

Burgos, Alexander N

From: Peaslee, William W
Sent: Thursday, October 5, 2023 11:39 AM
To: Burgos, Alexander N
Subject: FW: 15A NCAC 03M. .0101
Attachments: 10.05.2023 Marine Fisheries.docx

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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From: Peaslee, William W
Sent: Thursday, October 5, 2023 11:39 AM
To: Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Subject: 15A NCAC 03M. .0101

Good morning,

Attached please find the return of the above captioned rule pursuant to Section 21.2.(m) of S.L. 2023-134.

If you have any questions or concerns please do not hesitate to contact me.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
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(984) 236-1939
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Burgos, Alexander N

Subject: FW: [External] FW: MFC - Objection Letter - 15A NCAC 03M .0101
Attachments: 10.2023 Special - MFC 15A NCAC 03M .0101.pdf; Pages from H259-CCSMHxr-6 v17.pdf

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Tuesday, October 3, 2023 1:23 PM
To: Reynolds, Phillip T <preynolds@ncdoj.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] FW: MFC - Objection Letter - 15A NCAC 03M .0101

Good afternoon,

Attached please find the staff opinion concerning the above captioned rule which will be considered at the RRC Special meeting Thursday, October 5, 2023.

If you have any questions or concerns, please do not hesitate to contact me.

William W. Peaslee
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Burgos, Alexander N

Subject: FW: [External] RE: MFC - Objection Letter - 15A NCAC 03M .0101

From: Reynolds, Phillip <PREynolds@ncdoj.gov>

Sent: Monday, September 18, 2023 3:41 PM

To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>

Cc: Blum, Catherine <catherine.blum@deq.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: [External] RE: MFC - Objection Letter - 15A NCAC 03M .0101

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Lawrence,

I hope this email finds you doing well. I am writing to let you know that, at its last meeting, the Marine Fisheries Commission voted to revise and resubmit proposed language to satisfy the Rules Review Commission's objection to 15A NCAC 03M .0101. However, the Commission needs additional time to craft revised language in light of the RRC's objection and the purported issues raised by the Wildlife Resources Commission. The MFC intends to take action on proposed language at its November meeting, and its goal is to use the additional time to resolve potential conflicts and other issues in the intervening time.

Please let me know if you have any questions or would like to discuss further.

Thanks,
Phillip



Phillip T. Reynolds

Special Deputy Attorney General

Environmental Division

Commissions, Coastal and Administrative Section

Phone: (919) 716-6971

Email: preynolds@ncdoj.gov

114 W. Edenton St., Raleigh, NC 27603

www.ncdoj.gov

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Burgos, Alexander N

Subject: FW: [External] RE: MFC - Objection Letter - 15A NCAC 03M .0101

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Wednesday, August 16, 2023 11:49 AM
To: Reynolds, Phillip T <preynolds@ncdoj.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Blum, Catherine <catherine.blum@deq.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: MFC - Objection Letter - 15A NCAC 03M .0101

Phillip – thanks for the update. I'll let the RRC know tomorrow.

Lawrence Duke

Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

From: Reynolds, Phillip <PREynolds@ncdoj.gov>
Sent: Wednesday, August 16, 2023 11:38 AM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Blum, Catherine <catherine.blum@deq.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: MFC - Objection Letter - 15A NCAC 03M .0101

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Hi Lawrence,

Hope you're doing well. The MFC doesn't meet until next week, and will address the objection at its meeting then.

Thanks!
Phillip



Phillip T. Reynolds
Special Deputy Attorney General
Environmental Division
Commissions, Coastal and Administrative Section
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Email: preynolds@ncdoj.gov
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Burgos, Alexander N

Subject: FW: [External] MFC Rule 03M .0101
Attachments: 15A NCAC 03M 0101_Rev_V2.docx; 1995-06-13 Jurisdiction MFC & WRC Shad closure.pdf

From: Reynolds, Phillip <PReynolds@ncdoj.gov>
Sent: Tuesday, June 13, 2023 6:10 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Subject: RE: [External] MFC Rule 03M .0101

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Lawrence,

As we discussed, my client can agree to most of the language, except for the last line beginning with “or finfish....” The primary issue is that the “or finfish” language is not limited to specific finfish and would allow mutilation of any finfish, including, for example, federally protected sturgeon and river herring, for which there is a long standing moratorium in place. In other words, it would make the rule overly broad and the exception would directly conflict with the purpose of the rule. It would create innumerable enforcement issues related to possession limits, including size and bag limits, as long as a fisherman asserted that it was being used as bait.

Moreover, the rule at issue does not conflict with the authority of the WRC, as this isn’t a joint rule and the rule applies to those species for which the Marine Fisheries Commission has established a limit. It is inarguable that the Marine Fisheries Commission has authority over marine and estuarine resources, and we have agreed to include the other limiting language requested by the WRC regarding inland game fish and to include “joint and coastal waters.” It is also important to note that there is but one species managed jointly by the MFC and WRC, which is estuarine striped bass. I’ve attached an Advisory Opinion issued by the AG’s Office in 1995 that addresses the very argument and rule language that the WRC has cited in support of its argument. Though the finfish at issue is shad, the joint rule language is discussed at length and concludes that the rule was not intended to cede authority in every aspect, but rather as it relates to those species management jointly (i.e. striped bass).

Please let me know if you need additional information.

Thanks,
Phillip



Phillip T. Reynolds
Special Deputy Attorney General
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From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Tuesday, June 13, 2023 4:49 PM
To: Reynolds, Phillip <PReynolds@ncdoj.gov>
Subject: RE: [External] MFC Rule 03M .0101

I've been looking at this Rule this afternoon. If the "or for finfish taken or used as bait for hook and line fishing in joint waters." language is not included at the end of the Rule, then this Rule would conflict with WRC's rules, or at least need to be adopted concurrently with WRC because it is joint-jurisdictional. Without this qualifying language, the regulated fisherman wouldn't know what is okay and what isn't. That language needs to be in there.

Let me know soon. I need to give the RRC time to review.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

From: Reynolds, Phillip <PReynolds@ncdoj.gov>
Sent: Wednesday, June 7, 2023 9:22 AM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Zmuda, Tamara S <tzmuda@ncdoj.gov>
Subject: [External] MFC Rule 03M .0101

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Lawrence,

I hope this email finds you doing well. As we discussed, please find attached revisions for the MFC's mutilated finfish rule, 15A NCAC 03M .0101. I've also attached the issue paper developed for this rule in case it is useful to you in any way. The issue paper discusses the development of the rule and the circumstances leading to the proposed changes.

I've also copied Tamara Zmuda, Special Deputy AG and counsel to the WRC. She and I worked together on this rule, but I understand that her client continues to have concerns with the rule.

Please let me know if you need any additional information.

Thanks,
Phillip



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2
3 **SUBCHAPTER 03M - FINFISH**

4
5 **SECTION .0100 – FINFISH, GENERAL**

6
7 **15A NCAC 03M .0101 MUTILATED FINFISH**

8 It shall be unlawful to possess aboard a vessel or while engaged in fishing any species of finfish in joint or coastal
9 fishing waters that is subject to a ~~size or harvest restriction~~ possession limit, including size limit, recreational bag
10 limit, commercial trip limit, or season, without having head and tail attached, ~~except unless otherwise specified in a~~
11 rule of the Marine Fisheries [Commission or] Commission, a proclamation issued pursuant to a rule of the Marine
12 Fisheries [Commission.] Commission, or a rule of the Wildlife Resources Commission for inland game fish.

13 (1) ~~mullet when used for bait;~~

14 (2) ~~hickory shad when used for bait, provided that not more than two hickory shad per vessel or fishing~~
15 ~~operation may be cut for bait at any one time; and~~

16 (3) ~~tuna possessed in a commercial fishing operation as provided in Rule .0520 of this Subchapter.~~

17
18 *History Note: Authority G.S. 113-134; 113-182; 143B-289.52;*

19 *Eff. January 1, 1991;*

20 *Amended Eff. January 1, 1991;*

21 *Temporary Amendment Eff. May 1, 2001;*

22 *Amended Eff. May 1, 2015; April 1, 2011; July 1, 2006; August 1, 2002;*

23 *Readopted Eff. April 1, 2019;*

24 *Amended Eff. (Pending legislative review pursuant to S.L. 2019-198).*



MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina

Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

June 13, 1995

REPLY TO: J. Allen Jernigan
Environmental Division
Tel: (919) 733-7247
Fax: (919) 733-0791

Major Doug Freeman
North Carolina Marine Patrol
Post Office Box 769
Morehead City, North Carolina 28557

RE: Advisory Opinion: Closure of Shad Season - Conflict between Marine Fisheries Commission and Wildlife Resources Commission Rules; N.C.G.S. §113-132

Dear Major Freeman:

You have asked for advice on the following question regarding a conflict between Marine Fisheries Commission ("MFC") and Wildlife Resources Commission ("WRC") rules governing the hook-and-line season for shad in joint fishing waters. We thank you for your inquiry and are pleased to provide this reply.

QUESTION PRESENTED: Does 15A N.C. Admin. Code §10C.0401(a), the WRC's rule allowing year-round taking of shad by hook and line, supersede the closed season for shad adopted by the MFC in joint waters, by operation of 15A N.C. Admin. Code §3Q.0106?

ANSWER: No. Both rules are effective, as the two commissions have overlapping, concurrent jurisdiction in joint waters. However, the conflict between the MFC rule, 15A N.C. Admin. Code §3M.0513, and the WRC rule, 15A N.C. Admin. Code §10C.401(a), creates a significant problem for the N.C. Marine Patrol in enforcement of the season closure.

DISCUSSION

The WRC has authority to regulate hook-and-line fishing for shad in inland fishing waters under N.C.G.S. §§113-132(b), and 113-136(c)(3). The WRC classifies shad as a non-game fish (*see* 15A N.C. Admin. Code §10C.0301), for which it has established a year-round open season for hook-and-line fishing in inland waters. 15A N.C. Admin. Code §10C.0401(a). Similarly, the MFC has regulatory jurisdiction over the taking of shad in coastal waters, including hook-and-line fishing, per N.C.G.S. §§113-132(a) and 113-182. The MFC recently adopted a closed hook-and-line season for shad in 15A N.C. Admin. Code §3M.0513, which was effective March 1, 1995. The MFC rule provides:



It is unlawful to take blueback herring, alewife, **American shad and hickory shad** by any method from April 15 through January 1. (Emphasis added.)

The conflict between the two rules arises only in joint fishing waters, which are defined as coastal fishing waters "in which there are found a significant number of freshwater fish, as agreed upon by the Marine Fisheries Commission and Wildlife Resources Commission...." N.C.G.S. §113-132(e). The joint waters designation remains effective for so long as each commission maintains its joint rules. To the extent that the jurisdiction of the MFC and the WRC overlap in joint waters, the legislature has granted them concurrent jurisdiction, and empowered them to make joint rules delimiting the scope of their respective authority. N.C.G.S. §113-132(d). This is the source of the WRC's jurisdiction in joint waters. As joint fishing waters are coastal fishing waters in which the two commissions have agreed to exercise joint regulatory authority, the MFC's jurisdiction remains in place in those waters, unless expressly ceded to the WRC by the joint rules. The MFC and WRC have adopted joint rules in 15A N.C. Admin. Code 3Q. We examine those joint rules to determine the extent to which, if any, the MFC has relinquished its jurisdiction over shad in joint waters.

In 15A N.C. Admin. Code §3Q.0101, the two Commissions set forth the "Scope and Purpose" of the joint rules, as follows:

In addition to the classification of the waters of the state **these joint rules set forth guidelines to determine which fishing activities in joint waters are regulated by the Marine Fisheries Commission and which are regulated by the WRC.** Finally, the joint rules set forth special fishing regulations applicable in joint waters that can be enforced by officers of the Division of Marine Fisheries and the Wildlife Resources Commission. **These regulations do not affect the jurisdiction of the Marine Fisheries Commission and the Wildlife Resources Commission in any matters other than those specifically set out.** (Emphasis added.)

In 15A N.C. Admin. Code §3Q.0104 the joint rules provide that "[t]he regulation and licensing of fishing in joint waters shall be as stated in 15A NCAC 3Q .0106." 15A N.C. Admin. Code §3Q.0106, captioned "Applicability of Rules: Joint Waters" states:

(a) All coastal fishing laws and regulations administered by the Department of Environment, Health, and Natural Resources and the Marine Fisheries Commission apply to joint waters **except as otherwise provided**, and shall be enforced by fisheries enforcement officers.

(b) The following inland fishing laws and regulations administered by the Wildlife Resources Commission apply to joint waters and shall be enforced by wildlife enforcement officers:

- (1) all laws and regulations pertaining to inland game fishes,
- (2) all laws and regulations pertaining to inland fishing license requirements for hook and line fishing,
- (3) all laws and regulations pertaining to hook and line fishing except as hereinafter provided. (Emphasis added.)**

Paragraph (a) establishes that coastal fishing laws, and regulations adopted by the MFC for coastal waters, remain effective in joint waters, "except as otherwise provided." Thus it is necessary to look to the joint rules for any which "otherwise provide" that the MFC's rule closing the hook-and-line season for shad in coastal waters does not apply to joint waters. Paragraph (b) operates as a limited grant of jurisdiction to the WRC to enforce in joint waters the inland fishing laws and regulations specified in subparagraphs (b)(1), (b)(2) and (b)(3). The words "except as hereinafter provided" in subparagraph (b)(3) refer only to the joint rules which follow that provision (*i.e.*, the remainder of subchapter 3Q). However, none of those rules address hook-and-line fishing for shad in joint waters. Instead, they pertain principally to another migratory saltwater fish, striped bass, which was the subject of similar conflict a decade ago. The present joint rules evolved from that controversy, as in the absence of such joint rules resolving the jurisdictional conflict, a migratory saltwater fish is subject to regulation by both commissions in joint waters. Under .0106(b)(3) the WRC's a year-round open season for taking shad by hook-and-line fishing in inland waters also applies in joint waters.

Significantly, while § .0106(b) provides that certain types of inland fishing rules apply to joint waters, it does not state that the WRC's rules apply exclusively, so as to oust MFC jurisdiction over migratory saltwater fish.. Where the joint rules intend to supersede inconsistent rules, or to grant exclusive jurisdiction to one commission, the rules expressly state that intent. See 15A N.C. Admin. Code §3Q.0107 (special striped bass rules for joint waters "supersede any inconsistent rules of the Marine Fisheries Commission or the Wildlife Resources Commission that would otherwise be applicable in joint waters under the provisions of 15A NCAC 3Q .0106"). That joint rule clearly contemplates that inconsistent rules could be applicable to joint waters under §3Q.0106. Likewise, §3Q.0109 expressly confers "exclusive authority" to open and close seasons for striped bass to WRC for Roanoke River and MFC for Albemarle Sound, regardless of classification. Thus it would be improper to read §3Q.0106 as vesting the WRC with exclusive jurisdiction over hook-and-line fishing for shad in joint waters, absent such an express statement of intent.

The Legislature, in creating the present regulatory scheme, recognized that conflicts may occur from time to time between the commissions, and established in N.C.G.S. §113-132(d) a mechanism for resolving such conflicts. The statute provides:

(d) To the extent that the grant of jurisdiction to the Marine Fisheries Commission and the Wildlife Resources Commission may overlap, the Marine Fisheries Commission and the Wildlife Resources Commission are granted concurrent jurisdiction. **In cases of conflict between actions taken or regulations promulgated by either agency, as respects the activities of the other, pursuant to the dominant purpose of such jurisdiction, the Marine Fisheries Commission and the Wildlife Resources Commission are empowered to make agreements concerning the harmonious settlement of such conflict in the best interests of the conservation of the marine and estuarine and wildlife resources of the State.** In the event the Marine Fisheries Commission and the Wildlife Resources Commission cannot agree, the Governor is empowered to resolve the differences. (Emphasis added.)

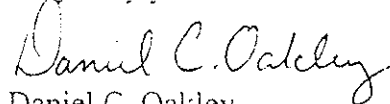
N.C.G.S. §143B-289.11 contains substantially similar provisions. Thus the MFC has the option of proceeding under this provision by reaching an agreement with WRC regarding the shad closure, or sending the matter to the Governor for resolution.

A second option is a rule change to make the MFC's shad season consistent with the WRC's. This would require public notice and hearing, as the requirements in N.C.G.S. §150B-21.1 for adoption of a temporary rule are absent.

Ultimately, this situation confronts the Marine Patrol with a serious enforcement dilemma. While the closed season remains in force and citations may be issued for violations, as a practical matter prosecution will be difficult in the face of the WRC's conflicting rule.

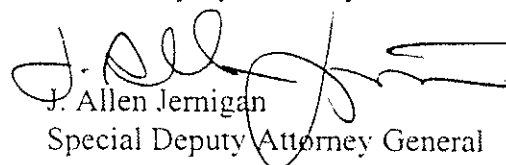
Thank you for your inquiry. Please advise if we may be of further assistance.

Very truly yours.



Daniel C. Oakley

Senior Deputy Attorney General



J. Allen Jernigan

Special Deputy Attorney General

Burgos, Alexander N

Subject: FW: [External] MFC Rule 03M .0101
Attachments: 15A NCAC 03M .0101 - Mutilated Finfish - WRC Language.docx

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Tuesday, June 13, 2023 10:21 AM
To: Reynolds, Phillip T <preynolds@ncdoj.gov>
Cc: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Zmuda, Tamara S <tmzuda@ncdoj.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Ruhlman, Carrie A <carrie.ruhlman@ncwildlife.org>
Subject: RE: [External] MFC Rule 03M .0101

Phillip,

Thanks for your call yesterday checking in about my weekend trip.

I have looked over the amended language and I still think the Rule needs more work. The Rule remains ambiguous as to where and in what situations the Rule applies. As written, it seems to apply to all NC waters, except MFC only has jurisdiction in joint or coastal waters. Also, WRC has jurisdiction for inland waters, over inland game fish, and “finfish taken or used as bait for hook and line fishing in joint waters.” I would suggest incorporating WRC’s language that clearly delineates where and to what this Rule applies (see attached), otherwise I will likely object on ambiguity grounds.

Let me know what you think.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

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2
3 **SUBCHAPTER 03M - FINFISH**

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5 **SECTION .0100 – FINFISH, GENERAL**

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7 **15A NCAC 03M .0101 MUTILATED FINFISH**

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9 fishing waters that is subject to a ~~size or harvest restriction~~ possession limit, including size limit, recreational bag limit,
10 commercial trip limit, or season, without having head and tail attached, ~~except~~ unless otherwise specified in a rule of the
11 Marine Fisheries Commission, a proclamation issued pursuant to a rule of the Marine Fisheries Commission, or in a
12 rule of the Wildlife Resources Commission for inland game fish or for finfish taken or used as bait for hook and line
13 fishing in joint fishing waters.

14 (1) ~~— mullet when used for bait;~~

15 (2) ~~— hickory shad when used for bait, provided that not more than two hickory shad per vessel or fishing~~
16 ~~operation may be cut for bait at any one time; and~~

17 (3) ~~— tuna possessed in a commercial fishing operation as provided in Rule .0520 of this Subchapter.~~

18
19 *History Note: Authority G.S. 113-134; 113-182; 143B-289.52;*

20 *Eff. January 1, 1991;*

21 *Amended Eff. January 1, 1991;*

22 *Temporary Amendment Eff. May 1, 2001;*

23 *Amended Eff. May 1, 2015; April 1, 2011; July 1, 2006; August 1, 2002;*

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Lawrence,

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I've also copied Tamara Zmuda, Special Deputy AG and counsel to the WRC. She and I worked together on this rule, but I understand that her client continues to have concerns with the rule.

Please let me know if you need any additional information.

Thanks,
Phillip



Phillip T. Reynolds

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10 ~~limit, recreational bag limit, commercial trip limit, or season,~~ without having head and tail attached, ~~except unless~~
11 ~~otherwise specified in a rule of the Marine Fisheries Commission or a proclamation issued pursuant to a rule of the~~
12 ~~Marine Fisheries Commission.~~

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16 (3) ~~tuna possessed in a commercial fishing operation as provided in Rule .0520 of this Subchapter.~~

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18 *History Note: Authority G.S. 113-134; 113-182; 143B-289.52;*

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23 *Readopted Eff. April 1, 2019;*

24 *Amended Eff. (Pending legislative review pursuant to S.L. 2019-198).*

Proposed Amendment to the Mutilated Finfish Rule Issue Paper

Feb. 3, 2022

I. ISSUE

Examine the mutilated finfish rule, 15A NCAC 03M .0101, including the current species exceptions and species-specific conflicts to the rule. Explore options that provide flexibility to manage current conditions and variable conditions that could occur in the future.

II. ORIGINATION

North Carolina Marine Fisheries Commission (MFC) and the North Carolina Division of Marine Fisheries (DMF)

III. BACKGROUND

The MFC originally adopted the mutilated finfish rule 15A NCAC 03M .0101 in 1991. The original intent of the rule was to provide added resource protection for finfish species subject to a size or bag limit. The current version of the rule includes species-specific exceptions to the requirements; the exceptions pertain to mullet, hickory shad, and tuna. Requirements in the rule can only be amended via the permanent rulemaking process since proclamation authority has never been delegated to the Fisheries Director in this rule. The rule, as written, does not provide flexibility to manage variable conditions for species commonly used as cut bait, particularly when new regulations implemented to meet sustainability objectives (i.e., size or bag limits) make species subject to this rule.

During the August 2021 MFC quarterly business meeting, a motion was passed requesting the DMF to develop an issue paper for rulemaking examining the mutilated finfish rule. Discussions during the meeting identified potential issues with the rule, current limitations of the rule, and potential changes needed. In particular, it was noted there have been recent issues with the public unknowingly failing to abide by requirements of the rule by using species that are not allowed as cut bait. The rule was not originally promulgated to manage cut bait per se, but rather to protect finfish species regulated by a size or bag limit. The MFC identified the need for flexibility with the mutilated finfish rule and suggested the potential need to delegate proclamation authority to the Fisheries Director. Several species have been identified for possible rule exceptions or changes to current exceptions based on communications from stakeholders, feedback from Marine Patrol officers, and implications from stock assessments and FMPs.

Commercial trotline fishers contacted the Fisheries Director in June 2021, after an interaction with Marine Patrol officers where violations of the mutilated finfish rule were identified. The issue stemmed from the fishers switching bait from gizzard shad to American eel. Using eel for cut bait is prohibited under the mutilated finfish rule as eel is subject to a minimum size limit and bag limit. This scenario applies to about a dozen fishers in the Albemarle Sound region who participate in the blue catfish trotline fishery. The recreational sector, especially those targeting trophy catfish, has also voiced concern to the DMF over the ability to use American eel as cut bait. In addition, Marine Patrol has communicated concerns from anglers regarding their desire to continue using spot, Atlantic croaker, and bluefish as cut bait. All three species currently have bag limits in effect and are therefore subject to the requirements of the mutilated finfish rule. These species have commonly been used as cut bait by anglers fishing from piers, shore, as well as aboard charter and private boats. Bluefish are used as cut bait in recreational fisheries including shark, red drum, and summer flounder, and as bait in commercial longline and crab pot fisheries. Both spot and Atlantic croaker are very popular as live and cut bait to target a variety of species including flounder, tarpon, and red drum. Regulations for spot and Atlantic croaker are relatively new; the bag limit was enacted in April 2021, along with a commercial season closure in December 2021. The popularity of these species as cut bait is a major consideration driving the need to amend the mutilated finfish rule. Lastly, stock assessments for American eel and striped mullet are underway, bluefish are under a rebuilding plan, and the management measures for spot and Atlantic croaker will be reevaluated in two to three years using results from future traffic light analysis. Management measures for these species are likely to be impacted by stock assessment and traffic light analysis results, further emphasizing the need for flexibility in the mutilated finfish rule to accommodate the inclusion or exclusion of species from the rule.

American eel, spot, Atlantic croaker, and bluefish are managed as multi-state coastwide stocks. To ensure compliance with interstate requirements, North Carolina manages American eel, spot, Atlantic croaker, and bluefish under the North Carolina Fishery Management Plan (FMP) for Interjurisdictional Fisheries. The goal of the North Carolina FMP for Interjurisdictional Fisheries is to adopt FMPs, consistent with North Carolina Law, approved by the Mid-Atlantic Fishery Management Council (MAFMC), South Atlantic Fishery Management Council (SAFMC), or the Atlantic States Marine Fisheries Commission (ASMFC) by reference and implement corresponding fishery regulations in North Carolina to provide compliance or compatibility with approved FMPs and amendments, now and in the future. The goal of the councils and ASMFC plans, established under the Magnuson-Stevens Fishery Conservation Management Act (federal councils) and the Atlantic Coastal Fisheries Cooperative Management Act (ASMFC) are similar to the goals of the N.C. Fisheries Reform Act of 1997 to “ensure long-term viability” of the fisheries. American eel, spot, and Atlantic croaker fall under the jurisdiction of the ASMFC, and bluefish fall under the jurisdiction of ASMFC and the MAFMC. Therefore, any proposed rule changes in this process must be vetted by ASMFC and MAFMC to ensure compliance with existing FMPs.

AMERICAN EEL

American eel are managed as a coastwide stock, from Maine through Florida, under Addendum V to the ASMFC Interstate FMP for American Eel. The original FMP was approved in 1999 and implemented a minimum recreational size limit and possession limit. Addendum III was approved in 2013 and implemented new size and possession limits as well as a seasonal gear closure. As a result, rule 15A NCAC 03M .0510, American Eel, was amended effective May 1, 2015. The coastwide quota was added under Addendum IV, approved in 2014. Under Addendum V, adopted in 2019, management action is initiated if the coastwide quota of 916,473 pounds is exceeded by 10% or more in two consecutive years. Management action has never been triggered. The 2017 stock assessment update indicated the American eel population remains depleted. A benchmark stock assessment is scheduled to be completed in 2022.

Under MFC Rule 15A NCAC 03M .0510, American eel are subject to a nine-inch total length minimum size limit for both the commercial and recreational fisheries and there is a bag limit of 25 eels per person per day for the recreational fishery, except the master and each mate of for-hire vessels that hold a valid for-hire license may possess 50 eels each per day. The rule also makes possession of American eel illegal from September 1 through December 31 except when taken by baited pots. Commercial eel pots are subject to MFC Rule 15A NCAC 03J .0301 establishing a ½-by-½ inch minimum mesh size requirement. The ½-by-½ inch minimum mesh size requirement in eel pots is designed to allow eels less than nine inches to escape. Commercial fishers harvesting American eels by eel pots are required to participate in a monthly logbook program designed to monitor the fishery.

The North Carolina Wildlife Resource Commission (WRC) experienced push back from catfish anglers when they established the nine inch minimum size limit for eel. American eel became subject to the WRC rule prohibiting cutting any fish with a size limit such that it could not be measured. In response, WRC proposed a rule change for American eel in inland fishing waters (part of rule 15A NCAC 10C .0401) that went into effect in 2021 and included “eels greater than 9 inches in length and with a minimum body depth greater than ½ inch may be cut for use as bait.” The ½ inch requirement is consistent with the ½-by ½-inch mesh restriction in place for eel pots and decreases the likelihood that smaller eels would be cut. Prior to approval, DMF reached out to ASMFC on behalf of WRC. ASMFC did not voice concern with cutting eels for bait as long as the nine inch minimum size limit did not change. While the ASMFC Interstate FMP does not directly prohibit the use of eel as cut bait, the depleted stock status and difficulty measuring ½ inch bait pieces limiting enforceability of the nine inch minimum size limit should be primary considerations in future discussions.

SPOT AND ATLANTIC CROAKER

For both spot and Atlantic croaker, a traffic light analysis is used as a precautionary management framework to annually evaluate fishery trends. The name of the analysis comes from assigning a color (red, yellow, or green) to categorize indicators that reflect the condition of the fish population (abundance characteristic) or the fishery (harvest characteristic) relating to a set reference level. Management action is triggered if harvest and abundance thresholds within a regional or coastwide traffic light analysis are met or exceeded for any two of the three terminal years for spot and any three of the four terminal years for Atlantic croaker. If management action is triggered, management measures remain in place for at least two years for spot and three years for Atlantic croaker. Future TLA determines if management measures are still required or if alternative management measures are needed.

There is an exception to the bag limit for spot and Atlantic croaker used as bait by recreational for-hire vessels and private vessels. Recreational for-hire vessels may possess live spot or Atlantic croaker for use as bait. The maximum number of spot or Atlantic croaker allowed to be held onboard for use as bait is the bag limit in effect multiplied by the number of customers allowed on the vessel. Private recreational vessels that possess live spot or Atlantic croaker for use as bait will be subject to personal bag limits of anglers on the vessel, with live fish possessed counting towards the bag limits.

Spot

Spot are managed as a coastwide stock, from Delaware through the east coast of Florida, under Addendum III to the Omnibus Amendment to the ASMFC Interstate FMP for Spanish Mackerel, Spot, and Spotted Seatrout. The original interstate FMP for spot was adopted in 1987 followed by the Omnibus Amendment in 2012. The 2017 benchmark stock assessment did not pass peer review due to conflicting trends in abundance and harvest. The 2020 TLA indicated harvest and abundance exceeded the 30% threshold, indicating moderate concern and requiring management action. Management included a 50-fish recreational bag limit and a 1% reduction of commercial harvest from the average state commercial harvest from the previous 10 years. In North Carolina, a recreational bag limit was implemented in April 2021 by proclamation FF-23-2021 and proclamation FF-66-2021 established a commercial season closure from December 10, 2021 to April 4, 2022. Prior to 2021, no direct recreational or commercial regulations existed for spot.

Atlantic Croaker

Atlantic croaker are managed as a coastwide stock, from New Jersey through the east coast of Florida, under Addendum III to Amendment 1 to the ASMFC Interstate FMP for Atlantic Croaker. The original FMP for Atlantic croaker was adopted in 1987 followed by Amendment 1 in 2015. The 2017 benchmark stock assessment did not pass peer review due to conflicting trends in abundance and harvest. The 2020 TLA indicated harvest and abundance exceeded the 30% threshold, indicating moderate concern and requiring management action. Management included a 50-fish recreational bag limit and a 1% reduction of commercial harvest from the average state commercial harvest from the previous 10 years. In North Carolina, the recreational bag limit was implemented in April 2021 by proclamation FF-24-2021 and proclamation FF-65-2021 established a commercial season closure from December 16 to December 31, 2021. Prior to 2021, no direct recreational or commercial regulations existed for Atlantic croaker.

BLUEFISH

Bluefish are managed as a coastwide stock, from Maine through Florida, under Amendment 7 to the joint ASMFC and MAFMC Interstate FMP for Bluefish. The original FMP for bluefish was adopted in 1990 and implemented a 10-fish bag limit. The daily bag limit was increased to 15 fish in June 2001. Amendment 1 established coastwide commercial and recreational quota allocations, and the commercial allocation was further divided by state-specific commercial allocations. The FMP allows a state-by-state commercial quota system and a coastwide recreational harvest limit to manage the commercial and recreational fisheries. Reporting and permit requirements are implemented for both commercial and recreational fishing sectors as well as fish dealers. The 2019 operational stock assessment determined bluefish are overfished but are not experiencing overfishing. The stock is currently under a rebuilding plan designed to rebuild the stock in seven years. Stock assessment updates are conducted to track the rebuilding process and adjust management if needed. A research track assessment is scheduled for 2022.

The bluefish fishery is managed under annual catch limits. The recreational fishery uses bag limits to constrain the harvest within the recreational harvest limit, while the commercial fishery is managed with a coastwide quota allocated to individual states. Due to the overfished stock status, the coastwide recreational harvest was reduced in 2020 (28.6% below the 2019 recreational harvest limit). As a result, the recreational bag limit was reduced. Starting on February 1, 2020, the private recreational (all persons not fishing on a for-hire vessel) bag limit was set at three bluefish per person per day and the recreational for-hire (persons fishing on a for-hire vessel) bag limit was set at five bluefish per person per day. Prior to this reduction, from June 2001 to January 2020 under 15A NCAC 03M .0511, North Carolina had a 15-fish recreational bag limit, and starting in April 2003 only five of the 15 fish could be greater than 24 inches total length. There are currently no size restrictions for bluefish.

EXCEPTIONS FOR MULLET, HICKORY SHAD, AND TUNA

The mutilated finfish requirement first appeared as paragraph (h) in Rule 15A NCAC 03B. 0105 in the late 1980s stating "It is unlawful to land or possess aboard a vessel any striped bass, red drum, spotted seatrout, or flounder mutilated to the extent that accurate length measurements cannot be made." This appears to be the origin of what became the stand-alone mutilated finfish rule. The mutilated finfish rule, 15A NCAC 03M .0101, was adopted as a

new rule in 1991 when the MFC reorganized and re-codified its rules. The rule did not provide any species-specific exceptions stating only: "It is unlawful to possess aboard a vessel or while engaged in fishing from the shore or a pier any species of finfish which is subject to a size or harvest restriction without having head and tail attached."

The rule was amended in 2002 to include: "Blueback herring, hickory shad and alewife shall be exempt from this Rule when used for bait provided that not more than two fish per boat or fishing operation may be cut for bait at any one time." At the time of this amendment, these species were subject to regulations established under Amendment 1 to the Interstate FMP for Shad and River Herring, including a recreational bag limit.

In July 2006, a rule amendment added mullet as an exception to the mutilated finfish rule with no further specifications. The striped mullet FMP was adopted in April 2006 and established a daily possession limit of 200 mullets (white and striped in the aggregate) per person per day in the recreational fishery, therefore subjecting mullet to the requirements of the mutilated finfish rule. The mutilated finfish rule was amended in 2006 because otherwise mullet could not be used as cut bait.

In 2011, the rule was restructured so each exception to the rule requirement was numbered and tuna was added as "tuna possessed in a commercial fishing operation as provided in 15A NCAC 03M .0520". The addition of this exception for tuna resolved discrepancies between state and federal rules. When 15A NCAC 03M .0520 was originally adopted in 2008, it subjected tuna to the requirements of the mutilated finfish rule but the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) allows the head to be removed from commercially caught tuna. The addition of the exception accommodates the federal regulations for beheaded tunas to maintain consistency for enforcement with MFC and NOAA Fisheries rules.

In 2015, the rule was amended to no longer specify "engaged in fishing from the shore or a pier", but rather "engaged in fishing". In addition, blueback herring and alewife were dropped from the list of species exceptions. The MFC adoption of Amendment 1 to the North Carolina River Herring FMP in February 2007 implemented a commercial and recreational no-harvest provision but DMF allowed possession of river herring purchased from bait/tackle dealers. The allowance of possession for bait created enforcement loopholes. In response, Amendment 2 to the River Herring FMP changed the possession requirement for river herring from only allowing river herring from sources outside of North Carolina coastal fishing waters to allowing only fish less than or equal to six inches total length aboard a vessel or while engaged in fishing, regardless of source. Amendment 2 also removed alewife and blueback herring as exceptions in the mutilated finfish rule so the length of the fish could be determined.

The current version of the rule readopted in 2019 excepts mullet without specifications, hickory shad provided no more than two are cut at a time, and tuna possessed in a commercial fishing operation.

In North Carolina, hickory shad are included in the North Carolina FMP for Interjurisdictional Fisheries, which defers to the ASMFC for FMP compliance requirements. The exception for hickory shad in the mutilated finfish rule allows hickory shad to be used as cut bait while still allowing enforcement of current regulations. The exception for tuna in the mutilated finfish rule maintains consistency with NOAA Fisheries rules. No changes to the rule are needed for hickory shad or tuna at this time.

Striped mullet are managed under Amendment 1 to the North Carolina Striped Mullet FMP as a coastal stock including coastal and joint fishing waters of North Carolina. The FMP was originally adopted in 2006 and amended in 2015. The 2018 update to the 2013 stock assessment concluded the stock was not undergoing overfishing and the overfished status could not be determined. A stock assessment is currently underway. If stock assessment results indicate overfishing is occurring or the stock is overfished, management measures more restrictive than the current 200 mullet recreational bag limit currently in place may be necessary. Therefore, continuing to allow an exception for mullet from the mutilated finfish rule without further specifications could jeopardize sustainability objectives.

PROCLAMATION AUTHORITY

North Carolina General Statute 113-221.1 states the "Marine Fisheries Commission may delegate to the Fisheries Director the authority to issue proclamations suspending or implementing, in whole or in part, particular rules of the Commission that may be affected by variable conditions." There are three required elements involved in delegation of proclamation authority to the Fisheries Director by the MFC. The MFC must specifically authorize the Fisheries

Director the ability to issue a proclamation, there must be a particular rule in place, and the rule must be affected by a variable condition. These three elements must apply when there is the potential for the Fisheries Director to issue a proclamation suspending a rule or when there is the potential for the Fisheries Director to issue a proclamation implementing a management measure.

In some cases, a specific variable condition is listed in the rule. An example is in rule 15A NCAC 03J .0301(a)(2) which delegates authority to the Fisheries Director to manage the use of pots via proclamation to allow for the variable spatial distribution of crustacea and finfish. If a variable condition is not provided in the rule, a list of variable conditions is provided in 15A NCAC 03H .0103. Examples include compliance with FMPs, user conflicts, and protection of public health. Regardless of whether the variable condition is provided in a particular rule or in 15A NCAC 03H .0103, there must be an identified variable condition that needs to be addressed. Over time, if a condition of a fishery ceases being variable in nature, the requirements for the fishery are placed in permanent rule. There is a balance to be achieved between having the flexibility to manage variable conditions of a fishery and having requirements that are not expected to change set in permanent rule for clarity and ease of access to the regulations by stakeholders.

IV. AUTHORITY

N.C. General Statutes

G.S. 113-134	Rules.
G.S. 113-182	Regulation of fishing and fisheries.
G.S. 113-221.1	Proclamations; emergency review.
G.S. 113-252	Atlantic States Marine Fisheries Compact and Commission.
G.S. 143B-289.52	Marine Fisheries Commission – powers and duties.

N.C. Marine Fisheries Commission Rules

15A NCAC 03H .0103	Proclamations, General
15A NCAC 03I .0102	Temporary Suspension of Rules
15A NCAC 03J .0301	Pots
15A NCAC 03M .0101	Mutilated Finfish
15A NCAC 03M .0502	Mullet
15A NCAC 03M .0510	American Eel
15A NCAC 03M .0511	Bluefish*
15A NCAC 03M .0512	Compliance with Fishery Management Plans
15A NCAC 03M .0519	Shad**
15A NCAC 03M .0520	Tuna

* Rule is anticipated to be repealed effective April 1, 2022, so management can continue via 15A NCAC 03M .0512 to address ongoing variable conditions in the bluefish fisheries.

** Rule is undergoing readoption. All requirements except paragraph (c) are suspended in accordance with the ASMFC FMP.

V. DISCUSSION

The mutilated finfish rule was originally adopted in 1991 to provide added resource protection for any finfish species subject to a size or bag limit by prohibiting possession of these species without head and tail attached. Over time, species-specific exceptions with varying levels of constraints have been added to and removed from the rule but the fundamental requirements of the rule have remained the same. Amendments to the rule have served to add or remove species-specific exceptions and these changes have allowed for the continued use of popular bait fish as cut bait while still protecting the resource.

Use of American eel, spot, Atlantic croaker, bluefish, and striped mullet as bait creates conflicts with the rule based on communication from stakeholders, feedback from Marine Patrol officers, and potential implications from stock assessments and FMPs in development. It is likely that species beyond the five outlined in the background could require similar consideration in the future. Therefore, the intent of this issue paper is to propose changes to amend the rule in a way that both resolves current conflicts with species used as cut bait and provides flexibility to manage

variable conditions. Ultimately, this issue paper presents a single option for consideration because, compared to other approaches, this option fully achieves all objectives of the rule change. The three other approaches considered but ultimately not recommended are outlined below.

As a management approach, status quo for the mutilated finfish rule is not viable. The rule is not written to accommodate the use of common bait species as cut bait. Adding or removing species exceptions can only occur via a rule amendment through the permanent rulemaking process. This does not provide flexibility to quickly address issues that occur due to changing management measures and changing bait fish preference. Furthermore, any species subject to a ‘size or harvest restriction’ is subject to the requirements of the rule. The term ‘harvest restriction’ is ambiguous and makes it difficult to distinguish what regulations subject a species to the rule. The MFC identified the need to explore approaches that provide flexibility to the rule to manage variable conditions for species commonly used as cut bait. The rule needs to better balance stakeholder needs with FMP requirements and implement management measures aimed to protect the resource.

One approach is to amend the rule in a similar manner as done in the past, in which species-specific exceptions are added or revised. Conflicts with use of American eel, spot, Atlantic croaker, and bluefish as cut bait could be resolved under this approach by specifically amending the requirements of the rule with respect to these species. However, the rule would be amended based on the management measures currently in place for these species and these management measures are subject to change based on stock assessment results and FMP requirements. Furthermore, bait use is a complex issue and it is likely that species beyond these five are used for cut bait. Fish that have been depredated, which is a fish that has been subject to some predation, may also be subject to the rule. The rule as written does not allow possession of a depredated fish with a size or bag limit. The SAFMC is considering a change to the FMP for the Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region that would allow the possession of king and Spanish mackerel depredated by sharks or other toothy species as long as they meet minimum size limits. This approach would require some level of proclamation authority to achieve the objective of providing the flexibility needed to manage potential variable conditions. The changing conditions of species stock status, management measures, and angler preferences may necessitate the need to issue proclamations. While the level of proclamation authority could be narrowed to address specific instances, the preferred option would avoid adding proclamation authority to this rule.

The ‘inverse’ approach to the mutilated finfish rule was also discussed. Prior to adoption of the rule in 1991, the mutilated finfish requirements were written such that only species specifically noted within the rule were subject to the requirements. When adopted in 1991, the structure of the rule was changed such that all species are subject to the requirements given they are also subject to a size or harvest restriction. Amending the rule similar to the original version would result in only species specifically noted within the rule being subject to the requirements. A similar approach is used by the WRC in rule 15A NCAC 10C .0401(q). Approaching the amendment of the rule this way allows any species to be cut for bait except those specifically identified in the rule as not being able to be cut. Revising the rule in this manner may limit the frequency that proclamations would need to be issued but does not eliminate the need to add proclamation authority to this rule.

The most practical solution as presented in the proposed rule text, simplifies the rule by removing exceptions, instead relying on proclamation authority set out in other existing rules to manage the use of cut bait through species-specific proclamations. This change eliminates the need to add proclamation authority to the mutilated finfish rule, instead utilizing proclamation authority already in place. The simplified rule is easier to explain to the regulated public and in court when violations have occurred. Any species-specific conflicts with the rule can be managed on a case-by-case basis via species-specific proclamations. This further simplifies regulations for the public by including all requirements for a species within the same rule or proclamation.

The proposed rule text removes the ambiguous ‘harvest restriction’ language and instead specifies ‘any species of finfish that is subject to a possession limit, including size limit, recreational bag limit, commercial trip limit, or season’. The use of only ‘size limit’ instead of ‘possession limit’ was considered, meaning only species subject to a size limit would be subject to the requirements of having head and tail attached. The use of ‘size limit’ over ‘possession limit’ would limit the number of species subject to the requirements of the rule, automatically eliminating all species conflicts identified in the background with the exception of eel. While the use of ‘size limit’ simplified the rule, marine patrol indicated it decreased the enforceability of other regulations. Wahoo is a prime example of this point. Wahoo has a 500-pound commercial trip limit and if allowed to be cut into steaks prior to landing, the commercial poundage

limit would be difficult (if not impossible) to enforce. The use of ‘possession limit’ preserves the enforceability and decreases the opportunity for loop holes. Although species-specific conflicts are not automatically eliminated by the use of ‘possession limit’ in the rule, they can be resolved by species-specific proclamations (see ancillary tasks).

The proposed option would amend the rule such that species with a possession limit would be subject to the requirements of the mutilated finfish rule unless otherwise specified in a rule or proclamation. MFC Rule 15A NCAC 03I .0101 (2)(g) defines ‘possess’ as ‘any actual or constructive holding whether under claim of ownership or not’. Possession limit includes size limit, recreational bag limit, commercial trip limit, season, or any other requirement that affects possession being allowed. The clarified language ensures the expectations of the rule are clear and helps to prevent confusion and loop holes when interpreting the rule. Overall, the proposed amendments to the rule simplify the rule and continue to serve the original intent of the rule to protect the resource, not to manage the use of cut bait.

The following text outlines how the proposed rule amendment applies to the specific issues and species outlined in the background as well as ancillary tasks that would result from the rule change. This includes species for which the Fisheries Director would need to consider if, at their discretion, a proclamation should be issued if the proposed rule change becomes effective. Managing the use of cut bait via species-specific proclamations would preserve acceptable practices for cutting species that are occurring now and would specify practices for cutting species that are prevented by the current rule but would be acceptable to occur after the rule is amended, consistent with the variable conditions provided in 15A NCAC 03H .0103.

AMERICAN EEL

American eel have been subject to the mutilated finfish rule since 1999 when the FMP was adopted requiring a minimum recreational size and possession limit. Under rule 15A NCAC 03M .0510, American eel are subject to a nine-inch minimum size limit for both the commercial and recreational fisheries along with a bag limit of 25 eels per person per day for the recreational fishery. American eel would continue to be subject to the requirements of the amended mutilated finfish rule because of this size and possession limit.

The use of eel as cut bait has been increasing in popularity in both the recreational and commercial sector. Eel are used to target striped bass and catfish and are used by commercial fishers in the trotline fishery. Marine Patrol has one documented violation of the rule in reference to eel, but increasing popularity of the species for cut bait would likely result in future violations if the requirements remain unchanged. Eel could be excepted from the requirements of the amended mutilated finfish rule via proclamation. The decision to issue a proclamation would be at the discretion of the Fisheries Director, consistent with the variable conditions provided in 15A NCAC 03H .0103 including compliance with FMPs. A stock assessment is underway and results of this assessment could impact future management of American eel, thus the Fisheries Director’s decision to issue a proclamation would be best informed closer to the date that the rule would be effective.

SPOT AND ATLANTIC CROAKER

The recreational bag limits implemented in April 2021 for spot and Atlantic croaker were the first direct harvest restrictions for these species. Prior to 2021, spot and Atlantic croaker were never subject to the requirements of the mutilated finfish rule. Both species are commonly used as live and cut bait by a variety of anglers including shore-based anglers, those fishing from private vessels, and for-hire vessels. Because of their popularity as cut bait, there is a state-level need to exclude spot and Atlantic croaker from the mutilated finfish requirements.

While spot and Atlantic croaker would still be subject to the requirements of the amended mutilated finfish rule, the amended rule would give the Fisheries Director the option to issue a proclamation to allow these species to be cut. Results of future TLA could impact management of spot and Atlantic croaker and there is the possibility that the bag limit could be removed or replaced around the time the amended rule would be effective and thus a proclamation would not be needed. The use of spot and Atlantic croaker for cut bait is not a sustainability concern because these species are a long-standing bait fish and they can be used for cut bait while still adhering to existing bag limits. Under the proposed rule amendment, the Fisheries Director would have the authority to determine if a proclamation is required and appropriate.

BLUEFISH

Bluefish have been subject to the mutilated finfish rule since adoption of the original FMP, which established a possession limit. The current three-fish bag limit is less than what was historically allowed (10-fish from 1999-2001

and 15-fish from 2000-2019) and no longer specifies any kind of size limit (only five of the 15 fish could be greater than 24 inches total length from 2003-2019). Bluefish would still be subject to the requirements of the amended mutilated finfish rule.

Bluefish are used as bait in recreational and commercial fisheries and are commonly used as cut bait by anglers on piers and in the surf. The amended rule allows for the option to except bluefish from the requirements of the rule via proclamation. Management measures may change as the stock is in a rebuilding plan, thus under the proposed rule amendment, the decision to except bluefish would be under the authority of the Fisheries Director.

EXCEPTIONS FOR MULLET, HICKORY SHAD, AND TUNA

The rule amendment removes the exceptions for mullet, hickory shad, and tuna from the rule. The exception for tuna only served to reference the existing rule 15A NCAC 03M .0520 and the amended rule continues to do so in stating 'unless otherwise specified in a rule of the Marine Fisheries Commission or a proclamation issued pursuant to a rule of the Marine Fisheries Commission'. Exceptions for mullet and hickory shad could be restored by issuing proclamations. Mullet are currently regulated by a recreational bag limit of 200 mullet per person per day. If stock assessment results indicate more stringent management measures are needed for mullet or excepting mullet from the mutilated finfish rule could cause enforcement issues which may undermine sustainability objectives, then a proclamation may not be needed. The decision to continue excepting mullet and hickory shad would be under the authority of the Fisheries Director at the time the amended rule would be effective.

Ancillary Tasks

The proposed option would amend the rule such that species with a possession limit would be subject to the requirements of the mutilated finfish rule unless otherwise specified in a rule or proclamation. This option simplifies the rule by including all requirements for a specific species within the same rule or proclamation. This approach mimics how species are managed at the federal level and ensures that compliance is maintained with ASMFC, SAFMC, and MAFMC FMPs. The species that may be in conflict with the amended rule are outlined below as ancillary tasks that may need to be addressed by proclamation upon the effective date for the proposed rule change. The proclamations could preserve acceptable practices for cutting species that are occurring now and specify practices for cutting species that are prevented by the current rule but would be acceptable to occur after the rule is amended. The decision to issue such proclamations would be under the authority of the Fisheries Director at the time the amended rule would be effective, consistent with the variable conditions provided in 15A NCAC 03H .0103. It is important to distinguish that while there are six potential proclamations identified below, mullet are the only species that do not have a preexisting proclamation. Existing proclamations could be reissued with cut bait requirements upon the effective date of the rule and in conjunction with the Fisheries Director's decision. Thus, the ancillary tasks include only one 'new' proclamation that may need to be issued for mullet (see item 5 below). The rest of the ancillary tasks could be resolved by reissuing existing proclamations, which is already done on an annual basis for many species.

1. American Eel would continue to be subject to the requirements of the amended mutilated finfish rule. A proclamation would need to be issued via 15A NCAC 03M .0512 if the Fisheries Director decides it is appropriate to allow American eel to be used as cut bait.
2. Spot would continue to be subject to the requirements of the amended mutilated finfish rule as long as the bag limit remains effect. A proclamation would need to be issued via 15A NCAC 03M .0512 if the Fisheries Director decides it is appropriate to allow spot to be used as cut bait.
3. Atlantic croaker would continue to be subject to the requirements of the amended mutilated finfish rule as long as the bag limit remains effect. A proclamation would need to be issued via 15A NCAC 03M .0512 if the Fisheries Director decides it is appropriate to allow Atlantic croaker to be used as cut bait.
4. Bluefish would continue to be subject to the requirements of the amended mutilated finfish rule. A proclamation would need to be issued via 15A NCAC 03M .0512 if the Fisheries Director decides it is appropriate to allow bluefish to be used as cut bait.
5. Mullet would no longer be exempt from the requirements of the amended mutilated finfish rule. A proclamation would need to be issued via 15A NCAC 03M .0502 if the Fisheries Director decides it is appropriate to continue to allow mullet to be used as cut bait.
6. Hickory shad would no longer be exempt from the requirements of the amended mutilated finfish rule. A proclamation would need to be issued via 15A NCAC 03M .0512 if the Fisheries Director decides it is appropriate to continue to allow hickory shad to be used as cut bait.

VI. PROPOSED RULE(S)

15A NCAC 03M .0101 MUTILATED FINFISH

It shall be unlawful to possess aboard a vessel or while engaged in fishing any species of finfish that is subject to a size or harvest restriction possession limit, including size limit, recreational bag limit, commercial trip limit, or season, without having head and tail attached, ~~except:~~ unless otherwise specified in a rule of the Marine Fisheries Commission or a proclamation issued pursuant to a rule of the Marine Fisheries Commission.

- (1) ~~mullet when used for bait;~~
- (2) ~~hickory shad when used for bait, provided that not more than two hickory shad per vessel or fishing operation may be cut for bait at any one time; and~~
- (3) ~~tuna possessed in a commercial fishing operation as provided in Rule .0520 of this Subchapter.~~

History Note: Authority G.S. 113-134; 113-182; 143B-289.52;
Eff. January 1, 1991;
Amended Eff. January 1, 1991;
Temporary Amendment Eff. May 1, 2001;
Amended Eff. May 1, 2015; April 1, 2011; July 1, 2006; August 1, 2002;
Readopted Eff. April 1, 2019.
Amended Eff. (Pending legislative review pursuant to S.L. 2019-198).

VII. PROPOSED MANAGEMENT OPTION

Use of American eel, spot, Atlantic croaker, bluefish, and striped mullet as bait creates conflicts with the mutilated finfish rule based on communication from stakeholders, feedback from Marine Patrol officers, and implications from stock assessments and FMPs. It is likely that species beyond the five outlined could require similar consideration in the future. Therefore, the intent of this issue paper is to propose changes to amend the rule in a way that both resolves current conflicts with species used as cut bait and provides flexibility to manage variable conditions. Ultimately, this issue paper presents a single option for consideration. This option is the only option that fully achieves all objectives of the rule change.

Amended rule 15A NCAC 03M .0101 to provide flexibility to manage variable conditions for the use of finfish as cut bait by simplifying the rule such that species subject to a possession limit are subject to the requirements unless otherwise specified in a rule or proclamation.

- + Allows access to a bait resource
- + Simplifies the rule and continues to serve the original intent of the rule to protect the resource, not to manage the use of cut bait.
- + Provides the flexibility to manage both current conditions and variable conditions
- + Preserves enforceability of existing regulations
- +/- Requires additional proclamations to be issued but provides a more holistic approach to species level management
- Requires lengthy rule making process

VIII. RECOMMENDATION

The DMF recommends supporting the single option presented in this paper. The proposed rule is automatically subject to legislative review pursuant to Session Law 2019-198; therefore, the earliest possible effective date would be the 30th legislative day of the 2024 short session, estimated to be approximately mid-June 2024.

Prepared by: Morgan Paris, morgan.paris@ncdenr.gov, (252) 948-3875
Dec. 8, 2021
Revised: Jan. 12, 2022
Jan. 18, 2022
Jan. 26, 2022

Burgos, Alexander N

From: Duke, Lawrence
Sent: Tuesday, May 16, 2023 5:30 PM
To: Everett, Jennifer
Cc: Quinlan, Katherine L; Nelson, Bradley W; Kountis, Elizabeth; Blum, Catherine; Lopazanski, Mike; Burgos, Alexander N; Reynolds, Phillip T
Subject: RE: May RRC Meeting - EMC, MFC, & CRC Rules

Thank you.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

From: Everett, Jennifer <jennifer.everett@deq.nc.gov>
Sent: Tuesday, May 16, 2023 4:17 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Cc: Quinlan, Katherine L <katherine.quinlan@ncdenr.gov>; Nelson, Bradley W <bradley.nelson@deq.nc.gov>; Kountis, Elizabeth <elizabeth.kountis@deq.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>; Lopazanski, Mike <mike.lopezanski@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>
Subject: RE: May RRC Meeting - EMC, MFC, & CRC Rules

Lawrence,

See my notes in red below.
Let me know if you have any questions.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Tuesday, May 16, 2023 12:01 PM
To: Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Quinlan, Katherine L <katherine.quinlan@ncdenr.gov>; Nelson, Bradley W <bradley.nelson@deq.nc.gov>; Kountis,

Elizabeth <elizabeth.kountis@deq.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>; Lopazanski, Mike <mike.lopezanski@ncdenr.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>

Subject: May RRC Meeting - EMC, MFC, & CRC Rules

Jennifer,

In preparation for the Rules Review Commission meeting on Thursday, May 18, I wanted to make sure we are on the same page for the rules you are shepherding through the process.

- Coastal Resources: 15A NCAC 07H .2305 has had no changes and no agency action. This Rule will remain a no action item. **Correct.**
- Environmental Management: 15A NCAC 02B .0315 has had no changes and will continue to be a no action item. The extension of time continues until the June meeting, at which time this rule must be reviewed. **Got it.**

15A NCAC 02D .0516 has gone through the process and will be reviewed at this May meeting. Please make sure the final version has been submitted to oah.rules@oah.nc.gov and that this version is reflected correctly in the online agenda for the May meeting. **The final version was submitted to oah.rules@oah.nc.gov on May 5, 2023 and is reflected in the online agenda correctly.**

- Marine Fisheries: 15A NCAC 03M .0101 has outstanding issues related to jurisdiction overlap with Wildlife Resources. I have spoken with Phillip Reynolds about changes to the language that will hopefully resolve these issues. If we are unable to work this out before the meeting, this Rule will continue to be a no action item. The extension of time continues until the June meeting, at which time this rule must be reviewed. **Got it.**

15A NCAC 18A .0911 has gone through the process and will be reviewed at this May meeting. Please make sure the final version has been submitted to oah.rules@oah.nc.gov and that this version is reflected correctly in the online agenda for the May meeting. **The final version was submitted to oah.rules@oah.nc.gov on May 11, 2023 and is reflected in the online agenda correctly.**

As always, if you have any questions, please feel free to reach out.

Thank you,

Lawrence Duke



Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
Lawrence.Duke@oah.nc.gov
(919) 738-1938

Burgos, Alexander N

From: Duke, Lawrence
Sent: Tuesday, May 16, 2023 12:01 PM
To: Everett, Jennifer
Cc: Quinlan, Katherine L; Nelson, Bradley W; Kountis, Elizabeth; Blum, Catherine; Lopazanski, Mike; Burgos, Alexander N; Reynolds, Phillip T
Subject: May RRC Meeting - EMC, MFC, & CRC Rules

Jennifer,

In preparation for the Rules Review Commission meeting on Thursday, May 18, I wanted to make sure we are on the same page for the rules you are shepherding through the process.

- Coastal Resources: 15A NCAC 07H .2305 has had no changes and no agency action. This Rule will remain a no action item.
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- Marine Fisheries: 15A NCAC 03M .0101 has outstanding issues related to jurisdiction overlap with Wildlife Resources. I have spoken with Phillip Reynolds about changes to the language that will hopefully resolve these issues. If we are unable to work this out before the meeting, this Rule will continue to be a no action item. The extension of time continues until the June meeting, at which time this rule must be reviewed. 15A NCAC 18A .0911 has gone through the process and will be reviewed at this May meeting. Please make sure the final version has been submitted to oah.rules@oah.nc.gov and that this version is reflected correctly in the online agenda for the May meeting.

As always, if you have any questions, please feel free to reach out.

Thank you,

Lawrence Duke



Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
Lawrence.Duke@oah.nc.gov
(919) 236-1938

Burgos, Alexander N

Subject: FW: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>

Sent: Monday, May 15, 2023 11:39 AM

To: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>

Subject: RE: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

Jennifer,

NC Wildlife Resources Commission has submitted comments regarding 15A NCAC 03M .0101. As questioned in my initial change requests regarding joint or overlapping jurisdiction, does the Marine Fisheries Commission wish to respond to MFC's encroachment on WRC's jurisdiction over finfish regulation in inland, joint, and coastal fishing waters? I tend to agree with WRC that this Rule is overly expansive, beyond the statutory authority of MFC – or at least vague and ambiguous enough to not clearly delineate where and to what species this Rule would apply. As written, this is sufficiently problematic to draw an objection.

Let me know how you would like to proceed on this. As a reminder, this Rule is operating under an extension of time that allows for another month to get this corrected.

Lawrence Duke

Counsel, NC Rules Review Commission

Office of Administrative Hearings

(984) 236-1938

Burgos, Alexander N

Subject: FW: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review
Attachments: 15A NCAC 18A 0911.docx

From: Everett, Jennifer <jennifer.everett@deq.nc.gov>
Sent: Thursday, May 11, 2023 12:58 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>
Subject: RE: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

Lawrence,

Attached is the rewritten 15A NCAC 18A .0911.
No further changes were made to 15A NCAC 03M .0101.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

icial.

1 15A NCAC 18A .0911 is readopted with changes as published in 37:07 NCR 541-542 as follows:

2
3 **15A NCAC 18A .0911 ~~MARINAS:~~ MARINAS, DOCKING FACILITIES: ~~FACILITIES, AND OTHER~~**
4 **MOORING AREAS**

5 ~~Classification of shellfish~~ [Shellfish] The Division of Marine Fisheries shall classify shellfish growing waters with
6 respect to marinas, docking facilities, and other mooring areas ~~shall be done~~ [classified] in accordance with the
7 following as follows:

- 8 (1) All the Division shall classify all waters within the immediate vicinity of a marina shall be classified
9 as prohibited to the harvesting of shellfish for human consumption ~~consumption; and~~
10 ~~Excluded from this classification are marinas with less than 30 slips, having no boats over 24 feet~~
11 ~~in length, no boats with heads and no boats with cabins. Marinas permitted prior to the effective~~
12 ~~date of this Rule may continue to have boats up to 21 feet in length with cabins and not be subject~~
13 ~~to the mandatory water classification of prohibited in the immediate vicinity of the marina.~~
14 (2) ~~Owners of marinas conforming to the exclusion provisions in Item (1) of this Rule shall make~~
15 ~~quarterly reports to the Division. These reports shall include the following information:~~
16 (a) ~~number of slips;~~
17 (b) ~~number and length of boats;~~
18 (c) ~~number and length of boats with cabins;~~
19 (d) ~~number of boats with heads; and~~
20 (e) ~~number of boats with "porta potties."~~

21 ~~Reports to the Division shall cover the occupancy of the marina on the fifth day of the first month of each quarter of~~
22 ~~the calendar year and shall be post marked on or before the fifteenth day of the reporting month.~~

- 23 (3) ~~The minimum requirement for the prohibited area beyond the marina shall be based on the number~~
24 ~~of slips and the type of marina (open or closed system). The prohibited area shall extend beyond~~
25 ~~the marina from all boat slips, docks, and docking facilities, according to the following:~~

Number of Slips in Marina	Size of Prohibited Area (Feet)	
	Open System	Closed System
11—25	100	200
26—50	150	275
51—75	175	325
76—100	200	400

34
35 ~~Open system marinas exceeding 100 slips shall require an additional 25 feet for each 25 slips or portion thereof over~~
36 ~~100. A closed system marina shall require 50 feet for each 25 slips or portion thereof over 100. Closed system private~~
37 ~~or residential marinas with more than 75 slips shall require a prohibited area of the number of feet determined above,~~

or 100 feet outside the entrance canal, whichever is greater. Closed system commercial marinas with more than 50 slips shall require a prohibited area of the number of feet determined above, or 100 feet outside the entrance canal, whichever is greater.

(2) the Division ~~[of Marine Fisheries]~~ shall conduct a dilution ~~[analysis]~~ analysis, in the form of a volumetric calculation or in-field hydrographic study, to determine [the minimum extent of the area adjacent to a marina that shall be classified as prohibited to the harvesting of shellfish for human consumption. The prohibited area shall be sized]the volume of water necessary to dilute the concentration of fecal coliform bacteria to less than 14 [MPN, as determined by the dilution analysis.]MPN. The Division shall classify the water area determined by this dilution analysis as prohibited to the harvesting of shellfish for human consumption. The Division shall conduct the dilution analysis [shall be conducted]yearly and shall incorporate the following:

(a) the findings of the shoreline survey, including the presence of a sewage pumpout system or dump station; ~~[and]~~

(b) the physical factors influencing the dilution and dispersion of human wastes; and

(c) for marinas, docking facilities, and mooring areas in close proximity to one another, slip counts and services shall be combined for the purposes of the dilution analysis. Marinas, docking facilities, and mooring areas, each with three slips or more, shall be considered to be in close proximity to one another if the dilution analysis for each individual facility indicates that the dilution areas meet or overlap.

~~(4)(3)~~ After a marina is put in use water quality impacts of marina facilities may require a change in classification. In determining if a change in classification is necessary, marina design, marina usage, dilution, dispersion, bacteriological, hydrographic, meteorological, and chemical factors will be considered. [slip counts and services for marinas, docking facilities, and mooring areas in close proximity to one another shall be combined for the purposes of determining the necessary prohibited area as required in Items (1) and (2) of this Rule. Docking facilities and mooring areas each with three slips or more and marinas shall be considered to be in close proximity to one another if the dilution analysis indicates that the necessary dilution areas meet or overlap.]

(5) Areas, other than marinas, where boats are moored or docked may be considered on a case by case basis with respect to sanitary significance relative to actual or potential contamination and classification shall be made as necessary.

(6) The cumulative impacts of multiple marinas, entrance canals, or other mooring areas, in close proximity to each other are expected to adversely affect public trust waters. When these situations occur the Division will recommend closures exceeding those outlined in Item (3) of this Rule. The following guides will be used in determining close proximity:

(a) marina entrance canals within 225 feet of each other;

(b) open system marinas within 450 feet of each other (Mooring areas shall be considered open system marinas);

- (c) ~~where closure areas meet or overlap; and~~
- (d) ~~open system marinas within 300 feet of a marina entrance canal.~~

History Note: Authority G.S. ~~130A-230; 113-134; 113-182; 113-221.2; 143B-289.52;~~
Eff. June 1, 1989;
Amended Eff. July 1, 1993;
Readopted Eff. June 1, 2023.

Burgos, Alexander N

Subject: FW: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>

Sent: Thursday, May 11, 2023 10:27 AM

To: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>

Subject: RE: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

Jennifer,

Only the responses to the request for changes file was attached to your email. The responses imply that there were changes made to the rule text. If this is true, can you please forward any rewritten rules?

Thank you,

Lawrence Duke

Counsel, NC Rules Review Commission

Office of Administrative Hearings

(984) 236-1938

al.

Burgos, Alexander N

Subject: FW: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review
Attachments: MFC - 04.2023 - 15A NCAC 03M .0101 18A .0911 - Change Requests_MFC Responses.docx

From: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Sent: Friday, May 5, 2023 12:26 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>
Subject: RE: MFC 15A NCAC 03M .0101 & 18A .0911 - Letter of Extension of the Period of Review

Lawrence,

Attached are responses to your technical change requests for 15A NCAC 03M .0101 and 15A NCAC 18A .0911 from the Marine Fisheries Commission.

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

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REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Marine Fisheries Commission

RULE CITATION: 15A NCAC 03M .0101 & 18A .0911

DEADLINE FOR RECEIPT: Tuesday, April 11, 2023

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Do either of these rules implicate the joint jurisdiction of Marine Fisheries and the Wildlife Resources Commission? If not, why not? If so, were they adopted concurrently with WRC?

These rules do not implicate the joint jurisdiction of the Marine Fisheries Commission and the Wildlife Resources Commission. Per N.C.G.S. 113-132, the agencies may make joint regulations governing the responsibilities of each agency. The joint regulations are found in 15A NCAC 03Q .0100 and 10C .0100 and were readopted effective September 1, 2022 and March 15, 2023 (15A NCAC 03Q .0107).

Please retype the rule accordingly and resubmit it to our office electronically.

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Marine Fisheries Commission

RULE CITATION: 15A NCAC 03M .0101

DEADLINE FOR RECEIPT: Tuesday, April 11, 2023

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Line 8 could be clarified. Is “engaged in fishing” different from simply using “fishing”? Is “any” necessary? Would it not be clearer to begin the Rule: “It shall be unlawful to possess, aboard a vessel or while fishing, finfish species that are subject to...”?

The phrase "engaged in fishing" occurs in numerous Marine Fisheries Commission rules and authorizing statutes and is familiar to regulated stakeholders and enforcement. It is used to set requirements for commercial fishing operations, for-hire operations, and recreational fishing. The phrase addresses the direct action of fishing, not operations before or immediately after the occurrence of removing a fish species from fishing waters, which are activities defined as "To Take" in G.S. 113-130. The term "any" is necessary to indicate that possession of a single finfish species (not multiple finfish species) that has a possession limit is sufficient to subject a person to the requirements of the rule.

Is “including” necessary on line 9 to modify “size limit”?

The word "including" is not modifying "size limit". It is introducing four examples of possession limits that include size limit, recreational bag limit, commercial trip limit, or season.

Both Subparagraphs listed above lack a clear method or procedure for “the determination of emissions” or “the determination of Btu input”. Is there a way to clarify this if this language is to be included?

This request is unclear to the agency and may be from a request for technical change for another agency.

Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: April 3, 2023

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Marine Fisheries Commission

RULE CITATION: 15A NCAC 18A .0911

DEADLINE FOR RECEIPT: Tuesday, April 11, 2023

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Please use active verbs. "The Division of Marine Fisheries shall classify shellfish growing waters with respect to marinas, docking facilities, and other mooring areas as follows:"

Completed

Please change the period at the end of Item (1) to a semicolon.

Completed

What is the "dilution analysis" in Item (2)? What is the procedure or method by which this analysis is conducted? Will the prohibition extend to the "minimum extent"? This is unclear and ambiguous.

The methodology for conducting a dilution analysis has been added to Item (2), consistent with National Shellfish Sanitation Program (NSSP) standards. The elements of Item (2) have been rearranged and additional details have been added to address the apparent ambiguity. North Carolina is part of the NSSP, which is a federal/state cooperative program designed to promote and improve the sanitation of shellfish (oysters, clams, mussels, and scallops) moving in interstate commerce. N.C. Division of Marine Fisheries staff work together with representatives from other states, the federal government, and industry through the Interstate Shellfish Sanitation Conference to develop guidelines for all state shellfish programs that are summarized in the NSSP Guide for the Control of Molluscan Shellfish (Guide). North Carolina must meet the minimum standards included in this Guide for North Carolina shellfish to be able to be sold through interstate commerce. The inclusion of this dilution analysis for determining the necessary buffer size around marinas adds a scientific rationale to the decision-making process and helps ensure that the health of shellfish consumers is protected by encompassing any waters that could potentially be impacted by overboard discharges of waste within the closed area.

Item (3) should begin like Item (2), "the Division of Marine Fisheries shall". For clarity, it should continue: "shall determine the prohibited areas required in Items (1) and (2) by..." Instead of "in close proximity to", use "close to". Instead of "for the purposes of determining", use "to determine". Words like "necessary" and "each" should be removed or defined more clearly. A phrase like "marinas shall be considered to be in close proximity to" is excessive. Use "marinas considered close to". Also, "if the dilution analysis indicates..." is unclear. How would it indicate? How would this be calculated and, when calculated, what would be the

Lawrence R. Duke
Commission Counsel

Date submitted to agency: April 3, 2023

numerical indication of “necessary dilution areas”? This needs to be clearly explained in rule to be used.

The phrase "in close proximity to" has a specific geographic implication and is a term that is in the current rule, so it is familiar to the regulated stakeholders. To replace the phrase with alternate language would actually reduce the clarity of what the rule amendments are intended to achieve. The phrase is also explained within the rule and the use of other language in its place would create awkward sentences throughout the rule. The word "each" is important to retain in the explanation of "in close proximity" because it clarifies that two or more separate facilities that each have three slips or more are being evaluated, not facilities that cumulatively have three slips or more. Without using the word "each", the rule would have a different meaning. Item (3) has been incorporated as Sub-Item (2)(c) for clarity. Please see the previous response regarding the methodology for conducting a dilution analysis. The remainder of the requests have been incorporated into the rewritten rule.

Please retype the rule accordingly and resubmit it to our office electronically.

Burgos, Alexander N

Subject: FW: MFC - 15A NCAC 03M .0101 & 18A .0911 - Change Requests

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>

Sent: Thursday, April 6, 2023 3:10 PM

To: Everett, Jennifer <jennifer.everett@ncdenr.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>

Subject: RE: MFC - 15A NCAC 03M .0101 & 18A .0911 - Change Requests

Jennifer,

Thank you for letting me know. I will present that to the RRC and recommend the extension.

Lawrence Duke

Counsel, NC Rules Review Commission

Office of Administrative Hearings

(984) 236-1938

Burgos, Alexander N

From: Everett, Jennifer
Sent: Wednesday, April 5, 2023 2:19 PM
To: Duke, Lawrence; Rules, Oah
Cc: Burgos, Alexander N; Blum, Catherine
Subject: RE: MFC - 15A NCAC 03M .0101 & 18A .0911 - Change Requests

Lawrence,

The Marine Fisheries Commission is requesting an extension for the period of review. This extension will allow additional time for staff to address your technical change requests.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
<https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules>

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From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Monday, April 3, 2023 11:27 AM
To: Everett, Jennifer <jennifer.everett@ncdenr.gov>; Blum, Catherine <catherine.blum@ncdenr.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: MFC - 15A NCAC 03M .0101 & 18A .0911 - Change Requests

Jennifer,

Please see attached requests for changes to the Marine Fisheries Commission's two rules submitted for review at the RRC's April 2023 meeting. If you have any questions please let me know.

Thanks,

Lawrence Duke



Council to the North Carolina Rules Review Commission
Office of Administrative Hearings
Lawrence.Duke@oah.nc.gov
(919) 236-1938

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.