

Study: Penalties Associated with Violations of Laws Regarding Taking Shellfish and Shellfish Aquaculture Operations



N.C. Department of Environmental Quality, Division of Marine Fisheries
in consultation with the
N.C. Department of Justice and N.C. Sentencing and Policy Advisory Commission

March 1, 2020

Introduction

The North Carolina General Assembly passed Senate Bill 648, Session Law (S.L.) 2019-37 effective July 1, 2019. The bill, entitled “An Act to Provide Further Support to the Shellfish Aquaculture Industry in North Carolina,” contains several study requirements relating to the shellfish aquaculture industry. Section 10 of the bill requires the North Carolina Department of Environmental Quality (NCDEQ), Division of Marine Fisheries (DMF), in consultation with the North Carolina Department of Justice (NCDOJ) and the North Carolina Sentencing and Policy Advisory Commission (Commission), collectively “agencies”, to study penalties associated with violations of laws regarding taking shellfish and shellfish aquaculture operations.¹

The legislation instructs the agencies to specifically review G.S. 113-207 (Taking shellfish from certain areas forbidden; penalty), G.S. 113-208 (Protection of private shellfish rights), G.S. 113-218 (Protection of private marine aquaculture rights), and G.S. 113-269 (Robbing or injuring hatcheries and other aquaculture operations). The agencies have discretion to review other statutes with penalties associated with violations of laws regarding taking shellfish and shellfish aquaculture operations. In this review the agencies must consider: 1) the levels of criminal penalties, fines, and restitution; 2) the consistency and proportionality of the statutes; and 3) whether any of the statutes or their provisions are duplicative. The agencies are then directed to develop recommendations for amending relevant statutes that would make the penalties more consistent and proportional and less duplicative. The deadline for reporting the study to the General Assembly is March 1, 2020.

The number of shellfish lease applications in North Carolina has increased exponentially from the years 2005 to 2011 (22 lease applications) compared to the years 2012 to 2019 (350 lease applications). This is an increase of approximately 1,491% from 2011 to 2019. A major concern for protecting the rights of shellfish leaseholders is the cost of establishing and maintaining private aquaculture operations. Deterring theft of gear and shellfish product from grow-out locations for both water column and bottom leases is of significant concern. Shellfish growers must buy and maintain gear along with oyster seed. Additionally, some growers pay to transplant oysters and clams from other areas. All of this activity incurs significant costs. Loss of gear and product from theft may make operations unsustainable for many shellfish leaseholders.

Despite fines of up to five thousand dollars (\$5000.00) for larceny related shellfish offenses, the agencies recommend stricter minimum mandatory penalties to deter theft or injury to shellfish

¹ Senate Bill 648 (S.L. 2019-37) Section 10: The Division of Marine Fisheries of the Department of Environmental Quality, in consultation with the North Carolina Department of Justice and the North Carolina Sentencing and Policy Advisory Commission, shall study the penalties associated with violations of laws regarding taking shellfish and shellfish aquaculture operations. The agencies shall specifically review G.S. 113-207 (Taking shellfish from certain areas forbidden; penalty), G.S. 113-208 (Protection of private shellfish rights), G.S. 113-218 (Protection of private marine aquaculture rights), and G.S. 113-269 (Robbing or injuring hatcheries and other aquaculture operations), and may review other statutes with penalties associated with violations of laws regarding taking shellfish and shellfish aquaculture operations. In their review of the statutes, the agencies shall consider the levels of criminal penalties, fines, and restitution; the consistency and proportionality of the statutes; and whether any of the statutes or their provisions are duplicative. The agencies shall develop recommendations for amendment of the statutes that would make the penalties more consistent and proportional and less duplicative and that would serve to better protect the wild and cultured shellfish resources in the State. The agencies shall report the results of their study, including their recommendations, to the General Assembly no later than March 1, 2020.

aquaculture operations. Fines in criminal proceedings related to shellfish theft are generally discretionary with individual judges. Statistically, the average fine over a 20-year period for conviction of taking shellfish from a private shellfish bottom is less than twenty-five dollars (\$25.00). DMF and the Marine Patrol have observed that these minimal fines appear to serve as no tangible deterrent and could signal that the courts may be reluctant to exercise discretion to impose larger fines in shellfish larceny related offenses. Similarly, the simple threat of a larger fine up to the five thousand dollars (\$5,000.00) limit alone does not seem to deter violators from engaging in criminal conduct.

NCDEQ and DMF staff coordinated by e-mail and telephone with the Commission's legal counsel during October 2019 and the week of December 2, 2019 to coordinate review of a preliminary draft of the study. The Commission's legal counsel and executive director provided excellent informal feedback regarding content of the preliminary draft. NCDEQ and DMF staff considered this feedback which resulted in several minor revisions to the proposed draft.

NCDEQ and DMF staff subsequently appeared before the Commission at its meeting on December 6, 2019, at the North Carolina Judicial Center to present the revised draft and proposed recommendations. Staff transmitted the revised draft to Commission legal counsel several days prior to the meeting to permit counsel's preparation of a power point presentation to facilitate more formal feedback from the Commission directly. Following Commission legal counsel's presentation to the full Commission, a thorough discussion ensued regarding each of the sections required to be reviewed by the study mandate. NCDEQ and DMF staff participated in the discussion and answered questions from Commission members. At the conclusion of the discussion, the Commission indicated it had no additional comments or recommendations. NCDEQ and DMF interpret these communications as satisfying the Commission consultation requirement mandated by Section 10.

NCDEQ also consulted with NCDOJ. NCDOJ performed a thorough review of the revised draft study which the Commission vetted during the Commission consultation process. NCDOJ had two minor recommendations which were incorporated into the final version of the study. NCDEQ and DMF interpret these communications as satisfying the NCDOJ consultation requirement mandated by Section 10.

As a consequence, the agencies have several recommendations with respect to the levels of criminal penalties and fines, and consistency between § 113-207, 113-208, 113-218 and 113-269. More detailed recommendations are contained in the body of the study following review of each of these enumerated sections. A review of each of the relevant statutory provisions follows. The agencies believe the recommendations contained in this study will serve to better protect the wild and cultured shellfish resources in the State.

II. Review of N.C.G.S. 113-207

The agencies first reviewed N.C.G.S. 113-207, entitled "Taking shellfish from certain areas forbidden; penalty." The current full text of the statute provides:

§ 113-207. Taking shellfish from certain areas forbidden; penalty

a), (b) Repealed by Session Laws 2009-433, s. 7, effective August 7, 2009.

(c) It is unlawful for any person to take shellfish within 150 feet of any part of a publicly owned pier beneath which the Division of Marine Fisheries has deposited cultch material.

(d) A person who violates this section is guilty of a Class 3 misdemeanor. (1977, c. 515, s. 1; c. 771, s. 4; 1989, c. 727, s. 103; 1993, c. 539, s. 841; 1994, Ex. Sess., c. 24, s. 14(c); 1999-143, s. 1; 2009-433, s. 7.)

A. Level of criminal penalties, fines, and restitution

Violation of section 113-207 is a Class 3 misdemeanor pursuant to G.S. 15A-1340.23(b) (Punishment limits for each class of offense and prior conviction level). A Class 3 misdemeanor subjects a violator to a maximum fine of two hundred dollars (\$200.00) under section 15A-1340(b).² Imprisonment for a Class 3 misdemeanor under section 113-207 is based on the offense and prior conviction levels as denoted in the section 113-1340.23(c) punishment chart. Each grid on the chart contains sentence disposition components. "C" indicates that a community punishment is authorized. "I" indicates that an intermediate punishment is authorized. "A" indicates that an active punishment is authorized. The chart also contains a range of sentences of imprisonment. The chart is depicted as follows:

PRIOR CONVICTION LEVELS

MISDEMEANOR OFFENSE CLASS	LEVEL I No Prior Convictions	LEVEL II One to Four Prior Convictions	LEVEL III Five or More Prior Convictions
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C if one to three prior convictions 1-15 days C/I if four prior convictions	1-20 days C/I/A

Unless otherwise provided for a specific offense, section 15A-1340.23(d) further provides that the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior

² N.C.G.S. 15A-1340.23(b): Fines. - Any judgment that includes a sentence of imprisonment may also include a fine. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. If a community punishment is authorized, the judgment may consist of a fine only. Unless otherwise provided for a specific offense, the maximum fine that may be imposed is two hundred dollars (\$200.00) for a Class 3 misdemeanor and one thousand dollars (\$1,000) for a Class 2 misdemeanor. The amount of the fine for a Class 1 misdemeanor and a Class A1 misdemeanor is in the discretion of the court. (Emphasis added).

convictions shall consist only of a fine. The level of criminal penalties and fines under section 113-207 is appropriate.

B. Consistency and proportionality

There is no issue with section 113-207 associated with consistency or proportionality.

C. Duplicity with other statutes

There is no issue with respect to duplicity involving section 113-207.

D. Recommendation

The General Assembly originally promulgated section 113-207 to protect an oyster cultivation operation planted by DMF under and near a publicly owned dock in Dare County. The DMF recommends no change to section 113-207.

III. Review of N.C.G.S. 113-208

The agencies next reviewed N.C.G.S. 113-208, entitled “Protection of private shellfish rights.” The current full text of the statute provides:

§ 113-208. Protection of private shellfish rights

a) It is unlawful for any person, other than the holder of private shellfish rights, to take or attempt to take shellfish from any privately leased, franchised, or deeded shellfish bottom area without written authorization of the holder and with actual knowledge it is a private shellfish bottom area. Actual knowledge will be presumed when the shellfish are taken or attempted to be taken:

(1) From within the confines of posted boundaries of the area as identified by signs, whether the whole or any part of the area is posted, or

(2) When the area has been regularly posted and identified and the person knew the area to be the subject of private shellfish rights.

A violation of this section shall constitute a Class A1 misdemeanor, which may include a fine of not more than five thousand dollars (\$5,000). The written authorization shall include the lease number or deed reference, name and address of authorized person, date of issuance, and date of expiration, and it must be signed by the holder of the private shellfish right. Identification signs shall include the lease number or deed reference and the name of the holder.

(b) The prosecutor shall dismiss any case brought for a violation of this section if the defendant produces a notarized written authorization in conformance with subsection (a) which states that the defendant had permission to take oysters or

clams from the leased area at the time of the alleged violation; except the prosecutor may refuse to dismiss the case if he has reason to believe that the written authorization is fraudulent. (1979, c. 537; 1987, c. 463; 1989, c. 281, s. 2; 1993, c. 539, s. 842; 1994, Ex. Sess., c. 24, s. 14(c); 1998-225, s. 3.7.)

A. Level of criminal penalties, fines, and restitution

Violation of section 113-208 is a Class A1 misdemeanor which may include a fine of up to five thousand dollars (\$5,000.00). Imprisonment levels are based on the offense and prior conviction levels under section 113-1340.23(c) as denoted in the prior convictions level punishment chart described in Section II.A. above.

B. Consistency and proportionality

Section 113-208 is not consistent with section 113-218 as described below.

C. Duplicity with other statutes

There is an issue with respect to duplicity involving section 113-208. Section 113-208 was last amended in 1998 and is over 21-years old. The General Assembly promulgated section 113-218, discussed below, in 2017. While the statutes contain some general similarities, section 113-218 specifically focuses on “marine aquaculture” and “marine species,” categories of marine organisms that are defined much broader than section 113-208 “shellfish.” In fact, the 2017 definition of the term “marine species” subsumes the term “shellfish.” Section 113-218 appears to have been intended to replace section 113-208. Section 113-208 should have likely been stricken at the same time section 113-218 became law in 2017.

D. Recommendation

The agencies recommend that section 113-208 be stricken in its entirety.

IV. Review of N.C.G.S. 113-218

The agencies next reviewed N.C.G.S. 113-218, entitled “Protection of private marine aquaculture rights.” The current full text of the statute provides:

§ 113-218. Protection of private marine aquaculture rights

It is unlawful for any person, other than the holder of a lease issued under this Article, to take or attempt to take marine species being produced under the license and associated lease from any privately leased, franchised, or deeded marine aquaculture operation without written authorization of the holder and with actual knowledge it is a marine aquaculture leased area. Actual knowledge will be presumed when the marine species are taken or attempted to be taken under the following circumstances:

(1) From within the confines of posted boundaries of the area as identified by signs, whether the whole or any part of the area is posted; or

(2) When the area has been regularly posted and identified and the person knew the area to be the subject of private marine aquaculture rights.

A violation of this subsection shall constitute a Class A1 misdemeanor, which may include a fine of not more than five thousand dollars (\$5,000). The written authorization shall include the lease number or deed reference, name and address of authorized person, date of issuance, and date of expiration, and it must be signed by the holder of the marine aquaculture rights. Identification signs shall include the lease number or deed reference and the name of the holder. (2017-190, s. 1.)

A. Level of criminal penalties, fines, and restitution

Violation of section 113-218 is a Class A1 misdemeanor which may include a fine of not more than five thousand dollars (\$5,000.00). Fines for Class A1 misdemeanors are generally at the discretion of the court under section 113-1340.23(c). Imprisonment levels are based on the offense and prior conviction levels under section 113-1340.23(c) as denoted in the prior convictions level punishment chart described in Section II.A. above.

The agencies believe that even though section 113-218 authorizes discretionary fines up to five thousand dollars (\$5000.00), there is no mandatory minimum fine requirement sufficient to deter criminal activity and protect private marine aquaculture shellfish rights. A mandatory minimum fine for Class A1 misdemeanor offenses should be set statutorily at a level of five hundred dollars (\$500.00) for first-time violators. Any violation within three years of a previous violation would be subject to a mandatory \$1,000.00 penalty. Courts would retain the discretion to impose a maximum fine of five thousand dollars (\$5,000.00).

The language of section 113-218 should also clarify that the provision expressly applies to “shellfish bottom” and “water column” leases. Finally, a separate provision regarding a prosecutor’s discretion to dismiss a case under certain circumstances should be retained from the stricken section 113-208(b).

B. Consistency and proportionality

Section 218 is not consistent with section 113-208. There are no issues with respect to proportionality with other statutes.

C. Duplicity with other statutes

There is an issue with respect to duplicity involving section 113-208. As described above in Section III.C., section 113-208 was last amended in 1998 and is over 21-years old. The General Assembly promulgated section 113-218 in 2017. While the two statutes contain some general similarities, section 113-218 specifically focuses on “marine aquaculture” and “marine species,” categories of marine organisms that are defined broader than section 113-208’s sole focus on

“shellfish.” In fact, the 2017 definition of the term “marine species” subsumes the term “shellfish.” Section 113-218 appears to have been intended to replace section 113- 208 and should have likely been stricken at the same time section 113-218 became law in 2017.

D. Recommendation

The agencies recommend amending subsections 113-218(a) and (b) as follows:

113-218. Protection of private marine aquaculture rights.

(a) It is unlawful for any person, other than the holder of a lease issued under this Article, to take or attempt to take marine species being produced under the license and associated lease from any privately leased, franchised, or deeded shellfish bottom or water column marine aquaculture operation without written authorization of the holder and with actual knowledge it is a marine aquaculture leased area. Actual knowledge will be presumed when the marine species are taken or attempted to be taken under the following circumstances:

- (1) From within the confines of posted boundaries of the area as identified by signs, whether the whole or any part of the area is posted; or
- (2) When the area has been regularly posted and identified and the person knew the area to be the subject of private marine aquaculture rights.

A violation of this subsection shall constitute a Class A1 misdemeanor which may include a fine ~~of not more than five thousand dollars (\$5,000)~~ of not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00). Any second or subsequent violation of this section within three years after the date of a prior violation is guilty of a Class A1 misdemeanor punishable by a fine of not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00). The written authorization shall include the lease number or deed reference, name and address of authorized person, date of issuance, and date of expiration, and it must be signed by the holder of the marine aquaculture rights. Identification signs shall include the lease number or deed reference and the name of the holder.

(b) The prosecutor shall dismiss any case brought for a violation of this section if the defendant produces a notarized written authorization in conformance with subsection (a) which states the defendant had permission to take marine species from the leased area at the time of the alleged violation; except the prosecutor may refuse to dismiss the case if he has reason to believe that the written authorization is fraudulent. (2017-190, s. 1.)

V. Review of N.C.G.S. 113-269

The agencies next reviewed N.C.G.S. 113-269, entitled “Robbing or injuring hatcheries and other aquaculture operations.” The current full text of the statute provides:

§ 113-269. Robbing or injuring hatcheries and other aquaculture operations

(a) The definitions established in G.S. 106-758 are incorporated by reference into this section. For the purposes of this section, a shellfish lease issued pursuant to G.S. 113-202 is defined as an aquaculture facility only when it has been amended pursuant to G.S. 113-202.1 to authorize use of the water column and when it is or

has been regularly posted and identified in accordance with the rules of the Marine Fisheries Commission.

(b) It is unlawful for any person without the authority of the owner of an aquaculture facility to take fish or aquatic species being cultivated or reared by the owner from an aquaculture facility.

(c) It is unlawful for any person to receive or possess fish or aquatic species stolen from an aquaculture facility while knowing or having reasonable grounds to believe that the fish or aquatic species are stolen.

(d) It is unlawful for any person to willfully destroy or injure an aquaculture facility or aquatic species being reared in an aquaculture facility.

(e) Violation of subsections (b) or (c) for fish or aquatic species valued at more than four hundred dollars (\$400.00) is punishable under G.S. 14-72. Violation of subsections (b) or (c) for fish or aquatic species valued at four hundred dollars (\$400.00) or less is a Class 1 misdemeanor.

(f) Violation of subsection (d) is a Class 1 misdemeanor.

(g) In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with G.S. 15A-1343, restitution to the victim for the amount of damage to the aquaculture facility or aquatic species or for the value of the stolen fish or aquatic species.

(h) The district attorney shall dismiss any case brought pursuant to subsections (b) and (c) if defendant produces a notarized written authorization for taking fish or aquatic species from the aquaculture facility or if the fish or aquatic species taken from a shellfish lease aquaculture facility was not a shellfish authorized for cultivation on the lease. (1989, c. 281, s. 1; 1993, c. 539, ss. 850, 851; 1994, Ex. Sess., c. 24, s. 14(c).)

A. Level of criminal penalties, fines, and restitution

Violation of subsections 113-269(b) and (c) for fish or aquatic species valued at more than four hundred dollars (\$400.00) is punishable under G.S. 14-72, entitled “Larceny of property; receiving stolen goods or possessing stolen goods.”³ Violation of subsections (b) or (c) for fish or aquatic

³ N.C.G.S. 14-72, “Larceny of property; receiving stolen goods or possessing stolen goods”: (a) Larceny of goods of the value of more than one thousand dollars (\$1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars (\$1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars (\$1,000), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen. (b) The crime of larceny is a felony, without regard to the value of the property in

species valued at four hundred dollars (\$400.00) or less is a Class 1 misdemeanor. Violation of subsection (d) is also a Class 1 misdemeanor. Again, the amount of the fine for a Class 1 misdemeanor is in the discretion of the court under section 113-1340.23(c). Imprisonment levels are based on the offense and prior conviction levels under section 113-1340.23(c) as denoted in the prior convictions level punishment chart described in Section II.A. above.

In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with G.S. 15A-1343 (Conditions of probation) restitution to the victim for the amount of damage to the aquaculture facility or aquatic species or for the value of the stolen fish or aquatic species.

question, if the larceny is any of the following: (1) From the person. (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54, 14-54.1, or 14-57. (3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen. (4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols. (5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and G.S. 121-2(8). (6) Committed after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea. If a person is convicted of more than one offense of misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used as a prior conviction under this subdivision; except that convictions based upon offenses which occurred in separate counties shall each count as a separate prior conviction under this subdivision. (c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question. (d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C.S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4; 1977, c. 978, ss. 2, 3; 1979, c. 408, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 11, 47; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 523, s. 2; 1993, c. 539, s. 34; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 185, s. 2; 2006-259, s. 4(a); 2012-154, s. 1.)

The agencies believe that a mandatory minimum fine of five hundred dollars (\$500.00) should be statutorily set in subsections 113-269(e) and (f) for a first violation to enhance deterrence. Any violation within three years of a previous violation would be subject to a mandatory \$1,000.00 penalty. A maximum fine up to five thousand dollars (\$5,000.00) should also be added to be consistent with the proposed amendments to N.C.G.S. 113-218 above.

The agencies recommend increasing the four hundred dollar (\$400.00) valuation limit in subsection 113-269(e) to one thousand dollars (\$1,000.00).

B. Consistency and proportionality

There are several issues with respect to consistency under section 113-269.

The agencies recommend amending section 113-269(a) by striking certain language so that all leases and franchises that satisfy the definition of an “aquaculture facility” in G.S. 106-758 (Definitions) are included in section 113-269, and not just those shellfish leases with water column amendments.⁴

The imposition of a minimum five hundred dollar (\$500.00) fine and five thousand dollar (\$5000.00) fine limit should be added in new section 113-269(e) consistent with the parallel changes recommended for section 113-218 above.

C. Duplicity with other statutes

There are no issues under section 113-269 with respect to duplicity.

D. Recommendation

The agencies recommend amending subsections 113-269(a), (e) and (f) as follows:

113-269. Robbing or injuring hatcheries and other aquaculture operations.

(a) The definitions established in G.S. 106-758 are incorporated by reference into this section. ~~For the purposes of this section, a shellfish lease issued pursuant to G.S. 113-202 is defined as an aquaculture facility only when it has been amended pursuant to G.S. 113-202.1 to authorize use of the water column and when it is or has been regularly posted and identified in accordance with the rules of the Marine Fisheries Commission.~~

(b) It is unlawful for any person without the authority of the owner of an aquaculture facility to take fish or aquatic species being cultivated or reared by the owner from an aquaculture facility.

(c) It is unlawful for any person to receive or possess fish or aquatic species stolen from an aquaculture facility while knowing or having reasonable grounds to believe that the fish or aquatic species are stolen.

⁴ N.C.G.S. 106-758(2): "Aquaculture facility" means any land, structure or other appurtenance that is used for aquaculture, including, but not limited to, any laboratory, hatchery, rearing pond, raceway, pen, incubator, or other equipment used in aquaculture.

(d) It is unlawful for any person to willfully destroy or injure an aquaculture facility or aquatic species being reared in an aquaculture facility.

(e) Violation of subsections (b) or (c) for fish or aquatic species valued at more than ~~four hundred dollars (\$400.00)~~ one thousand dollars (\$1,000.00) is ~~punishable a Class H felony~~ under G.S. 14-72: which shall include a fine of not less than five hundred dollars (\$500.00) nor more than five thousand (\$5,000.00) dollars. Violation of subsections (b) or (c) for fish or aquatic species valued at ~~four hundred dollars (\$400.00)~~ one thousand dollars (\$1,000.00) or less is a Class 1 misdemeanor.

(f) Violation of subsection (d) is a Class 1 misdemeanor which shall include a fine of not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00). Any second or subsequent violations of this section within three years after the date of a prior violation is guilty of a Class 1 misdemeanor punishable by a fine of not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00)

(g) In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with G.S. 15A-1343, restitution to the victim for the amount of damage to the aquaculture facility or aquatic species or for the value of the stolen fish or aquatic species.

(h) The district attorney shall dismiss any case brought pursuant to subsections (b) and (c) if defendant produces a notarized written authorization for taking fish or aquatic species from the aquaculture facility or if the fish or aquatic species taken from a shellfish lease aquaculture facility was not a shellfish authorized for cultivation on the lease. (1989, c. 281, s. 1; 1993, c. 539, ss. 850, 851; 1994, Ex. Sess., c. 24, s. 14(c).)