

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Marine Fisheries Commission

RULE CITATION: 15A NCAC 030 .0114

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Rule 030 .0114 provides for suspension, revocation, and reissuance of licenses to harvest shellfish. Inter alia, the Rule provides the process for license revocation, which requires the Fisheries Director to "cause the licensee to be served with written notice of suspension or revocation." The rule goes on to state that "[i]t shall be unlawful to evade the service prescribed in this Rule.

Staff inquired as to the agency's source of authority to make evasion of service not merely a violation of its rules but unlawful. The agency responded that it relies principally on the language of Session Law 2010-145, section 1, which reads:

The Marine Fisheries Commission shall adopt rules pursuant to and consistent with G.S. 113-171, as amended by Section 2 of this act, and G.S. 143B-289.52 for the suspension, revocation, and reissuance of marine resources licenses and permits issued under Articles 14A, 14B, and 25A of Chapter 113 of the General Statutes. Rules adopted pursuant to this section shall not become effective prior to October 1, 2012. In adopting rules pursuant to this section, the Commission shall consider all of the following:

- (1) Whether the rules should differentiate between minor and major violations.
- (2) How to define minor and major violations.
- (3) How service of revocation could be made more efficient.
- (4) How the rules should treat violations related to recreational fishing licenses and permits.
- (5) Whether violations related to littering or assault on a marine patrol inspector should be treated as grounds for suspension or revocation.
- (6) Whether suspension and revocation provisions should be strengthened in cases of harvesting shellfish from polluted waters.

Staff believes this provision does not empower the agency to create a criminal penalty, and as such, recommends objection to this Rule for lack of statutory authority.

1 15A NCAC 03O .0114 is readopted with changes as published in 36:07 NCR 488-489 as follows:

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3 **15A NCAC 03O .0114 SUSPENSION, REVOCATION, AND REISSUANCE OF LICENSES**

4 (a) All commercial and recreational licenses issued under Article 14A, Article 14B, and Article 25A of Chapter 113
5 shall be subject to suspension and revocation.

6 (b) A conviction resulting from being charged by an inspector under G.S. 14-32, 14-33, 14-72, or 14-399 shall be
7 deemed a conviction for the purposes of license suspension or revocation.

8 (c) Upon receipt of notice of a licensee's conviction as specified in G.S. 113-171 or a conviction as specified in
9 Paragraph (b) of this Rule, the Fisheries Director shall determine whether it is a first, second, third, fourth, or
10 subsequent conviction. Where several convictions result from a single transaction or occurrence, the convictions shall
11 be treated as a single conviction for the purposes of license suspension or revocation. For a second conviction, the
12 Fisheries Director shall suspend all licenses issued to the licensee for a period of 30 days; for a third conviction, the
13 Fisheries Director shall suspend all licenses issued to the licensee for a period of 90 days; for a fourth or subsequent
14 conviction, the Fisheries Director shall revoke all licenses issued to the licensee, except:

15 (1) for a felony conviction under G.S. 14-399, the Fisheries Director shall suspend all licenses issued
16 to the licensee for a period of one year;

17 (2) for a first conviction under G.S. 113-187(d)(1), the Fisheries Director shall suspend all licenses
18 issued to the licensee for a period of one year; for a second or subsequent conviction under G.S.
19 113-187(d)(1), the Fisheries Director shall revoke all licenses issued to the licensee;

20 (3) for a conviction under G.S. 14-72, 113-208, 113-209, 113-268, or 113-269, the Fisheries Director
21 shall revoke all licenses issued to the licensee; and

22 (4) for a conviction under G.S. 14-32 or 14-33, if the offense was committed against a marine fisheries
23 inspector, the Fisheries Director shall revoke all licenses issued to the licensee and the former
24 licensee shall not be eligible to apply for reinstatement of a revoked license or for any additional
25 license authorized in Article 14A, Article 14B, or Article 25A of Chapter 113 for a period of two
26 years.

27 (d) After the Fisheries Director determines that a conviction requires a suspension or revocation of the licenses of a
28 licensee, the Fisheries Director shall cause the licensee to be served with written notice of suspension or revocation.
29 If the licensee is not an individual, the written notice shall be served upon any responsible individual affiliated with
30 the corporation, partnership, or association. The notice of suspension or revocation shall be served by an inspector or
31 other agent of the Department or by certified mail, shall state the ground upon which it is based, and shall take effect
32 immediately upon service. The agent of the Fisheries Director making service shall collect all license certificates and
33 plates and other forms or records relating to the license as directed by the Fisheries Director. Upon service of a notice
34 of suspension or revocation of a license, it shall be unlawful to fail to surrender any license so suspended or revoked.

35 (e) If a license has been suspended, the former licensee shall not be eligible to apply for reissuance of license or for
36 any additional license authorized in Article 14A, Article 14B, or Article 25A of Chapter 113 during the suspension

1 period. Licenses shall be returned to the licensee by the Fisheries Director or the Director's agents at the end of a
2 period of suspension.

3 (f) Where a license has been revoked, the former licensee shall not be eligible to apply for reinstatement of a revoked
4 license or for any additional license authorized in Article 14A, Article 14B and Article 25A of Chapter 113 for a
5 period of one year, except as provided in Subparagraph (c)(4) of this Rule. For a request for reinstatement following
6 revocation, the former licensee shall ~~demonstrate~~ describe in the request ~~that how~~ the licensee will conduct the
7 operations for which the license is sought in ~~accord~~ accordance with all applicable laws and rules, shall submit the
8 request in writing, and shall ~~send~~ mail the request to the Fisheries Director, Division of Marine Fisheries, 3441
9 Arendell Street, P.O. Box 769, Morehead City, NC 28557. Upon the application of an eligible former licensee after
10 revocation, the Fisheries Director may issue one license sought but not another, as necessary to prevent the hazard of
11 recurring violations of the law.

12 (g) ~~A licensee shall not willfully~~ It shall be unlawful to evade the service prescribed in this Rule.

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14 *History Note: Authority G.S. 113-134; 113-168.1; 113-171; 113-182; 143B-289.52; S.L. ~~2010-145; 2010-145, s.~~*

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16 *Eff. October 1, 2012;*

17 *Amended Eff. May 1, 2017;*

18 *Readopted Eff. (Pending legislative review pursuant to S.L. 2019-198).*

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AGENCY: Marine Fisheries Commission

RULE CITATION: 15A NCAC 03O .0209

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

G.S. 113-202 governs the issuance and transfer of leases for shellfish cultivation. The statute speaks specifically to the transfer of leases:

(k) Except as restricted by this Subchapter, leaseholds granted under this section are to be treated as if they were real property and are subject to all laws relating to taxation, sale, devise, inheritance, gift, seizure and sale under execution or other legal process, and the like. Leases properly acknowledged and probated are eligible for recordation in the same manner as instruments conveying an estate in real property. Within 30 days after transfer of beneficial ownership of all or any portion of or interest in a leasehold to another, the new owner must notify the Secretary of such fact. Such transfer is not valid until notice is furnished the Secretary. In the event such transferee is a nonresident, the Secretary must initiate proceedings to terminate the lease.

In the proposed readoption, Rule 03O .0209 states:

(b) No transfer or sublease of a shellfish lease or franchise, in whole or in part, shall be valid until notice is provided to the Division of Marine Fisheries as provided in Article 16 of Chapter 113 of the North Carolina General Statutes and the Division provides written consent in order to ensure that a transferee or sub-lessee meets the requirements of the North Carolina General Statutes and Marine Fisheries Commission Rules. A transfer may only be made by the use of a form provided and approved by the Division.

Additionally, in Paragraph (d), the Rule limits the smallest portion of an existing lease that may be transferred to one-half acre:

~~(d) If the new owner obtains a~~ **The smallest portion of an existing shellfish bottom lease or franchise, it shall not contain less than franchise to be transferred or subleased shall be one-half acre acre.** ~~and the required notification to the Division shall be accompanied by a survey prepared in accordance with the standards in 15A NCAC 030 .0203(d).~~

Staff believes that the highlighted language exceeds the agency's statutory authority under G.S. 113-202. A plain reading of the statute indicates that transfers of shellfish leases are to be treated as the transfer of any other lease, and that the only restriction on the transfer itself is notice to the Secretary.

Moreover, the statute explicitly states that non-residents are ineligible to hold shellfish leases ("...the Secretary may grant shellfish cultivation leases to persons who reside in North Carolina....), yet provides that the remedy for a transfer to a non-resident is not for MFC to prevent the transfer, but for the Secretary to initiate termination proceedings.

Thus, although it appears that MFC may institute termination proceedings against an ineligible transferee once it receives notice of the transfer, staff believes that MFC lacks statutory authority to prevent the transfer from happening and lacks statutory authority to condition the size of the transfer.

1 15A NCAC 03O .0209 is readopted with changes as published in 36:07 NCR 491-492 as follows:

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3 **15A NCAC 03O .0209 ~~TRANSFER OF INTEREST~~ ASSIGNMENT OF SHELLFISH LEASES AND**
4 **FRANCHISES**

5 (a) For the purpose of effecting assignments of shellfish leases or franchises in accordance with this Rule:

6 (1) "transfer" shall be defined as any permanent assignment of a shellfish lease or franchise, in whole
7 or in part.

8 (2) "sublease" shall be defined as any temporary assignment of a shellfish lease or franchise, in whole
9 or in part.

10 ~~(a) Within 30 days after transfer of ownership of all or any portion of interest in a shellfish lease or franchise, the new~~
11 ~~owner shall notify the Division, and provide the number of the lease or franchise and the county in which it is located.~~
12 ~~Such notification shall be accompanied by a management plan prepared by the new owner in accordance with 15A~~
13 ~~NCAC 03O .0202(b).~~

14 (b) No transfer or sublease of a shellfish lease or franchise, in whole or in part, shall be valid until notice is provided
15 to the Division of Marine Fisheries as provided in Article 16 of Chapter 113 of the North Carolina General Statutes
16 and the Division provides written consent in order to ensure that a transferee or sub-lessee meets the requirements of
17 the North Carolina General Statutes and Marine Fisheries Commission Rules. A transfer may only be made by the use
18 of a form provided and approved by the Division.

19 (c) Notice to transfer or sublease a shellfish lease or franchise shall include the shellfish lease or franchise number,
20 county in which the lease or franchise is located, and the name of the transferee or sub-lessee. include:

21 (1) shellfish lease or franchise number;

22 (2) date of transfer or sublease;

23 (3) name and city of shellfish lease or franchise holder;

24 (4) name and address of transferee or sub-lessee;

25 (5) waterbody and county of shellfish lease or franchise being transferred or subleased;

26 (6) area description and total acres of shellfish lease or franchise or portion of shellfish lease or franchise
27 being transferred or subleased; and

28 (7) end date for a sublease.

29 The transferee or sub-lessee of a shellfish lease shall provide to the Division the required Shellfish Lease Management
30 Plan and proof of completion of training requirements in accordance with Rule .0202 of this Section.

31 ~~(b)(d) If the new owner obtains a~~ The smallest portion of an existing shellfish bottom lease or franchise, it shall not
32 contain less than franchise to be transferred or subleased shall be one-half acre acre, and the required notification to
33 the Division shall be accompanied by a survey prepared in accordance with the standards in 15A NCAC 03O .0203(d).

34 ~~(e) Within six months after transfer of ownership, the new owner shall complete shellfish cultivation lease training~~
35 ~~as specified in 15A NCAC 03O .0202(d).~~

36 (e) A shellfish lease or franchise shall not be transferred or subleased to a nonresident of North Carolina in accordance
37 with G.S. 113-202, G.S. 113-202.1, G.S. 113-202.2, and G.S. 113-206.

1 ~~(d)(f) Water column leases are not transferrable except when the Secretary approves such transfer. A shellfish water~~
2 ~~column lease shall only be transferred~~ in accordance with G.S. 113-202.1(f) and G.S. 113-202.2(f).

3 (e) ~~In the event the transferee involved in a lease is a nonresident, the Secretary must initiate termination proceedings.~~

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5 *History Note: Authority G.S. 113-134; 113-182; 113-201; 113-202; 113-202.1; 113-202.2; 113-205; 113-206;*
6 *143B-289.52;*

7 *Eff. January 1, 1991;*

8 *Amended Eff. April 1, 2011; March 1, 1994; September 1, 1991;*

9 *Readopted Eff. May 1, 2022.*