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Aug. 17, 2022

N.C. Rules Review Commission  
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[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)

RE: Comments on N.C. Wildlife Resources Commission proposed adopted temporary rules cited as 15A NCAC 10C .0325, .0326, .0409-.0430, and .0701 and proposed amended temporary rules cited as 15A NCAC 10C .0307, .0314, .0401, and .0402, as published June 15, 2022, on the N.C. Office of Administrative Hearings website.

The North Carolina Division of Marine Fisheries (“DMF”) appreciates the opportunity to comment on the North Carolina Wildlife Resources Commission (“WRC”) proposed adopted and amended rules in 15A NCAC 10C as published June 15, 2022, on the N.C. Office of Administrative Hearings website, in particular, how the rules fail to comply with the statutory grounds for the Rules Review Commission’s review set out in G.S. § 150B-21.9(a)(3) and a number are unnecessary. The DMF believes that the temporary rules exceed the WRC’s authority with respect to the management of coastal species and that three of the temporary rules are unnecessary.

Several of the rules proposed by the WRC relate to the taking of finfish that are designated as marine and estuarine species of commercial and recreational significance, which are regulated through fishery management plans (“FMPs”) adopted by the NC Marine Fisheries Commission (“MFC”) and implemented by the DMF pursuant to N.C. Gen. Stat. § 113-182.1. The proposed rules also create separate regulations for the taking of certain anadromous species, which are saltwater fish that spawn in fresh water, and “migratory” coastal species, meaning that the species travels in and among the coastal waters of various states along the Atlantic coast, such as American eel, Atlantic croaker, black drum, bluefish, cobia, Spanish mackerel, spot, and weakfish. These species are managed by the MFC and DMF in concert with other states and federal agencies through the Atlantic States Marine Fisheries Commission (“ASMFC”), the Mid-Atlantic Fishery Management Council, and the South Atlantic Fishery Management Council.

Currently the WRC regulates a limited number of marine and estuarine species in inland fishing waters by referencing the regulations in place in MFC rule. With the proposed temporary rules, the WRC is seeking to establish discrete rules for a number of marine and estuarine species for which the MFC already has established management and rules in place in the State waters of the Atlantic Ocean and coastal and joint fishing waters. Because of the current fishing water boundaries, there are several inland fishing waters where significant numbers of marine and estuarine species occur.

Both the Mid-Atlantic and South Atlantic Councils were created pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.*, and the State's participation on those Councils is codified in Article 19A, Subchapter IV of Chapter 113. The Director of the DMF is statutorily designated as the "principal State official with marine fishery management responsibility and experience in the State..." with respect to the State's participation on the councils. N.C. Gen. Stat. §§ 113-259(b) and -260(b). The MFC is responsible for nominating the other members from the State, who are then selected by the Governor and submitted to the United States Secretary of Commerce for appointment.

The ASMFC is comprised of 15 states on the Atlantic coast between Maine and Florida who are signatories to the Atlantic States Marine Fisheries Compact. The Compact was approved by Congress in 1942 (16 U.S.C. § 661 *et seq.*), and ratified by the State in 1949 (Article 19, Chapter 113, *et seq.*). The ASMFC is responsible for the management of Atlantic coastal anadromous and migratory resources. N.C. Gen. Stat. § 113-252. Management efforts and plans related to these species are made in coordination with the voting member-states, as well as in coordination with federal entities, including NOAA Fisheries and the U.S. Fish and Wildlife Conservation Service. As with the two other federal councils, the DMF Director is the "first commissioner" from the State, and the Governor is responsible for appointing two additional members, one of whom must be a member of the Legislature. As with the State MFC, the ASMFC is required to take into consideration both commercial and recreational interests in designing management plans.

The DMF does not dispute the WRC's authority to establish rules in inland fishing waters. It is, however, inarguable that the WRC's adoption of separate regulations for anadromous and migratory coastal species has a direct and potentially significant impact on the ability of the MFC and DMF to manage these species in accordance with State law. Where the WRC has proposed to separately regulate species that are currently subject to interjurisdictional management plans, such regulations directly contravene the authority and duty of the MFC and DMF to ensure compliance with interjurisdictional plans. However, we are concerned that the establishment of discrete inland fishing rules for marine and estuarine species without reference to the restrictions set by the MFC will increase public confusion, rather than avoid it, and negatively impact the State's ability to successfully manage marine and estuarine species subject to the Fisheries Reform Act requirements for sustainable management. These concerns were described at length in DMF's public comment for the WRC proposed amended and adopted rules in 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register* (attached). While the MFC is subject to a set of legislatively required sustainable fisheries management practices for these species, the WRC is not. This difference in legislative mandate, as well as the DMF and MFC's interstate and federal requirements through the ASMFC and regional councils, can lead to substantial differences in the methods of management used by the two agencies. Non-compliance with federal requirements has the potential to disrupt the State's access to federal funds.

Even in situations where the WRC does mirror the requirements set by the MFC, there is still potential that WRC's implementation will lag behind that of DMF, risking further overharvest. The MFC has the authority, pursuant to G.S. § 113-221.1, to implement adaptive management measures through proclamation to ensure sustainable harvest goals are achieved in a timely manner. Although the WRC has temporary rulemaking authority for certain management actions, it has no direct corollary to proclamation authority except in limited circumstances with respect to striped

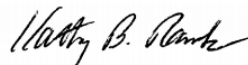
bass. By creating discrete inland fishing regulations for fish currently managed under State FMPs, the WRC may inadvertently cause overharvest of certain species, because of their inability to monitor these marine and estuarine species on a population level and immediately adjust seasons or bag limits through proclamation as necessary.

Finally, the existing version of 15A NCAC 10C .0307 highlights the fact that existing rule language is sufficient and that no “regulatory gap” exists for three of the adopted temporary rules. 15A NCAC 10C .0307 sets inland recreational seasons, size limits, and creel limits for flounder, sea trout, and red drum to be “the same as those established in the Rules of the Marine Fisheries Commission or proclamations issued by the Fisheries Director in adjacent joint or coastal fishing waters.” Rather than maintain these limits, the WRC has adopted separate temporary rules for flounder (.0307), sea trout (.0325), and red drum (.0326). These temporary rules are unnecessary as the existing rule references the MFC’s rules for these species and there are no existing regulatory gaps. The WRC’s permanent rulemaking action on this issue is awaiting legislative review and the current rule regarding flounder, sea trout and red drum is sufficient to protect these species in the interim.

While the DMF does not agree with WRC’s approach in adopting discrete rules for marine and estuarine species without reference to the MFC’s regulations, we do agree with the WRC’s intent to establish regulations for marine and estuarine species that are currently unregulated in inland fishing waters. These regulations, however, should be tied to current management practices and reference MFC rule and proclamations issued by the Fisheries Director for any marine and estuarine species managed in accordance with the Fisheries Reform Act. This is the current standard of management for these species and is the most harmonious with successful species management and public clarity.

Again, DMF is appreciative of this opportunity to comment on WRC’s proposed adopted and amended temporary rules in 15A NCAC 10C as published June 15, 2022, on the N.C. Office of Administrative Hearings website.

Sincerely,



Kathy B. Rawls  
Director, N.C. Division of Marine Fisheries

Attachment

Cc: Bill Lane, NCDEQ  
Carrie Ruhlman, NCWRC Rulemaking Coordinator

cb/KBR



ROY COOPER  
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March 21, 2022

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RE: Comments on N.C. Wildlife Resources Commission proposed amended and adopted rules in 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register*

The North Carolina Division of Marine Fisheries (“DMF”) appreciates the opportunity to comment on the North Carolina Wildlife Resources Commission (“WRC”) proposed amended and adopted rules in 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register*. During discussions between WRC and DMF staff during the periodic review of the jointly adopted MFC and WRC rules, it became apparent that there is a fundamental disagreement regarding the interpretation of the respective commissions’ responsibilities. With the publication of the proposed rules WRC clarified their intent to establish rules for the purpose of supporting their interpretation of their own commission responsibilities. WRC proposed several rules which effectively establish divergent State regulations for many marine and estuarine species. Furthermore, by establishing regulations that are likely to diverge, they are introducing a substantial source of confusion regarding fishing regulations in the State.

The Executive Director for the WRC has indicated via email that WRC anticipates withdrawing the proposed amendments to 11 joint rules in 15A NCAC 10C and proposed new rules 15A NCAC 10C .0701 and .0702 and will proceed with readopting the 11 joint rules without any changes. We appreciate that these changes will be withdrawn as both commissions work towards updating the joint rules, however, the remaining 46 rules continue to conflict with the DMF and MFC’s interpretation of authority in joint fishing waters. The fiscal note for the WRC proposed rules specifically cites that the intent of the rules is to clarify their authority as they interpret it.

DMF’s comments are intended to clarify the principal disagreement with WRC’s interpretation and provide information on the potential substantial impacts the proposed rules will have on fisheries management in the State. Comments provided specifically highlight divergent management of marine and estuarine species managed by the MFC and DMF and, in many cases, those that fall under federal or interstate management authority. A full comment document is attached to this letter as a supplement and incorporated herein by reference. It is our hope that the more detailed rule-by-rule explanation in this supplement will assist in a better understanding of

DMF's position and further facilitate dialogue and continuing efforts to resolve any future disagreement between the two commissions.

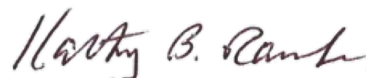
The DMF mission is to ensure sustainable marine and estuarine fisheries and habitats for the benefit and health of the people of North Carolina. In support of this mission the DMF enforces statutes and rules governing fishing in coastal fishing waters. One of DMF's most important principles to achieve the objectives of this mission is a fair and consistent enforcement of those statutes and rules. Such enforcement necessitates that fishery rules are clear and unambiguous for the regulated public. It is the DMF's position that the rules proposed by the WRC will reduce clarity and increase ambiguity for the regulated public by establishing divergent regulations for species already managed and under the authority of the MFC.

An additional concern for which we have provided detailed analyses is the potential for inconsistent management between the commissions that lead to an inability to meet the statutorily mandated sustainable fishery requirements in the Fisheries Reform Act of 1997 ("Act") and compliance with interstate and federal fisheries management. While the proposed rules match regulation and proclamations that are current to the time of publishing of the rules, there is no inherent flexibility to adapt to changing fishery management strategies and population conditions. The inability to adjust fishery regulations may jeopardize the state's ability to meet requirements of the Act.

Also of concern is the potential to cause the State to fall out of compliance with requirements for stocks under the management authority of the Atlantic States Marine Fishery Commission, the South Atlantic Fishery Management Council, and the Mid-Atlantic Fishery Management Council. Failure to meet the management requirements for these stocks may lead to intervention by the United States Secretary of Commerce resulting in fishery closures and significant disruptions to the states fishing economy.

Again, DMF is appreciative of this opportunity to comment on WRC's proposed amended and adopted rules in 15A NCAC 10C as published in the Jan. 18, 2022, issue of the *N.C. Register*.

Sincerely,



Kathy B. Rawls  
Director, N.C. Division of Marine Fisheries

Enclosure

Cc: Bill Lane, NCDEQ  
John Batherson, NCDEQ  
Jessica Englert

## SUPPLEMENT DOCUMENT

### DIVISION OF MARINE FISHERIES MARCH 21, 2022, COMMENT LETTER ON WILDLIFE RESOURCES COMMISSION'S PROPOSED AMENDED AND ADOPTED RULES: 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register*

#### I. Introduction.

Session Law 1965-957 amended Subchapter IV of Chapter 113 of the General Statutes of North Carolina to create N.C.G.S. § 113-132, titled “Jurisdiction of fisheries agencies.” This legislation was enacted in part to clarify the conservation laws of the State and the authority and jurisdiction of what are now the Marine Fisheries Commission (MFC) and the Wildlife Resources Commission (WRC). Paragraph (e) of this statute states the “Marine Fisheries Commission and the Wildlife Resources Commission may make joint regulations governing the responsibilities of each agency and modifying the applicability of licensing and other regulatory provisions as may be necessary for rational and compatible management of the marine and estuarine and wildlife resources in joint fishing waters.” This law provides express authority for the MFC and the WRC to make joint rules for “rational and compatible management of the marine and estuarine and wildlife resources in joint fishing waters” where the jurisdictions of the two agencies overlap.

The Coastal Recreational Fishing License was implemented effective January 1, 2007, after the joint rules in 15A NCAC 03Q .0100 and 10C .0100 were last amended. To account for the various licenses available to adhere to the requirements to engage in recreational fishing in the State, N.C.G.S. § 113-174.1 was amended. Under current law, there are now three categories of recreational fishing licenses available to an angler to fish in joint fishing waters: Coastal Recreational Fishing Licenses for coastal and joint fishing waters (see Article 14B of Chapter 113); Inland Fishing Licenses for inland and joint fishing waters (see Article 21 of Chapter 113); and Unified Licenses for inland, joint, and coastal fishing waters (see Article 25A of Chapter 113).

More specifically, N.C.G.S. § 113-174.1 entitles a licensee to engage in recreational fishing in coastal fishing waters and joint fishing waters. Similarly, N.C.G.S. § 113-271 entitles a licensee to fish with hook and line in inland fishing waters and joint fishing waters. N.C.G.S. § 113-351 entitles a licensee to fish with hook and line for all fish in inland fishing waters and joint fishing waters and to engage in recreational fishing in coastal fishing waters.

Several definitions pertinent to resolution of the joint rules issue are set out in State law. N.C.G.S. § 113-129 defines “coastal fishing waters,” “inland fishing waters,” and “joint fishing waters.” Coastal fishing waters include out to three miles in the Atlantic Ocean through the sounds and estuarine waters up to the dividing line with inland fishing waters. All references in laws and rules to commercial fishing waters apply to coastal fishing waters. Inland fishing waters include all waters connecting with or tributary to the coastal sounds or the ocean upstream from the dividing line with coastal fishing waters. Joint fishing waters are coastal fishing waters that have a significant number of freshwater fish as agreed upon by the MFC and the WRC. By law, joint fishing waters are a subset of coastal fishing waters.

The definition of “inland game fish” as set out in N.C.G.S. § 113-129(10) is equally important. Inland game fish means the species of freshwater fish found in any waters (inland, joint,

and coastal fishing waters) and the species of migratory saltwater fish when found in inland fishing waters that have an important element of sport in taking and that are designated as inland game fish in WRC rule. In other words, fish are prized for the sport it gives the angler in its capture rather than for value as food. Importantly, no species of fish of commercial importance not already classified as a game fish in commercial fishing waters as of January 1, 1965, may be classified as an inland game fish in coastal fishing waters without the concurrence of the MFC.

It is also important to examine a WRC rule that is not subject to joint readoption (but that is in this group of proposed changes) that is related to the definition in N.C.G.S. § 113-129(10). WRC rule 15A NCAC 10C .0301 designates inland game fishes. The WRC adopted this rule in 1976. The rule has been amended seven times since and the WRC readopted the rule August 1, 2020. It includes various freshwater fish that are found in any waters to include such species as mountain, rainbow, and brook trout, walleye, and various species of pickerel, black bass, crappie, and sunfish. Some migratory saltwater fish and species of commercial importance are also included in the rule, including yellow perch, spotted seatrout, flounder, red drum, striped bass, American and hickory shad, and several species of catfish. These fish are listed in the rule with the caveat “when found in inland fishing waters” because concurrence of the MFC is required by N.C.G.S. § 113-129(10) for these fish to be classified as inland game fish in coastal fishing waters (unless they were already classified as a game fish as of January 1, 1965). Significantly, this concurrence does not appear to have ever been sought by the WRC or given by the MFC.

Finally, N.C.G.S. § 113-130(7) defines “to take” as “all operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any fisheries resources or wildlife resources.” This term is much broader than simple possession of a fish.

## II. Adaptive Management Capabilities.

Adaptive management is a structured, iterative process of decision-making when uncertainty is present with the objective of reducing uncertainty through time with monitoring. As more is learned about a fishery, adaptive management provides flexibility to incorporate new data and information to accommodate alternative and/or additional actions. In the context of North Carolina fishery management plans, adaptive management is an optional management framework that allows for specific management changes to be taken between fishery management plan reviews under specified circumstances to accomplish the goals and objectives of the plan, including sustainable harvest. Proposed adaptive management actions are evaluated, adopted, and documented through an issue paper and the final revision document. The revision document and process are comparable to the federal “framework” process.

The authority for the MFC and the WRC to each implement adaptive management measures to respond to variable conditions of a particular fishery are set out separately. For the MFC, this authority is found in N.C.G.S. § 113-221.1, 15A NCAC 03H .0103, 15A NCAC 03M .0512 relative to compliance with interstate management of fish stocks, and various other MFC rules where the MFC delegates its authority to the DMF Fisheries Director to issue proclamations. The WRC's authority is found in N.C.G.S. § 150B-21.1(a)(7) for temporary rulemaking for fishing seasons (including provisions for manner of take or any other conditions required for the implementation of such season) and fishing bag limits.

The joint rule interaction can be complex. With regard to estuarine striped bass, for example, the authority for each commission to take its own action for management is referenced in but set out separately from MFC rule 15A NCAC 03Q .0109 and WRC rule 10C .0109. For the MFC, this authority is found in N.C.G.S. § 113-221.1, 15A NCAC 03M .0512, and 03M .0202 for proclamations. For the WRC, this authority is found in N.C.G.S. § 150B-21.1(a)(7) for temporary rulemaking as described above and N.C.G.S. § 113-292 and 15A NCAC 10C .0314 for proclamations to suspend or extend the hook-and-line season for striped bass in inland fishing waters and joint fishing waters.

### III. Compliance with Interstate and Federal Fisheries Management.

The Atlantic States Marine Fisheries Commission (ASMFC) and the federal government, including the National Oceanic and Atmospheric Administration (NOAA) Fisheries and federal fishery management councils, namely the Mid-Atlantic Fishery Management Council (MAFMC) and the South Atlantic Fishery Management Council (SAFMC) manage species that migrate across state boundaries or fisheries occurring in the Exclusive Economic Zone (EEZ) from three miles out to 200 miles in the Atlantic Ocean. Coastal and joint fishing waters typically lie between inland fishing waters and the EEZ.

State inspectors may enforce federal regulations if state rules are adopted to complement management measures adopted by the ASMFC, NOAA Fisheries, or the federal fishery management councils. Additionally, N.C.G.S. § 113-252 enters the state into a compact of joint management with the other Atlantic coast states and requires cooperative and/or conservationally equivalent management of marine and estuarine species that occur across state boundaries. MFC rule 15A NCAC 03M .0512 provides the DMF Fisheries Director proclamation authority to comply with fishery management plans adopted by the ASMFC, MAFMC, and SAFMC.

### IV. General Enforcement Concerns Other than in Proposed Rules 10C .0100 *et seq.*

Certain rules within the WRC proposed rule package (excluding rules in 10C .0100 *et seq.*) create ambiguity by use of the generic phrase “size limit” as opposed to the more specific and defined terms used in MFC rules and proclamations for determining length of finfish. MFC rule 15A NCAC 03I .0101 defines “curved fork length,” “fork length,” “pectoral fin curved fork length,” and “total length.” The proposed WRC rules include size limits for many marine and estuarine species. The term “size limits” is undefined and its use diverges from the more specific regulations set forth in MFC rules for some marine or estuarine species.

In addition, MFC rule 15A NCAC 03M .0103 does establish a generic minimum size limit for all species of four inches where a lower size limit is not more specifically defined elsewhere in rule and with some exceptions specified within. The proposed WRC rules diverge from this where they specify “There is no size limit” for a marine or estuarine species. The DMF recommends the WRC include the specific legal metric for each species (i.e., total length, fork length, etc.) to avoid ambiguity and simplify enforcement. As written, the WRC rules would create confusion and would conflict with MFC rules for requirements pertaining to size limits in joint fishing waters. These same size limit rule conflicts would also create compliance issues with ASMFC managed fish,



which would result in greater management ramifications if North Carolina was found out of compliance for non-compliant size limits.

The phrase “to take” is defined broadly under state law to be inclusive of all activities before, during, or immediately after possession or potential possession of a fish (N.C.G.S. § 113-130(7)). For example, a commercial fishing operation that is in the process of fishing but that has not yet harvested any fish is still “taking” fish under this provision. WRC rule 10C .0302(c)(1) proposes the deletion of text that states game fishes “taken” incidental to “commercial fishing operations in joint fishing waters or coastal fishing waters shall be immediately returned to the water unharmed.” The purpose of this requirement is to allow an inland game fish to be returned to the water if it is taken incidental to commercial fishing operations in joint or coastal fishing waters. In other words, a commercial fishing operation can interact with an inland game fish in joint or coastal fishing waters as long as the fish is not retained and is safely returned to the water.

Proposed WRC rules sections .0701(d) and .0801(d) below include this same deleted text: “inland game fishes ‘taken’ incidental to commercial fishing operations shall be immediately returned to the water unharmed.” These additions are in the context of joint fishing waters and coastal fishing waters respectively. In compartmentalizing this requirement by removing it from the context of “game fish” in section .0300 and adding it in section .0700 for joint fishing waters (and in section .0800 for coastal fishing waters) DMF wants to ensure clarity and continuity of regulations are retained for regulated stakeholders and enforcement officers. The current practice whereby an inland game fish is “taken” by gear other than hook and line incidental to a commercial fishing operation but does not result in harvest or possession of that fish (simply meaning a commercial fisherman is fishing) and the safe return of that inland game fish to the waters where found needs to be allowed to continue so as to avoid an unwarranted citation being issued for violation under the definition of “take” for the use of that commercial gear that would otherwise be lawful.

#### V. North Carolina Administrative Code (NCAC) Citation Discrepancies.

Two fiscal notes are provided on the WRC website in support of the proposed rules in 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register*: “Adoption & Amended Rules” and “Readopted Rules.” There appear to be two discrepancies in the citations to the North Carolina Administrative Code. First, rule 15A NCAC 10C .0316 (Trout) is listed in the “Adoption & Amended Rules” fiscal note as a proposed rule, but it is not published in the January 18, 2022, issue of the *N.C. Register*. This may have been an administrative oversight but could be concerning if changes are being proposed by the WRC that have not been noticed to the public in accordance with N.C.G.S. § 150B-21.2. Second, WRC rule 15A NCAC 10C .0318 (White Bass) is listed in both fiscal notes but based on the proposed changes it seems it is appropriate only to the “Readopted Rules” fiscal note.

#### VI. Cross Cutting Comments

While rule specific comments are provided below on a section-by-section basis, there are several more global comments that are relevant generally to many or all aspects of WRC’s proposed rules. At the MFC February 2021 business meeting the Commission passed a motion

mandating that a circle hook requirement shall be considered on a species-by-species basis through the fishery management plan process. As circle hook regulations are potentially adopted for marine and estuarine species through the fishery management plan process, WRC rules on hook and line requirements in inland and joint fishing waters are not likely to mirror these additions. For example, MFC rule 15A NCAC 03J .0306 makes it unlawful to use any hook larger than 4/0 from July 1 to September 30 in specific Internal Coastal Waters if using natural bait. Under current WRC interpretation and under proposed WRC rules, these regulations would not be in effect in joint fishing waters and have not been adopted in inland fishing waters. Of note, circle hooks are also required by proclamation for Snapper/Grouper species (Proclamations FF-8-2022, FF-9-2022) and sharks (Proclamation FF-3-2022) when using natural baits. This requirement would apply to joint fishing waters if anglers fish for or possess these species.

Many of the species in North Carolina waters are managed under the authority of the federal government by the ASMFC, MAFMC, and SAFMC. Compliance with these management authority plans often dictates harvest bag/creel limits and size limits for recreational harvest. Differing regulations in inland fishing waters may cause the State to be found out of compliance by a federal council or commissions and result in the United States Secretary of Commerce closing fisheries in State waters.

The WRC fiscal note for the proposed rules states that the WRC will evaluate impacts to species as part of routine fisheries management. However, the WRC does not perform stock assessments or directed sampling for most species. WRC generally does not have the data necessary to perform stock assessments. Many of these species listed by WRC are currently managed under State, interstate, or federal fishery management plans. They are also monitored in long-term DMF data collection programs and have current stock assessments performed by the DMF, ASMFC, or by a federal agency with management authority. The DMF recommends that for marine and estuarine species, the WRC reference MFC rules to reduce ambiguity and regulatory burden, as well as maintain compliance with ASMFC managed species. Differing regulations between inland fishing waters and coastal and joint fishing waters may jeopardize the sustainability of some stocks and cause the fishery management plan to fail to meet sustainability benchmarks defined in N.C.G.S. § 113-182.1.

Finally, many fishery management plans include adaptive management. As described above, these are management measures that provide management flexibility and are triggered by updated stock data. These management measures are an essential part of the management process both for the MFC/DMF and for ASMFC and the federal councils. Without the flexibility to adjust management measures relatively quickly the State would be faced with non-compliance of its own fishery management plans and those of the federal government.

## VII. Section by Section Specific Analysis

### 15A NCAC 10C .0103 “COASTAL FISHING WATERS”

The addition of the phrase “...waters, excluding joint fishing waters, shall...” is ambiguous and could be construed to extinguish the MFC’s authority to regulate or license in joint fishing waters, the statement being inclusive of not just hook and line but also regulation of the use of

commercial gear in joint fishing waters. Likewise, the addition of the same exclusionary language in 10C .0103(c) effectively revokes marine fisheries inspector authority to enforce all coastal fishing rules and laws in joint fishing waters unless specified in the jointly adopted rules. Both cases are inconsistent with N.C.G.S. §§ 113-129 and 113-136 as well as with the proposed language in 10C .0104(b) and 10C .0106 (a). By statutory definition joint fishing waters are a subset of coastal fishing waters (N.C.G.S. § 113-129(10a)). As written, this exclusion conflicts with State law and MFC rules for joint fishing waters and would create confusion for the regulated public.

#### 15A NCAC 10C .0108 “SPECIFIC CLASSIFICATION OF WATERS” (Proposed for Repeal)

The proposed repeal of this rule, which references MFC 03Q .0202 “Descriptive Boundaries for Coastal-Joint-Inland Waters,” would lead to considerable confusion among the regulated public and would lead to significant confusion for enforcement of the rules in inland, joint, and coastal fishing waters. In addition, the boundaries described in 03Q .0202 are used not only by the MFC and WRC but are referenced by many of the North Carolina Department of Environmental Quality divisions and related commissions in their respective rules. The implication that WRC will pursue an approach where it will not reference and extinguish those descriptive boundaries, and is not now providing an alternative description, would have far reaching impacts on environmental regulation in the State of North Carolina.

#### 15A NCAC 10C .0110 “MANAGEMENT RESPONSIBILITY FOR OF ESTUARINE STRIPED BASS IN JOINT WATERS THE ALBEMARLE SOUND AND ROANOKE RIVER MANAGEMENT AREAS”

North Carolina has four stocks of striped bass. The WRC proposed rule specifically applies to the most northern stock, the Albemarle-Roanoke stock. The Albemarle-Roanoke stock is managed jointly by the WRC and the MFC. In these joint rules, the WRC is provided authority over management of the Albemarle-Roanoke striped bass in the Roanoke River Management Area (RRMA), while the MFC is provided authority over the management of the Albemarle-Roanoke stock in the Albemarle Sound Management Area.

The entire Albemarle-Roanoke stock contributes to the coastal migratory population of striped bass, and as such, falls under the management authority of the ASMFC. While the ASMFC does not directly manage striped bass in the Albemarle-Roanoke stock, the ASMFC’s Striped Bass Management Board approves stock assessments for management use. The Albemarle-Roanoke stock is currently managed under the North Carolina Estuarine Striped Bass Fishery Management Plan, which is a joint plan developed by both the MFC and WRC. All of the management measures in the Estuarine Striped Bass Fishery Management Plan are based on these stock assessments. WRC’s proposed changes remove the requirement that it will be consistent with the Plan in the RRMA. RRMA management that does not follow that Plan or constrain harvest to the quota may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all of the Albemarle-Roanoke striped bass fisheries in State waters.

## 15A NCAC 10C .0111 “IMPLEMENTATION OF ESTUARINE STRIPED BASS MANAGEMENT PLANS: RECREATIONAL FISHING”

The contents of this rule have been proposed to be added to 10C .0110 as new Paragraph (d). That rule has changes that propose disconnecting the WRC rules from the Estuarine Striped Bass Fishery Management Plan as noted by the comments in 10C .0110.

## 15A NCAC 10C .0300 “GAME FISH IN INLAND FISHING WATERS”

The name of proposed section .0300 is changed from “Game Fish” to “Game Fish in Inland Fishing Waters.” While this change aligns with the intent of the proposed rule as stated in the corresponding WRC fiscal note to “clarify current requirements regarding inland game fishes in inland fishing waters,” the applicability of the requirements to “inland fishing waters” is only stated in rule 10C .0301 (Inland Game Fishes Designated) and sporadically stated in 10C .0302 (Manner of Taking Inland Game Fishes), 10C .0304 (Taking and Possession of Inland Game Fishes) and 10C .0314 (Striped Bass). All other proposed rules in 10C .0300 do not state “inland fishing waters” and so as written could create confusion and conflict with MFC rules for joint fishing waters.

Additionally, the WRC proposed a rule for amendment and two rules for adoption in Section .0300 that appear to have a similar intent. The fiscal note describes proposed changes to rule 10C .0307 (Flounder) and proposed adoption of 10C .0325 (Sea Trout) and .0326 (Red Drum) as establishing a season, size, and creel limit in inland fishing waters. The fiscal note acknowledges the WRC does not have proclamation authority for these three species but has the regulatory responsibility to manage the species. Further, the fiscal note states the proposed rules mimic current DMF proclamations or rules for season, size, and creel “and is believed to meet management objectives for the recreational fishery in inland fishing waters. However, the agency will continuously evaluate impacts to this species as part of routine fisheries management, which could lead to divergence from DMF proclamations in the future.” Divergence from DMF proclamations or rules in the future would create confusion and would conflict with MFC rules for joint fishing waters.

## 15A NCAC 10C .0302 “MANNER OF TAKING INLAND GAME FISHES”

In this proposed rule the language concerning an angler keeping up to three daily limits would potentially result in non-compliance with several interjurisdictional fishery management plans.

## 15A NCAC 10C .0304 “TAKING AND POSSESSION OF INLAND GAME FISHES”

The proposed rule would not allow recreational hook and line anglers to use hickory shad as cut bait for catfish and striped bass. This practice frequently occurs in most coastal river systems. The proposed language also allows possession of up to three days of creel limit, which exceeds daily per person possession requirements. Similarly, the provision identifies that the three days creel limits are allowed “at any place.” This phrase is ambiguous and needs further clarification on what defines “at any place.”

Also, proposed amendments to section .0304 would conflict with MFC rule 15A NCAC 03M .0101 for mutilated finfish requirements in joint fishing waters in two primary ways. First, changes would conflict by using inconsistent and undefined charging descriptions including “afield,” “any place,” “unnecessarily,” “destroy,” and “impracticable” - terms that are not clear or unambiguous. Second, changes would establish possession requirements inconsistent with 03M .0101.

#### 15A NCAC 10C .0307 “~~FLOUNDER, SEA TROUT, AND RED DRUM FLOUNDER~~”

The proposed changes to this rule present many challenges to the continued management of flounder. While the proposed creel limit, minimum size limit, and season mimic the current flounder regulations established under the State’s statutorily mandated Southern Flounder Fishery Management Plan, that plan is currently being amended to implement regulatory changes to work towards recovery of the flounder stock and ensure a sustainable fishery for this estuarine species. For example, a one (1) fish bag limit is expected to be implemented with the adoption of the current amendment. In addition, the plan includes adaptive management measures.

As described above, adaptive management is a standard tool used by fishery managers to adjust management within appropriate parameters to ensure sustainable harvest, and in the case of flounder, continued recovery of an overfished stock. While the MFC has authority to quickly make these adjustments in coordination with the DMF, the WRC cannot. This would lead to a divergence in regulation and could jeopardize successful rebuilding of the flounder stock. In addition, flounder are currently managed as an aggregate by the MFC, meaning the regulations established for southern flounder currently apply to summer flounder, gulf flounder, and any other flounder species encountered. However, Southern Flounder Fishery Management Plan Amendment 3 has an option to allow species-specific management, which could lead to further confusion if size limits or bag limits differ by species in the future.

In addition to the North Carolina regulations, flounder management is impacted by ASMFC and MAFMC management under the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan. This plan impacts size limits and bag limits based on conservation equivalencies for compliance. Divergent regulations in inland and joint fishing waters may cause the State to be found out of compliance by ASMFC and MAFMC and result in the United States Secretary of Commerce closing all flounder fisheries in State waters.

To ensure continued compliance with the ASMFC and MAFMC, and to ensure divergent, and potentially confusing regulations do not hamper the statutorily mandated flounder stock recovery, the DMF suggests that the WRC continue their current practice of referencing the rules established by the MFC for all marine and estuarine species in inland fishing waters. This would lead to more clarity for the regulated public and would ensure compliance with all state and federal regulatory authorities.

For example, relating to proposed WRC section .0307, by comparison the MFC could close the flounder season in accordance with the North Carolina Southern Flounder Fishery Management Plan while the WRC rule has the season open. Or the MFC could change the size and creel (bag) limits for flounder in compliance with the Plan while the WRC rule would authorize a different size and bag limit in effect that does not allow for the adaptive management from year

to year that the Plan provides to achieve sustainable harvest. Moreover, marine fisheries inspectors could write a citation for possessing flounder during the closed season when the WRC has left the season open. Similarly, inspectors could write a citation for not complying with the size and bag limit when the WRC has a different size or bag limit in effect.

#### 15A NCAC 10C .0313 “AMERICAN SHAD AND HICKORY SHAD (~~AMERICAN AND HICKORY~~)”

The proposed rule for American shad largely aligns with the North Carolina American Shad Sustainable Fishery Plan that was approved by ASMFC. However, the season in the proposed rule is not consistent with current MFC regulations. ASMFC’s Interstate Fishery Management Plan for Shad and River Herring requires states to have an approved Sustainable Fishery Plan for American shad and river herring to allow harvest of these species. Sustainable fishery plans must be updated no later than every five years and approved by ASMFC’s Shad and River Herring Management Board. Management under sustainable fishery plans can result in updated management measures, which could result in compliance issues in inland and joint fishing waters with outdated regulations and cause confusion for the regulated public.

More specifically, proposed amendments to section .0313 include a season of March 1 through April 30. This is inconsistent with the season implemented by MFC rule and proclamation in accordance with the North Carolina American Shad Sustainable Fishery Plan, which is part of Amendment 3 to the ASMFC Interstate Fishery Management Plan for Shad and River Herring. Marine fisheries inspectors could write a citation for possessing shad during the closed season while the WRC rule has the season open.

To ensure continued compliance with the ASMFC, and to avoid divergent, and potentially confusing, regulations, DMF recommends the WRC continue to reference the rules established by the MFC for all marine and estuarine species in inland fishing waters. Divergent regulations in inland fishing waters may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all American shad fisheries in State waters.

#### 15A NCAC 10C .0314 “STRIPED BASS”

The proposed changes to remove the reference to the rule establishing the delineation boundaries of fishing waters, including the two striped bass management areas, would lead to confusion and reduce clarity for stakeholders. Instead of being able to reference a single delineation rule, the public would require detailed knowledge of the North Carolina Administrative Code to be able to find the specific descriptions of various locations for different fishing activities. This would place an undue burden on the regulated public. In addition, if WRC and MFC reference divergent area descriptions and not the same agreed upon management area descriptions, there would be the possibility for future divergence and conflict in management authority. This would jeopardize the success of the jointly managed estuarine striped bass fishery and may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing the Albemarle-Roanoke striped bass fishery in State waters.

Also, proposed amendments to section .0314 do not include reference to the jointly developed North Carolina Estuarine Striped Bass Fishery Management Plan or compliance with

the management measures implemented to achieve sustainable harvest. Marine fisheries inspectors could write a citation for possessing striped bass during the closed season while the WRC has left the season open or could write a citation for not complying with the size and bag limit while the WRC has a different size or bag limit in effect.

#### 15A NCAC 10C .0325 “SEA TROUT”

DMF recommends a more species-specific title for clarity, such as “Spotted Seatrout,” as there are numerous species that are referred to generically as sea trout. The proposed rule states there is no closed season for spotted seatrout in inland fishing waters. The fiscal note indicates WRC used existing MFC management measures contained in Proclamation FF-23-2018. While the creel limit and minimum size limit are correct as taken from this proclamation, a closure of the fishery is possible in any year if a cold stun event occurs. (Spotted seatrout are prone to high mortality events during periods of near or below freezing temperatures.) The proposed rule would allow the harvest of spotted seatrout in inland fishing waters when harvest is closed in coastal and joint fishing waters. Marine fisheries inspectors could write a citation for possessing spotted seatrout during the closed season while the WRC has left the season open.

Divergent regulations between inland fishing waters and coastal and joint fishing waters may jeopardize the sustainability of the spotted seatrout stock and cause the fishery management plan to fail to meet sustainability benchmarks defined in N.C.G.S. § 113-182.1. The spotted seatrout stock assessment is currently underway. Based on the outcome of that assessment, MFC and DMF regulations may diverge from what is proposed by WRC within the next two years.

In addition to the North Carolina regulations, spotted seatrout also fall under the management authority of the ASMFC. The unit stock assessed by DMF includes all spotted seatrout in North Carolina and Virginia waters. Staff with the Virginia Marine Resources Commission provide data for and participate in the stock assessment process. Compliance with the ASMFC plan dictates a minimum size limit for harvest (recreational and commercial). Divergent regulations in inland and joint fishing waters may cause the State to be found out of compliance by ASMFC, but more immediately may result in inadequate management measures to address sustainable fishing.

#### 15A NCAC 10C .0326 “RED DRUM”

As indicated in the WRC fiscal analysis, the proposed rule text does reflect the current MFC rule for season, size, and bag limits, however, those limits are subject to change. In addition to the North Carolina specific regulations, red drum also fall under the authority of the ASMFC. North Carolina red drum are part of the northern stock, which includes fish from all states between North Carolina and Maine. As mentioned above, the regulations are subject to change but only based on options in the ASMFC plan and pending stock assessment outcomes.

Since WRC does not participate in either monitoring or management of red drum, they will have no scientific basis to deviate from management measures set forth by the existing ASMFC and state fishery management plans for red drum. Differing regulations between inland fishing waters and coastal and joint fishing waters may jeopardize the sustainability of the red drum stock and cause the fishery management plan to fail to meet sustainability benchmarks defined in

N.C.G.S. § 113-182.1. Compliance with the ASMFC plan dictates harvest bag and size limits for recreational harvest. Diverging regulations in inland fishing waters may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all red drum fisheries in State waters.

Proposed WRC section .0326 raises an additional enforcement issue. The MFC could close the commercial red drum season once the quota was met in accordance with the North Carolina Red Drum Fishery Management Plan and the ASMFC Fishery Management Plan for Red Drum. If a commercial fisherman would then fish in joint fishing waters with hook and line and retain the one fish creel limit for red drum under the proposed WRC rule and the required bycatch under MFC rule, the WRC rules would allow the harvest and sale of that fish, yet marine fisheries inspectors could write a citation for fishing during the closed season while the WRC has left the season open.

#### 15A NCAC 10C .0400 ~~“JURISDICTION OF AGENCIES: CLASSIFICATION OF WATERS NONGAME FISH IN INLAND FISHING WATERS”~~

The name of section .0400 is proposed to be changed from “Jurisdiction of Agencies: Classification of Waters” to “Nongame Fish in Inland Fishing Waters.” While this name change aligns with the stated intent of the proposed adopted rules, the applicability of the requirements to “inland fishing waters” is only stated in the two existing amended rules of this provision: rules .0401 and .0402. Also included in one requirement in rule .0402(e) is the prohibition of the possession of more than 200 nongame fish accounting for species specific size and creel limits identified “in Section .0400 of this Subchapter.”

Proposed rules 10C .0409 (Taking and Possession of Nongame Fishes), .0410 (American Eel), .0411 (Atlantic Croaker), .0413 (Blue Crab), .0417 (Cobia), .0420 (King Mackerel), .0422 (Striped Mullet and White Mullet), .0424 (Sharks), .0425 (Sheepshead), .0426 (Spanish Mackerel), .0427 (Spot), .0428 (Tarpon), .0429 (Weakfish), and .0430 (Other Fishes) do not refer to “inland fishing waters” and so as written would create confusion and would conflict with MFC rules for joint fishing waters. Additionally, proposed rules 10C .0411 (Atlantic Croaker), .0413 (Blue Crab), .0417 (Cobia), .0420 (King Mackerel), .0425 (Sheepshead), .0426 (Spanish Mackerel), .0427 (Spot), and .0429 (Weakfish) would conflict with MFC rules that allow the sale of these fish when taken in joint fishing waters.

#### 15A NCAC 10C .0401 “MANNER OF TAKING NONGAME FISHES”

This proposed rule would eliminate the use of gill nets (possibly limited to 100 yards) for taking blue catfish, an invasive species now commonly found within the Albemarle Sound region.

#### 15A NCAC 10C .0402 “TAKING NONGAME FISHES BY SPECIAL DEVICE FOR BAIT OR PERSONAL CONSUMPTION”

The proposed rule diverges from MFC and DMF management in two places. The rule language in (d)(1) contradicts DMF Proclamation FF-67-2021, which states: “It is unlawful to possess American shad or hickory shad for recreational purposes by any method except hook-and-



line after midnight, Thursday, April 14, 2022.” The language in (b)(8) states that two eel pots may be used but does not mirror the mesh size requirements mandated by ASMFC for eel pots, and as implemented in MFC rule 03J .0301(f).

#### 15A NCAC 10C .0407 “PERMITTED SPECIAL DEVICES AND OPEN SEASONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)”

The proposed rule language allows setting of crab pots in inland fishing waters for those owning property adjacent to inland fishing waters of coastal rivers and their tributaries. This diverges from current management under Amendment 3 to the North Carolina Blue Crab Fishery Management Plan. In accordance with Amendment 2, Proclamation M-1-2021 specifies seasons when pots must be removed from coastal fishing waters. Additionally, Proclamation M-1-2021 specifies each pot must contain no less than three unobstructed escape rings that are at least two and five-sixteenths inches inside diameter and specifies locations of where those escape rings must be located. Recreationally set pots are not exempt from these requirements in coastal fishing waters but these requirements are not mirrored in the proposed rule, creating inconsistencies between coastal and inland fishing waters. These divergent regulations would create inconsistencies between management in coastal and inland fishing waters and may impact the sustainability of the blue crab fishery.

#### 15A NCAC 10C .0409 “TAKING AND POSSESSION OF NONGAME FISHES”

The proposed rule allows possession of up to three days of creel limit, which exceeds daily per person possession requirements. Similarly, the provision identifies that the three days creel limits are allowed “at any place.” This phrase is ambiguous and needs further clarification on what “at any place” means. In the fiscal note for 15A NCAC 10C .0400, American eel, blue crab, alewife, blueback herring, and catfish are not included. Additionally, paragraph (d) conflicts with MFC rule 15A NCAC 03M .0101 for mutilated finfish requirements in joint fishing waters.

#### 15A NCAC 10C .0410 “AMERICAN EEL”

The proposed rule does not make it unlawful to possess American eels from September 1 through December 31 except when taken by baited pots. This is a deviation from the current management requirement in ASMFC’s Interstate Fishery Management Plan for American Eel, which could result in a finding of noncompliance by ASMFC and result in the United States Secretary of Commerce closing all American eel fisheries in State waters. To ensure continued compliance with the ASMFC, and to avoid divergent and potentially confusing regulations, DMF suggests WRC reference the rules established by the MFC for all marine and estuarine species in inland fishing waters.

#### 15A NCAC 10C .0411 “ATLANTIC CROAKER”

Atlantic croaker falls under the management authority of the ASMFC and is subject to coast-wide management measures. The 50 fish creel limit was implemented in 2021 in response to the Traffic Light Approach triggering at the 30% threshold. Management is scheduled to be reevaluated in three years (2024) and may result in more stringent measures or the removal of current management requirements. The fiscal note states the WRC will evaluate impacts to the

species as part of routine fisheries management, however, the DMF already performs this function. This proposal would create redundancy and likely divergence in management of this species across State agencies introducing regulatory complexity.

In addition, Addendum III to the ASMFC Amendment 1 to the Interstate Fishery Management Plan for Atlantic Croaker has an allowance for recreational for-hire vessels to possess live Atlantic croaker for use as bait. The maximum number of Atlantic croaker allowed to be held onboard for this use prior to beginning a trip, during a trip, and after a trip is completed is the bag limit in effect multiplied by the number of customers allowed on the vessel. Diverging regulations in inland fishing waters may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all Atlantic croaker fisheries in State waters.

#### 15A NCAC 10C .0412 “BLACK DRUM”

The proposed rule establishes static management measures for this species, which falls under the management authority of the ASMFC and is subject to coast-wide management measures. A benchmark stock assessment is currently underway and is scheduled to be completed in 2022. Existing management measures may change based on the results of the assessment. These static regulations are expected to diverge from ASMFC required regulations and would result in increased confusion for the regulated public and would result in compliance issues for the State. As written, the rule does not conform to current MFC rules, specifically lacking a provision for one black drum per person per day over 25” in total length. Diverging regulations in inland fishing waters may cause the State to be found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all black drum fisheries in State waters.

#### 15A NCAC 10C .0413 “BLUE CRAB”

The proposed rule language diverges from current management under Amendment 3 to the North Carolina Blue Crab Fishery Management Plan. This change would impact the overfishing and overfished status of the plan as required under the Fisheries Reform Act of 1997. Specifically, the proposed rule does not specify no harvest of immature female crabs or sponge crabs. Currently, under Amendment 3 to the Blue Crab Fishery Management Plan, the harvest of black/brown sponge crabs is not allowed from April 1 through April 30. As proposed, this rule is inclusive of peeler crabs. The MFC has no size restrictions for peeler/soft crabs but the proposed WRC rule will place a five-inch (5") minimum size limit on peeler/soft crabs as currently written, increasing the regulatory burden on the public. The rule also states there is no closed season. However, Amendment 3 prescribes that DMF implement seasons via Proclamation M-1-2021 based on the overfished and overfished status of the stock. Not specifying season dates is a divergence from the current regulations based on sustainable fishing and would impact DMF’s ability to meet Fisheries Reform Act of 1997 objectives.

The proposed rule establishes static management measures for this species. Amendment 3 includes adaptive management that specifies the blue crab stock assessment will be updated at least once between Fishery Management Plan reviews. Based on the results, additional management measures may be implemented or management measures may be relaxed via

proclamation authority. The inability to implement needed management changes quickly would have implications for rebuilding of the stock and sustainability.

#### 15A NCAC 10C .0414 “BLUEFISH”

The proposed rule diverges from current MFC management under Proclamation FF-1-2020, which provides the For-Hire charter daily harvest limit is five (5) fish per person per day. Bluefish fall under the management authority of ASMFC and the MAFMC, and the State implements the necessary regulations via MFC's North Carolina Fishery Management Plan for Interjurisdictional Fisheries. The rule as proposed is more restrictive than the current harvest limits, so while the rule as written would not interrupt compliance with the ASMFC and MAFMC, it would result in greater confusion among the regulated public and would make enforcement more challenging.

#### 15A NCAC 10C .0417 “COBIA”

Cobia fall under the management authority of the ASMFC and is subject to coast-wide management measures. The proposed rule is less restrictive than the State's current recreational management measures approved by ASMFC. These static proposed WRC regulations would diverge from ASMFC approved regulations and would result in increased confusion for the regulated public and ASMFC compliance issues for the State. Additionally, rule .0417 would conflict with the private vessel limits and commercial limits implemented by MFC rule and DMF proclamation.

#### 15A NCAC 10C .0420 “KING MACKEREL”

King mackerel fall under the management authority of the SAFMC and are subject to coast-wide management measures. While the proposed rule language is consistent with current MFC regulations, these regulations are subject to change. The DMF and MFC have historically mirrored SAFMC regulations, which are based on the regional stock assessment. The SAFMC is currently working on an amendment that could result in changes to the minimum size limit and/or bag limit.

Additionally, in September 2020, a temporary rule was implemented to increase the recreational bag limit to four (4) fish per person through March 2021, which DMF was able to implement by proclamation. WRC's static regulations would be expected to diverge from SAFMC required regulations and would result in increased confusion for the regulated public and compliance issues for the State.

#### 15A NCAC 10C .0422 “STRIPED MULLET AND WHITE MULLET”

The proposed rule creates static regulations for striped mullet and white mullet that are expected to diverge from the MFC regulation under the North Carolina Striped Mullet Fishery Management Plan. A stock assessment is underway and may impact management for striped mullet, which could include season closures, changes in possession limits, changes in size limits, etc. The inability to implement needed management changes quickly would have implications for rebuilding of the stock and sustainability. Additionally, rule .0422 would conflict by not allowing for the use of these fish as cut bait.

#### 15A NCAC 10C .0423 “ALEWIFE AND BLUEBACK HERRING”

Alewife and blueback herring, collectively called river herring, fall under the management authority of the ASMFC and are subject to coast-wide management measures. The proposed rule language conflicts with the ASMFC harvest moratorium. For a state to allow harvest under the ASMFC Interstate Fishery Management Plan for Shad and River Herring, the state must have an approved Sustainable Fishery Management Plan.

#### 15A NCAC 10C .0424 “SHARKS”

Atlantic coastal sharks fall under the management authority of the ASMFC and are subject to coast-wide management measures and regulations that complement federal management actions for sharks. The proposed rule conflicts with DMF Proclamation FF-3-2022. Per Proclamation FF-3-2022, some species of sharks can be taken for recreational purposes and have specific limits set by proclamation. Divergent regulations may impact ASMFC compliance and would add to public confusion.

#### 15A NCAC 10C .0425 “SHEEPSHEAD”

The proposed rule would establish regulations for sheepshead that are consistent with current MFC rule, however, these regulations for time, area, means and methods, season, size, and quantity are set forth via proclamation and are, therefore, subject to change based on the outcome of the stock assessment. A benchmark sheepshead stock assessment is scheduled to begin soon. Once the stock status is determined, regulations may change based on the outcome and depending on sustainability for the stock. WRC’s static proposed regulations would be expected to diverge from MFC regulations, which would result in increased regulatory complexity for the public and would impact sustainable management.

#### 15A NCAC 10C .0426 “SPANISH MACKEREL”

Spanish mackerel are managed jointly under the authority of the SAFMC and the ASMFC. The MFC historically mirrored the council regulations. While the proposed rule language reflects the current recreational regulations there is currently a stock assessment underway. The results of that assessment could lead to changes in the regulations.

#### 15A NCAC 10C .0427 “SPOT”

Spot fall under the management authority of the ASMFC and are subject to coast-wide management measures. The current 50 fish creel limit was implemented in 2021 in response to management triggers as outlined in the ASMFC plan. Management is scheduled to be reevaluated in two years (2023) and may result in more stringent measures or the removal of current management requirements. ASMFC Addendum 3 has an allowance for recreational for-hire vessels to possess live spot for use as bait. The maximum number of spot allowed to be held onboard for this use prior to beginning a trip, during a trip, and after a trip is completed is the bag limit in effect multiplied by the number of customers allowed on the vessel. WRC’s static proposed

regulations would diverge from ASMFC approved regulations and would result in increased confusion for the regulated public and result in compliance issues for the State.

#### 15A NCAC 10C .0428 “TARPON”

The proposed rule diverges from the current MFC rule, which in addition to not allowing the take or possession of tarpon, also makes it unlawful to gaff, spear, or puncture tarpon.

#### 15A NCAC 10C .0429 “WEAKFISH (GRAY TROUT)”

Weakfish fall under the management authority of the ASMFC. The proposed rule language is consistent with current MFC regulations, however, these regulations are subject to change. Divergent regulations in inland fishing waters and/or joint fishing waters could result in the State being found out of compliance by ASMFC and result in the United States Secretary of Commerce closing all weakfish fisheries in State waters.

#### 15A NCAC 10C .0430 “OTHER FISHES”

The proposed rule as written would include many marine and estuarine species, such as kingfishes, yellow and white perch, oysters, hard clams, rangia clams, shrimp, and others, which are regulated by the MFC and DMF. N.C.G.S. § 113-129 defines fish as “(7) Fish; Fishes. – All finfish; all shellfish; and all crustaceans.” It is relevant to point out that there are other species of commercial importance that are subject to interstate or federal management that may occur in joint and inland fishing waters that fall under the definition of “fish.” Moreover, proposed rule 10C .0430 establishes no creel, size, or season for “fish.” Establishing divergent regulations for this broad spectrum of animal species, not consistent with current state regulations, could significantly increase the regulatory burden on the public. In addition, some of the “fishes” could potentially be subject to the ASMFC and federal management councils and may lead to compliance issues for the State.

#### 15A NCAC 10C .0701 “INLAND GAME FISHES DESIGNATED IN JOINT FISHING WATERS”

The proposed rule would diverge from current regulations by disallowing the use of hickory shad as cut bait for catfish by recreational hook and line anglers. This practice is currently standard in the Cape Fear River as well as other systems. The proposed rule allows possession of up to three days of creel limit, which exceeds daily per person possession requirements. Similarly, the provision identifies that the three days creel limits are allowed “at any place.” This phrase is ambiguous and needs further clarification on what defines “at any place.”

#### 15A NCAC 10C .0702 “TAKING AND POSSESSION OF OTHER FISHES BY HOOK AND LINE IN JOINT FISHING WATERS”

The proposed rule is divergent with many MFC rules currently in place. Many of the species impacted by this rule are under the management authority of the ASMFC, MAFMC, SAFMC, or some combination of these entities. Establishing divergent regulation for all other fishes in joint fishing waters would significantly increase the regulatory burden on the public,

would create regulatory conflict between the WRC, the MFC and DMF, and would cause compliance issues with ASMFC and federal agencies.

In addition, the proposed rule in Subparagraph (d)(3) identifies “joint fishing waters of the Central Southern Management Area” (CSMA) as MFC rule 15A NCAC 03R .0201. This MFC rule does not identify joint fishing waters but instead the boundaries that encompass the entire CSMA. Also, in Paragraph (d) of the proposed rule it states that size, creel limits, and seasons for fishes taken by hook and line in joint fishing waters shall be the same as those designated in sections .0300 and .0400. However, WRC designates flounder, red drum, spotted seatrout, and others only “as gamefish when occurring in inland waters” and then provides size, creel, and for flounder, seasons for these fish as it applies to their gamefish status in inland fishing waters (10C .0307; 10C .0325; 10C .0326). Since the inland gamefish as stated only applies when these fish are occurring in inland fishing waters, there is no corresponding rule that appears to cover these same species when they occur in joint fishing waters.

WRC proposed rule Subparagraph .0702(e) would also prohibit the sale of fish in joint fishing waters (excluding the game fishes listed in 10C .0701(a)) as designated in sections .0300 and .0400 in inland fishing waters. This would mean Atlantic croaker (10C .0411), black drum (10C .0412), blue crab (10C .0413), bluefish (10C .0414), cobia (10C .0417), king mackerel (10C .0420), sheepshead (10C .0425), Spanish mackerel (10C .0426), spot (10C .0427), and weakfish (10C .0429) would not be allowed to be sold when taken in joint fishing waters. The proposed changes would conflict with MFC rules that allow for the sale of those species when taken from joint fishing waters. In the case of sharks (section .0424), the proposed WRC rule prohibits taking or possessing sharks, so a fisherman would also not be allowed to sell sharks either. Additionally, section .0702(i) would conflict with MFC rule 15A NCAC 03M .0101 for mutilated finfish requirements in joint fishing waters.

#### 15A NCAC 10C .0801 “INLAND GAME FISHES DESIGNATED IN COASTAL FISHING WATERS”

The proposed rule allows possession of up to three days of creel limit, which exceeds daily per person possession requirements. Similarly, the provision identifies that the three days creel limits are allowed “at any place.” This phrase is ambiguous and needs further clarification on what defines “at any place.”



## NORTH CAROLINA MARINE FISHERIES COMMISSION DEPARTMENT OF ENVIRONMENTAL QUALITY

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Aug. 17, 2022

N.C. Rules Review Commission

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RE: Comments on N.C. Wildlife Resources Commission proposed adopted temporary rules cited as 15A NCAC 10C .0325, .0326, .0409-.0430, and .0701 and proposed amended temporary rules cited as 15A NCAC 10C .0307, .0314, .0401, and .0402, as published June 15, 2022, on the N.C. Office of Administrative Hearings website.

The North Carolina Marine Fisheries Commission (“MFC”) appreciates the opportunity to comment on the North Carolina Wildlife Resources Commission (“WRC”) proposed adopted and amended rules in 15A NCAC 10C as published June 15, 2022, on the N.C. Office of Administrative Hearings website, in particular, how the rules fail to comply with the statutory grounds for the Rules Review Commission’s review set out in G.S. § 150B-21.9(a)(3) and a number are unnecessary. The MFC believes that the temporary rules exceed the WRC’s authority with respect to the management of coastal species and that three of the temporary rules are unnecessary.

Several of the rules proposed by the WRC relate to the taking of finfish that are designated as marine and estuarine species of commercial and recreational significance, which are regulated through fishery management plans (“FMPs”) adopted by the MFC and implemented by the Division of Marine Fisheries (“DMF”) pursuant to N.C. Gen. Stat. § 113-182.1. The proposed rules also create separate regulations for the taking of certain anadromous species, which are saltwater fish that spawn in fresh water, and “migratory” coastal species, meaning that the species travels in and among the coastal waters of various states along the Atlantic coast, such as American eel, Atlantic croaker, black drum, bluefish, cobia, Spanish mackerel, spot, and weakfish. These species are managed by the MFC and DMF in concert with other states and federal agencies through the Atlantic States Marine Fisheries Commission (“ASMFC”), the Mid-Atlantic Fishery Management Council, and the South Atlantic Fishery Management Council.

Currently the WRC regulates a limited number of marine and estuarine species in inland fishing waters by referencing the regulations in place in MFC rule. With the proposed temporary rules, the WRC is seeking to establish discrete rules for a number of marine and estuarine species for which the MFC already has established management and rules in place in the State waters of the Atlantic Ocean and coastal and joint fishing waters. Because of the current fishing water boundaries, there are several inland fishing waters where significant numbers of marine and estuarine species occur.

Both the Mid-Atlantic and South Atlantic Councils were created pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.*, and the State's participation on those Councils is codified in Article 19A, Subchapter IV of Chapter 113. The Director of the DMF is statutorily designated as the "principal State official with marine fishery management responsibility and experience in the State..." with respect to the State's participation on the councils. N.C. Gen. Stat. §§ 113-259(b) and -260(b). The MFC is responsible for nominating the other members from the State, who are then selected by the Governor and submitted to the United States Secretary of Commerce for appointment.

The ASMFC is comprised of 15 states on the Atlantic coast between Maine and Florida who are signatories to the Atlantic States Marine Fisheries Compact. The Compact was approved by Congress in 1942 (16 U.S.C. § 661 *et seq.*), and ratified by the State in 1949 (Article 19, Chapter 113, *et seq.*). The ASMFC is responsible for the management of Atlantic coastal anadromous and migratory resources. N.C. Gen. Stat. § 113-252. Management efforts and plans related to these species are made in coordination with the voting member-states, as well as in coordination with federal entities, including NOAA Fisheries and the U.S. Fish and Wildlife Conservation Service. As with the two other federal councils, the DMF Director is the "first commissioner" from the State, and the Governor is responsible for appointing two additional members, one of whom must be a member of the Legislature. As with the State MFC, the ASMFC is required to take into consideration both commercial and recreational interests in designing management plans.

The MFC does not dispute the WRC's authority to establish rules in inland fishing waters. It is, however, inarguable that the WRC's adoption of separate regulations for anadromous and migratory coastal species has a direct and potentially significant impact on the ability of the MFC and DMF to manage these species in accordance with State law. Where the WRC has proposed to separately regulate species that are currently subject to interjurisdictional management plans, such regulations directly contravene the authority and duty of the MFC and DMF to ensure compliance with interjurisdictional plans. However, we are concerned that the establishment of discrete inland fishing rules for marine and estuarine species without reference to the restrictions set by the MFC will increase public confusion, rather than avoid it, and negatively impact the State's ability to successfully manage marine and estuarine species subject to the Fisheries Reform Act requirements for sustainable management. These concerns were described at length in DMF's public comment for the WRC proposed amended and adopted rules in 15A NCAC 10C as published in the January 18, 2022, issue of the *N.C. Register*. While the MFC is subject to a set of legislatively required sustainable fisheries management practices for these species, the WRC is not. This difference in legislative mandate, as well as the DMF and MFC's interstate and federal requirements through the ASMFC and regional councils, can lead to substantial differences in the methods of management used by the two agencies. Non-compliance with federal requirements has the potential to disrupt the State's access to federal funds.

Even in situations where the WRC does mirror the requirements set by the MFC, there is still potential that WRC's implementation will lag behind that of DMF, risking further overharvest. The MFC has the authority, pursuant to G.S. § 113-221.1, to implement adaptive management measures through proclamation to ensure sustainable harvest goals are achieved in a timely manner. Although the WRC has temporary rulemaking authority for certain management actions, it has no direct corollary to proclamation authority except in limited circumstances with respect to striped bass. By creating discrete inland fishing regulations for fish currently managed under State FMPs, the WRC may inadvertently cause overharvest of certain species, because of their inability to monitor these marine and estuarine species on a population level and immediately adjust seasons or bag limits through proclamation as necessary.



Finally, the existing version of 15A NCAC 10C .0307 highlights the fact that existing rule language is sufficient and that no “regulatory gap” exists for three of the adopted temporary rules. 15A NCAC 10C .0307 sets inland recreational seasons, size limits, and creel limits for flounder, sea trout, and red drum to be “the same as those established in the Rules of the Marine Fisheries Commission or proclamations issued by the Fisheries Director in adjacent joint or coastal fishing waters.” Rather than maintain these limits, the WRC has adopted separate temporary rules for flounder (.0307), sea trout (.0325), and red drum (.0326). These temporary rules are unnecessary as the existing rule references the MFC’s rules for these species and there are no existing regulatory gaps. The WRC’s permanent rulemaking action on this issue is awaiting legislative review and the current rule regarding flounder, sea trout and red drum is sufficient to protect these species in the interim.

While the MFC does not agree with WRC’s approach in adopting discrete rules for marine and estuarine species without reference to the MFC’s regulations, we do agree with the WRC’s intent to establish regulations for marine and estuarine species that are currently unregulated in inland fishing waters. These regulations, however, should be tied to current management practices and reference MFC rule and proclamations issued by the Fisheries Director for any marine and estuarine species managed in accordance with the Fisheries Reform Act. This is the current standard of management for these species and is the most harmonious with successful species management and public clarity.

Again, MFC is appreciative of this opportunity to comment on WRC’s proposed adopted and amended temporary rules in 15A NCAC 10C as published June 15, 2022, on the N.C. Office of Administrative Hearings website. The MFC requests the opportunity for MFC counsel to address the RRC regarding these rules at the RRC’s August 18, 2022, meeting.

Sincerely,



W. Robert Bizzell, Chairman  
N.C. Marine Fisheries Commission

Cc: Bill Lane, NCDEQ  
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cb/WRB