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STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233

November 5, 1990

Richard M. Hall, Esq.
Sive, Paget and Riesel, P.C.
1055 Thomas Jefferson Street, N.W.
Suite 501
Washington, D.C. 20007

Re: Petition of East Hampton Town Baymens Association
for a Declaratory Ruling (11-03)

Dear Mr. Hall:

By letter dated October 5, 1990, you petitioned for a Declaratory Ruling pursuant to State Administrative Procedure Act (SAPA) §204 and 6 NYCRR Part 619. The subject matter of the petition is amendments to 6 NYCRR 40.1, effective September 5, 1990, which, among other things, authorize a limited commercial fishery for striped bass in the waters of eastern Long Island from September 1 to December 15, 1990. Specifically, you seek a declaratory ruling addressing whether the regulations (1) apply to commercial and recreational fishermen for striped bass on Long Island and elsewhere in New York State, and (2) were arbitrarily and capriciously adopted and are null and void.

Whether a regulation applies to a person is an issue specifically identified by SAPA §204 and 6 NYCRR 619.1 as appropriate for consideration in a declaratory ruling. Accordingly, I rule as follows on the question of whether the amended regulation applies to commercial and recreational fishermen on Long Island and elsewhere in New York.

The regulations which govern open seasons, size and catch limits for marine fish provide:

- (a) No person shall take or possess on the waters of the marine and coastal district described in Table B of the shores thereof, or possess inland from such shores in the counties of Suffolk, Nassau, Queens, Kings, Richmond, New York and Bronx, fish of the species listed:
- (1) other than during the open season specified;

- (2) of a size less than that specified for such species;
- (3) in excess of the daily limit specified for such species; and
- (4) contrary to the provisions of any special regulations for such species.

6 NYCRR 40.1 (emphasis added).

The remainder of 6 NYCRR 40.1 establishes recreational and commercial seasons, size limits, possession requirements and gear restrictions for harvest of striped bass.

Environmental Conservation Law (ECL) §11-0103(19)(a) defines "person" to include an individual. Thus, individuals, including members of petitioner East Hampton Baymen's Association, are subject to 6 NYCRR 40.1 when fishing for striped bass in New York waters for either recreational or commercial purposes.

The second issue raised by your declaratory ruling request concerns whether the amendments to 6 NYCRR 40.1 were arbitrarily and capriciously adopted and are null and void. The September 5, 1990 amendments to 6 NYCRR 40.1 were adopted in accordance with ECL §11-0303(3) which authorizes DEC to adopt regulations for possession, transportation, identification and sale of striped bass consistent with the objectives of the Interstate Fisheries Management Plan for Striped Bass (the Plan) adopted by the Atlantic States Marine Fisheries Commission (the Commission). The Atlantic Striped Bass Conservation Act, 16 USC §1851 (note), provides that the Commission in each year shall determine whether each coastal state, including New York, has adopted all regulatory measures necessary to fully implement the plan in its coastal waters. On April 10 and 11, 1990, DEC presented its regulatory proposal for harvest of striped bass to the Scientific and Statistical Committee of the Commission's Striped Bass Board. In May of 1990, the Striped Bass Board presented DEC's proposal to the Commission, which found it to be consistent with the plan. DEC has thus complied with statutory mandates of both the New York Legislature and Congress relating to striped bass management and the regulations are rational and consistent with the law and are neither arbitrary nor capricious.

Sincerely,



Marc S. Gerstman
Deputy Commissioner and
General Counsel