PETITION FOR RULEMAKING

Pursuant to Va. Code § 2.2-4007
Before the Virginia Marine Resources Commission

I. PETITIONER

Name: Tanya O'Connor
Status: Virginia resident
Interest: The petitioner uses and enjoys the Chesapeake Bay for recreational and environmental purposes and is directly affected by regulatory decisions governing the management of its living marine resources held in trust by the Commonwealth.

II. AUTHORITY FOR PETITION

This petition is submitted pursuant to:

- Virginia Administrative Process Act, Va. Code § 2.2-4007, authorizing any person to petition an agency to adopt, amend, or repeal a regulation and requiring the agency to issue a written decision stating its reasons;
- Virginia Constitution, Article I, § 12 (right to petition the government); and
- Va. Code § 28.2-201, granting the Virginia Marine Resources Commission ("VMRC") authority to regulate fisheries in tidal waters.

VMRC is the agency responsible for the regulation identified below.

III. REGULATION AT ISSUE

4 VAC 20-1270-35 — Chesapeake Bay Menhaden Cap

This regulation authorizes purse-seine reduction fishing for Atlantic menhaden within the Chesapeake Bay.

IV. STATEMENT OF FACTS

1. VMRC currently authorizes industrial removal of menhaden from the Chesapeake Bay under 4 VAC 20-1270-35.

2. At the time VMRC approved continued industrial menhaden removal under 4 VAC 20-1270-35, it did not have—and still does not have—a Bay-wide estimate of menhaden biomass, age structure, spatial distribution, recruitment trends, or localized depletion risk.
3. VMRC has not conducted a Bay-specific analysis of the consumption needs, prey thresholds, or reproductive-season energy requirements of forage-dependent species, including osprey, striped bass, bluefish, weakfish, red drum, and marine mammals.
4. These Bay-specific abundance and ecological-dependence data are necessary to evaluate the effects of industrial forage removal in the Chesapeake Bay and are required prior to authorizing such removal to fulfill VMRC's public trust and statutory management obligations.
5. VMRC did not evaluate or document the economic impacts of industrial menhaden removal on the Chesapeake Bay bait fishery or on Bay-dependent economic activities, including sportfishing, bird watching, and crabbing, when approving reduction fishing under 4 VAC 20-1270-35.
6. The Chesapeake Bay functions as a primary nursery for Atlantic menhaden, and effective management must ensure menhaden are not removed before reaching reproductive maturity and that older age classes are maintained to support recruitment stability and ecosystem function. VMRC's current authorization framework contains no measures designed to ensure such protection.

V. GROUNDS FOR PETITION

A. Public Trust Obligations Governing Chesapeake Bay Resource Management

A1. Public trust obligations require prudent decision-making

Under Virginia common law, marine fisheries resources in tidal waters are held by the Commonwealth in trust for the public. *See* Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932); Taylor v. Commonwealth, 102 Va. 759, 47 S.E. 875 (1904); Bradford v. Nature Conservancy, 224 Va. 181, 294 S.E.2d 866 (1982).

This body of law—commonly referred to as the public trust doctrine—means that marine fisheries resources are not held for private exploitation, but are managed by the Commonwealth for the benefit of the public as a whole. Under this doctrine, the Commonwealth has an ongoing obligation to protect public marine resources from unreasonable impairment and to manage their use in a manner consistent with long-term public benefit.

Because the General Assembly has delegated regulatory authority over marine fisheries resources to VMRC, VMRC exercises that authority as the Commonwealth's designated decision-maker for purposes of managing public trust resources. VMRC's regulatory decisions

must therefore be consistent with the Commonwealth's public trust obligations when authorizing industrial use of those resources.

Authorizing industrial removal of a forage species from a nursery estuary without knowing population size or ecosystem reliance raises serious public trust concerns because it risks impairment of a public resource without sufficient information to evaluate those impacts.

A2. Public trust obligations require independent oversight

The public trust obligation requires that the Commonwealth retain independent oversight over industrial use of public marine resources, sufficient to ensure that such use remains within authorized limits and does not impair trust resources. Management frameworks that depend on information supplied exclusively by the regulated entity are inconsistent with that obligation because they do not provide the independent confirmation necessary for meaningful public trust oversight.

A3. Public trust obligations extend to protection of habitat function

Virginia law treats the Chesapeake Bay's submerged lands, tidal waters, and the habitat they support as public trust property. *See* Va. Code § 28.2-1200 *et seq.*; Va. Code § 28.2-201. Public trust obligations therefore extend beyond regulating harvest levels to protecting the functional integrity of public trust resources.

Menhaden function as a keystone forage species in the Chesapeake Bay ecosystem. Industrial-scale removal of menhaden from Bay waters affects trophic structure and energy availability within nursery habitats associated with submerged lands. These impacts implicate habitat function, not merely fish harvest.

Authorizing industrial menhaden removal without accounting for effects on nursery function and submerged-land–associated habitats raises public trust concerns independent of stock-status determinations. Even where a species is designated "not overfished," VMRC's authority to manage fisheries does not extend to authorizing uses of public trust property that impair the habitat functions those resources support.

B. Interstate Considerations Reinforce the Need for Caution

Virginia is a member of the interstate compact establishing the Atlantic States Marine Fisheries Commission, codified at Va. Code §§ 28.2-1000 through 28.2-1000.2, and is obligated to cooperate in the conservation and management of shared migratory fishery resources. The Chesapeake Bay is the primary nursery area for Atlantic menhaden. Authorization of potentially localized depletion without adequate information risks undermining coast-wide management objectives, interstate conservation responsibilities, and the viability of dependent fisheries.

The Chesapeake Bay is a highly interconnected ecosystem in which ecological impacts in one jurisdiction directly affect species, habitats, fisheries, and Bay-dependent economic activities

throughout the system, including the menhaden bait fishery, as well as forage-dependent species such as striped bass and osprey, which rely on a stable and sustainable menhaden population.

In authorizing industrial menhaden removal within the Chesapeake Bay, VMRC has not evaluated the ecological or economic impacts of that activity on Maryland waters or on Bay-dependent fisheries and economic activities beyond Virginia. Because the Chesapeake Bay is jointly managed by Virginia and Maryland, interstate conservation responsibilities require that VMRC evaluate cross-jurisdictional ecosystem and economic impacts before authorizing industrial menhaden removal, reinforcing the need for precautionary management.

C. VMRC Has Authority to Obtain and Verify Fisheries Information, but Has Not Obtained Bay-Specific Data

Va. Code § 28.2-204 authorizes VMRC to collect fisheries statistics and require reporting necessary for fisheries management. That authority includes initiating, funding, or contracting for studies (i.e., commissioning) to obtain needed data; agencies are not limited to passively receiving information, and commissioning studies is a routine and legally accepted means of "collecting" fisheries data. Despite this authority, VMRC has not obtained or commissioned Bay-specific abundance or ecological-dependence information and continues to authorize industrial menhaden removals. Maintaining a regulation while declining to obtain readily identifiable and legally obtainable information leaves the regulatory record unable to demonstrate that continued authorization of the activity is lawful or justified.

In addition, when exercised in conjunction with VMRC's public trust obligations, this statutory authority necessarily includes verification of reported data sufficient to ensure accuracy, compliance, and protection of public trust resources. VMRC relies almost entirely on landing information generated by the regulated industrial entity itself. Reliance on industry self-reported data, without independent verification, renders VMRC unable to confirm accuracy, evaluate compliance, or demonstrate fulfillment of its public trust and statutory duties.

VMRC also does not exercise independent oversight to verify compliance with key operational features of the industrial menhaden fishery, including bycatch. Although bycatch is reported as approximately one percent of the overall fishery, VMRC does not independently monitor, verify, or audit bycatch levels within the Chesapeake Bay. The issue is not the reported percentage, but the absence of independent verification sufficient to confirm its accuracy. Bycatch is a biological and ecological impact of the fishery, and absent independent verification, the regulatory record lacks reliable information to confirm whether reported bycatch levels are accurate or whether non-target species impacts are being adequately controlled.

Nor does the regulatory record demonstrate that VMRC evaluates cumulative menhaden removals from the Chesapeake Bay by combining industrial landings with harvest levels from the Bay's menhaden bait fishery. VMRC's approvals reference compliance with industrial landing limits, but there is no documented analysis showing that total Bay-wide forage extraction—across fisheries and over time—is examined or reconciled when authorizing continued industrial removals. Without such analysis, VMRC cannot demonstrate that it is accounting for cumulative impacts on the Bay's forage base.

Taken together, VMRC has adopted and continues to administer a regulation governing industrial use of Chesapeake Bay resources without obtaining Bay-specific ecological information, without independently verifying compliance with key regulatory requirements, and without demonstrating that cumulative menhaden removals from the Bay are evaluated. This absence of data collection, verification, and documented oversight is inconsistent with VMRC's statutory authority and public trust responsibilities under Va. Code § 28.2-204 and leaves the regulatory record insufficient to support continued authorization of industrial menhaden removal within the Chesapeake Bay.

D. Failure to Demonstrate Consideration of Mandatory Factors Under Va. Code § 28.2-204.1

Va. Code § 28.2-204.1 provides that, in exercising its regulatory authority, "the Commission shall consider all factors relevant to the Commonwealth's fishery management policy, including but not limited to … (5) impact on species and fisheries; and (6) abundance of the resource."

Consideration of these mandatory factors in the Chesapeake Bay context necessarily depends on Bay-specific information regarding menhaden abundance and Bay-specific analysis of the dependence of other species and fisheries on menhaden as forage.

In the absence of Bay-specific information sufficient to assess resource abundance and impacts on dependent species and fisheries, the regulatory record cannot demonstrate that the factors enumerated in § 28.2-204.1(5)–(6) have been considered with respect to industrial menhaden harvest in the Chesapeake Bay. Where the record does not demonstrate consideration of mandatory statutory factors, continued authorization of the activity lacks a legally sufficient basis under § 28.2-204.1.

E. Failure to Demonstrate Compliance with Va. Code § 28.2-203

Va. Code § 28.2-203 provides that *"Any fishery management plan prepared, and any regulation promulgated to implement the plan, shall be consistent with the following standards for fishery conservation and management:"* The statute then enumerates mandatory standards that govern the Commission's exercise of discretion.

E1. Optimum yield and prevention of overfishing (§ 28.2-203(1))

Section 28.2-203(1) requires that conservation and management measures prevent overfishing while achieving optimum yield, defined as the amount of harvest that provides the greatest overall benefit to the Commonwealth. In the Chesapeake Bay context, determining optimum yield necessarily depends on Bay-specific ecological conditions, including the Bay's role as a nursery system and forage base for predator species. Absent Bay-specific abundance data and predator-dependence analysis, the regulatory record cannot demonstrate that the Chesapeake Bay menhaden cap reflects an optimum yield for the estuarine system rather than a historical landing figure untethered from current ecological conditions.

E2. Best scientific, economic, biological, and sociological information available (§ 28.2-203(2))

E2a. Statutory Standard

Virginia law requires that conservation and management measures be based upon the best scientific, economic, biological, and sociological information available. Va. Code § 28.2-203(2). This standard requires not only use of existing information, but use of information that is appropriate to the ecosystem being managed, and it requires agencies to seek out or generate better data when existing information is incomplete, outdated, or ill-suited to the management decision.

E2b. Reliance on Ocean-Based Science for a Bay-Specific Fishery

VMRC authorizes industrial menhaden removal in the Chesapeake Bay using scientific models and ecological reference points developed for the open Atlantic Ocean, specifically the 2022 ASMFC Atlantic Menhaden Stock Assessment, not science developed for the Bay itself. The Chesapeake Bay is a confined, nursery-dominated estuarine ecosystem with ecological conditions that differ materially from the open ocean, including limited spatial buffering, concentrated forage demand, distinct predator assemblages, and different predator–prey dynamics. Scientific tools designed for coastwide ocean management do not evaluate conditions within this estuarine system.

E2c. Failure to Develop Bay-Specific Ecological Information

Additionally, VMRC has not sought to generate better data to address these known limitations. VMRC has not developed Bay-specific estimates of menhaden abundance, Bay-specific analysis of predator energetic needs or forage thresholds, or Bay-wide baseline data necessary to

evaluate the ecological sustainability of industrial menhaden removal within the Chesapeake Bay. As a result, management decisions affecting the Bay are made without any localized scientific foundation.

E2d. Failure to Protect Juveniles in a Known Nursery System

The Chesapeake Bay is the primary nursery for Atlantic menhaden, and precautionary protection of juvenile fish is therefore warranted as a matter of basic fisheries management. VMRC nonetheless authorizes industrial removals within this nursery without implementing protective measures for juveniles—such as seasonal or area restrictions—despite the Bay's well-established nursery function and the known importance of juvenile menhaden to recruitment, forage availability, and ecosystem stability.

E2e. Reliance on Historical and Legacy Data Unrelated to Bay Ecology

Separate from its reliance on ocean-derived models, VMRC's management decisions also rely on historical and legacy data derived from past industrial fishing activity. These long-standing landing figures and reference points were never designed to reflect Chesapeake Bay–specific ecological conditions, and in many cases trace back many decades and, in some instances, more than a century. Such data reflect past exploitation patterns and institutional inertia, not menhaden availability, predator demand, or ecosystem needs within the Chesapeake Bay. Reliance on these legacy benchmarks further disconnects management decisions from the ecological realities of the estuarine system.

E2f. Failure to Consider Relevant Ecosystem Indicators and Stressors

VMRC has also failed to consider readily available scientific and observational information documenting significant declines in Chesapeake Bay species that are heavily dependent on menhaden as forage. These include well-documented declines in osprey nesting success, the decline of the Chesapeake Bay striped bass fishery, the effective elimination of a historical bluefish fishery, and historically low blue crab abundance. While these conditions may have multiple contributing factors, they constitute relevant biological information concerning forage availability and ecosystem stress that must be evaluated when authorizing continued industrial removal of a foundational forage species.

In addition, VMRC has not evaluated the ecological effects of invasive blue catfish when determining menhaden removals. Blue catfish consume menhaden, particularly juveniles, and exert substantial predation pressure that alters food-web dynamics within the Chesapeake Bay. Failure to consider the combined effects of invasive predation and industrial forage extraction further undermines any claim that menhaden management decisions are based on the best scientific and biological information available.

E2g. Exclusion of Known Biological Impacts

In addition, VMRC's scientific framework excludes known biological effects associated with industrial fishing activity within the Chesapeake Bay. One such effect is the incidental capture of non-target species. Bycatch is a biological and ecological impact of the fishery, and without independent, Bay-level bycatch data or verification, these impacts are excluded from the scientific basis of VMRC's management decisions.

E2h. Conclusion

Taken together, VMRC's authorization of industrial menhaden removal in the Chesapeake Bay is based on science developed for a different ecosystem, on historical and legacy data that were never designed to reflect Chesapeake Bay–specific ecological conditions, and on a selective scientific record that excludes relevant ecosystem indicators and known biological impacts such as bycatch. VMRC has not sought to generate the localized, contemporary data necessary to correct these deficiencies. Accordingly, the regulatory record demonstrates that conservation and management measures are not based upon the best scientific, economic, biological, and sociological information available, as required by Va. Code § 28.2-203(2).

E3. Management of stocks as functional units (§ 28.2-203(3))

Managing an individual stock as a functional unit, as contemplated by Va. Code § 28.2-203(3), requires that management measures reflect how the stock actually functions within the Commonwealth's waters. In the Chesapeake Bay, this means treating the Bay as a distinct estuarine subunit of the Atlantic menhaden stock, characterized by concentrated juvenile abundance, limited exchange with the open ocean, and intense localized forage demand by resident and migratory predators. Proper functional-unit management therefore requires Bay-specific estimates of menhaden abundance, evaluation of internal ecological demand within the Bay, and management limits derived from those conditions, rather than reliance on coastwide stock metrics alone. Absent such Bay-specific analysis, the regulatory framework does not demonstrate that menhaden are being managed as a functional unit within Virginia's territorial waters, as required by § 28.2-203(3).

E4. Fair and equitable treatment of user groups (§ 28.2-203(4))

Section 28.2-203(4) requires that conservation and management measures not discriminate among user groups and that any allocation of fishing privileges be fair, equitable, and reasonably calculated to promote conservation. Virginia is the only Atlantic state that permits industrial reduction fishing within the Chesapeake Bay, resulting in concentrated access by a single operation to a shared public resource. The regulatory record does not demonstrate how this allocation has been evaluated for fairness, conservation benefit, or disproportionate impact

on other user groups, including recreational and commercial fisheries dependent on predator species.

E5. Efficiency without exclusive economic allocation (§ 28.2-203(5))

Va. Code § 28.2-203(5) requires that conservation and management measures promote efficiency in the utilization of fishery resources, but prohibits measures whose sole purpose is economic allocation. VMRC's continued reliance on old, ocean-based landing data that were never designed to reflect Chesapeake Bay ecological conditions to set and maintain industrial removal levels raises serious questions as to whether the current framework promotes efficient use of the Bay's forage base or instead preserves an established industrial allocation disconnected from present-day ecological realities.

VMRC has also failed to examine the economic impacts of continued industrial menhaden removal on other Bay-dependent economic activities, including the Chesapeake Bay menhaden bait fishery, recreational and charter fishing, and associated ancillary industries. Absent consideration of how industrial removals affect other lawful and dependent uses of the same forage resource, the regulatory record does not demonstrate that the current framework reflects efficient utilization of the resource rather than preferential preservation of a single industrial allocation.

E6. Consideration of variability and contingencies (§ 28.2-203(6))

Section 28.2-203(6) requires that management measures take into account variations and contingencies in fisheries, fishery resources, and catches. The Chesapeake Bay is a highly dynamic estuarine system subject to seasonal, climatic, and ecological variability. A static cap derived from historical averages does not reflect these contingencies, and the regulatory record does not demonstrate how variability in Bay conditions has been considered in continued authorization of industrial menhaden removals.

E7. Minimization of unnecessary regulatory burdens (§ 28.2-203(7))

Section 28.2-203(7) directs the Commission to minimize regulatory burden where practicable and consistent with conservation objectives. In doing so, however, it does not permit the Commission to forgo necessary ecological analysis in order to reduce administrative or industry burden. Absent Bay-specific ecological information sufficient to evaluate the effects of industrial menhaden removals, continued authorization of harvest cannot be justified as consistent with the conservation objectives required by § 28.2-203(7).

Conclusion under § 28.2-203

Taken together, the standards set forth in Va. Code § 28.2-203 require that conservation and management measures, including regulations implementing fishery management plans, be

consistent with the prevention of overfishing, achievement of optimum yield, management of stocks as functional units, equitable treatment of user groups, consideration of variability, and reliance on the best scientific, economic, biological, and sociological information available.

As applied to the Chesapeake Bay, satisfaction of these standards necessarily depends on Bay-specific information regarding menhaden abundance, ecological dependence by predator species and fisheries, and the operation of the Bay as a distinct estuarine system. In the absence of such Bay-specific information, the regulatory record does not demonstrate that continued authorization of industrial menhaden removals under the Chesapeake Bay cap is consistent with the standards mandated by § 28.2-203.

Where a regulation cannot be shown on the existing record to be consistent with the statutory standards governing fishery conservation and management, continued authorization of the regulated activity lacks a sufficient legal foundation. This deficiency supports the requested moratorium pending development and consideration of the information necessary to ensure compliance with § 28.2-203.

F. Potential Noncompliance with the Federal Endangered Species Act

Atlantic sturgeon, a federally listed endangered species present in the Chesapeake Bay, relies on available forage resources to support essential life functions. Industrial menhaden removal authorized by the Commonwealth remains subject to the federal Endangered Species Act, which prohibits any person or governmental entity from causing the take of a federally listed species through direct or indirect harm. See 16 U.S.C. § 1538(a)(1)(B).

“Take” under the Endangered Species Act includes harm through habitat modification or degradation that significantly impairs essential behavioral patterns, including feeding. Harm does not require direct capture or mortality. Authorizing large-scale removal of a major forage species without Bay-specific information regarding forage abundance or predator dependence creates a foreseeable risk of impairing essential feeding and survival behaviors necessary for the recovery of a listed species.

Menhaden are a keystone forage species, and large-scale removal disrupts Chesapeake Bay food webs. That disruption reduces energy transfer, alters predator behavior, and degrades ecosystem stability. Habitat harm does not require a direct predator–prey link; ecosystem degradation alone can impair listed species by reducing prey diversity, altering benthic conditions, and placing additional stress on recovery processes. Where endangered species such as Atlantic sturgeon rely on the Bay’s forage base and habitat functions, those indirect impacts are legally relevant and must be evaluated before fishing is authorized or continued.

VI. REQUESTED RELIEF

The petitioner respectfully requests that VMRC:

1. Grant this petition by adopting a temporary moratorium on purse-seine reduction fishing for menhaden within the Chesapeake Bay and initiating rulemaking to amend 4 VAC 20-1270-35.
2. Maintain the moratorium until VMRC has affirmatively demonstrated, on the administrative record, compliance with all applicable statutory and public trust obligations, including that it has:
   a. Determined Bay-specific menhaden abundance and Bay-specific ecological dependence, including the needs of predator species, juvenile life stages, and dependent fisheries within the Chesapeake Bay, consistent with Va. Code §§ 28.2-204.1 and 28.2-203(2);
   b. Demonstrated, on the administrative record, compliance with the mandatory requirements of Va. Code § 28.2-204.1 by evaluating—*before authorizing industrial menhaden removal*—the impacts on species and fisheries, age structure, and the abundance of the resource;
   c. Demonstrated compliance with all fishery management standards set forth in Va. Code § 28.2-203, including:
      i. Prevention of overfishing while achieving optimum yield (§ 28.2-203(1));
      ii. Reliance on the best scientific, economic, biological, and sociological information available (§ 28.2-203(2));
      iii. Management of individual and interrelated stocks as a unit, including forage-dependent predator species (§ 28.2-203(3));
      iv. Fair, equitable, and non-discriminatory management measures that do not grant excessive fishing privileges (§ 28.2-203(4));
      v. Promotion of efficient utilization of fishery resources without economic allocation as the sole purpose (§ 28.2-203(5));
      vi. Consideration of variations among, and contingencies in, fisheries, fishery resources, and catches (§ 28.2-203(6)); and
      vii. Minimization of unnecessary regulatory burdens while still achieving conservation objectives (§ 28.2-203(7));
   d. Demonstrated compliance with Va. Code § 28.2-204 by obtaining or commissioning necessary fisheries data and implementing independent monitoring, verification, and enforcement mechanisms sufficient to ensure compliance with any future authorization of industrial menhaden removals, including verification of landings, bycatch, juvenile impacts, and cumulative removals across fisheries; and
   e. Demonstrated satisfaction of interstate conservation responsibilities, including documented evaluation of cross-jurisdictional ecological and economic impacts within the Chesapeake Bay, consistent with Virginia's obligations under the

Atlantic States Marine Fisheries Compact (Va. Code § 28.2-1000 through 28.2-1000.2).

The petitioner does **not** request a specific numerical quota and requests that no industrial reduction fishing resume until these conditions are satisfied.

VII. VMRC'S OBLIGATIONS

Under Va. Code § 2.2-4007, VMRC is required to consider this petition and issue a written decision stating its reasons for maintaining, amending, or repealing the challenged regulation.

As described in Sections V and VI, the existing regulatory framework authorizes industrial menhaden removals in the Chesapeake Bay without Bay-specific information regarding menhaden abundance or ecological dependence, and without independent mechanisms sufficient to verify compliance with the existing Bay cap.

In the absence of such information and oversight, the existing regulatory record does not identify a sufficient basis—grounded in Bay-specific abundance and ecological-dependence considerations—to justify continued authorization of the reduction fishery. Accordingly, any response to this petition must explain what information VMRC relies upon to support continued authorization and how that information satisfies its regulatory and public trust obligations.

VIII. CERTIFICATION

I certify that this petition is submitted in good faith pursuant to Va. Code § 2.2-4007.

Respectfully submitted,

Tanya O'Connor
Date: January 2, 2026