFC considers relevant to the two statutory criteria for making a finding, as outlined in Section 5106(a) of the Atlantic Coastal Act.

This information is expected to cover the majority of state noncompliance and fishery conservation-related evaluations essential to the two statutory criteria for making a finding, however, it is not all-inclusive.

NMFS will respond to ASMFC's notice of state noncompliance in the following manner:⁶

⁶ Steps 1 – 3 are generally happening concurrently and as soon as practicable.

1. NMFS will notify and inform the Secretary that an ASMFC noncompliance determination has been received by way of an Information Memorandum. This memo does not provide any discussion or recommendations for making a finding; rather it provides a broad, high-level overview of the ASMFC's noncompliance determination process, the delegation of authority to NMFS, the implications of making a positive or negative finding, and the statutory requirements under the Atlantic Coastal Act, including that NMFS has 30 days to make a finding;
2. NMFS will send letters to the Parties to request comments on the ASMFC noncompliance determination; and advise the state in question that it may, *upon request*, meet with and present comments directly to NMFS. The letters will also indicate the requirements of NMFS as delegated.
3. NMFS will publish a notice in the *Federal Register*. The notice is necessary to alert the public that the agency has received and is reviewing a determination of noncompliance from the ASMFC. The intent of the notice is to inform the public of the specific ASMFC noncompliance determination and to outline the process that will be used to conduct the review, including statutory requirements, delegation of authority to NMFS, and potential outcomes (e.g., a moratorium). The Atlantic Coastal Act does not require solicitation of public comment in the public notice. However, NMFS has historically provided a short public comment period when practicable, and will continue to do so.
4. NMFS will meet with the noncompliant state *upon request* as quickly as possible from the first working day after the ASMFC noncompliance determination letter was received by the agency. A meeting with the state should occur no later than day 20 due to the Atlantic Coastal Act's 30 day procedural deadline for make a finding.
5. NMFS will formally advise the Secretary of its **intended finding** in writing as soon as practicable. The intended finding is considered draft and pre-decisional. The intended finding (positive or negative) shall be based on the information available for agency review, and include rationale relative to the two statutory criteria outlined in Section 5106(a) of the Atlantic Coastal Act. If the intended finding is positive, it will also specify and include additional rationale for prohibited acts, when necessary, during the moratorium, and an effective date of the moratorium no later than six months after the moratorium is declared.
6. A **finding** is made when a Decision Memorandum is signed by the signee. Per the delegation of authority, the signee could be any position of leadership from the Secretary of Commerce down to the Assistant Administrator for Fisheries.

- a. If a **positive finding** is made, a non-discretionary moratorium on fishing in the fishery in question in the waters of the noncompliant state is automatically declared upon the signing of the decision memo. NMFS will notify the Parties in writing stating the reasons for the positive finding.⁷ The notice, as described in the decision memo, will specify and include rationale for an effective date of the moratorium; specify prohibited acts during the moratorium; and outline the action(s) the state must take for the moratorium to be terminated;

or

 - b. If a **negative finding** is made, NMFS will notify the Parties in writing stating the reasons for the negative finding, and that a moratorium on fishing will not be declared. (Note that a negative finding does not mean that the state is following the applicable FMP.)
7. NMFS will publish a notice in the *Federal Register* alerting the public that the Secretary has made a finding pursuant to the Atlantic Coastal Act. The content of this notice will mirror that of the notice to the Parties in Step 6 above.

No further administrative action by the agency is necessary beyond this step. After the public is notified that a positive (or negative) finding has been made, the federal requirements for making a finding and implementing a moratorium under the Atlantic Coastal Act are satisfied. However, the agency may publish subsequent notice in the *Federal Register*, as needed, to further clarify prohibited acts or the effective date of the moratorium.

8. If after a moratorium is declared, the agency is notified by the ASMFC that the state in question is now back in compliance with the relevant FMP, and that it is withdrawing its determination of noncompliance:
 - a. NMFS shall immediately review all the pertinent documents and information, including those submitted by the noncompliant state, the ASMFC, the enforcement agencies, and any other source of information pertaining to compliance by the state to the provisions of the FMP covering the species included in the moratorium. If following review, it is unclear to NMFS that the state is in compliance, NMFS may further consult with the state, the ASMFC, and the Secretary, as necessary.
 - b. If NMFS is satisfied that the state is back in compliance with the relevant FMP, NMFS will notify the Secretary of its intent to withdraw the moratorium. NMFS will then notify all Parties in writing stating its withdrawal of the moratorium, and publish a notice in the *Federal Register* that the moratorium has been withdrawn;

⁷ If the U.S. Fish and Wildlife Service is a voting member of the relevant ASMFC species management board, NMFS will also notify the Secretary of Interior in writing that a finding has been made.

or

If NMFS disagrees with ASMFC's determination that the state is back in compliance, NMFS will notify the Secretary that the moratorium will remain in effect. NMFS will then notify all Parties in writing of the reasons for the decision, and that the effective date of the moratorium is still in effect.

C. Considerations and Additional Contextual Information

It is important to note that NMFS is committed to understanding the full breadth and scope of the noncompliance issue. In making a finding, NMFS will consider the initial noncompliance determination notice from the ASMFC, the comment(s) received as outlined in Steps 2 through 4 above, and other information available to or analyzed by the agency. These comments and materials will weigh heavily in the final decision, however, NMFS reserves the right to consider additional information not listed herein or novel circumstances as they arise to make a finding. NMFS may only consider available information to the extent relevant to the ACA's statutory criteria for making a finding. Additional information germane to the noncompliance issue that is not particularly relevant to the two statutory criteria for making a finding, including but not limited to social and economic information, could inform other aspects of federal action, such as an appropriate effective date for the moratorium and whether additional restrictions, as authorized, are warranted to further the purposes of the Atlantic Coastal Act.