

## **Fiscal Impact Analysis of Proposed Rule Amendment to the Mutilated Finfish Rule**

**Rule Amendments:** 15A NCAC 03M .0101 (amendment)

**Name of Commission:** N.C. Marine Fisheries Commission

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**Impact Summary:** State government: Yes  
Local government: No  
Federal government: No  
Substantial impact: No

### **AUTHORITY**

#### N.C. General Statutes

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

#### N.C. Marine Fisheries Commission Rules (See Appendix II)

15A NCAC 03H .0103 Proclamations, General  
15A NCAC 03I .0102 Temporary Suspension of Rules  
15A NCAC 03M .0502 Mullet  
15A NCAC 03M .0510 American Eel  
15A NCAC 03M .0512 Compliance with Fishery Management Plans  
15A NCAC 03M .0519 Shad\*  
15A NCAC 03M .0520 Tuna

\* Rule is undergoing reoption. All requirements except paragraph (c) are suspended in accordance with the Atlantic States Marine Fisheries Commission (ASMFC) fishery management plan (FMP).

**Necessity:** The original intent of the mutilated finfish rule was to provide added resource protection for finfish species subject to a size or bag limit. Proposed amendments to this rule would provide flexibility to manage current conditions for the use of certain finfish species as cut bait, as well as variable conditions that could occur in the future, all while continuing to protect fisheries resources. Proposed amendments would also clarify requirements, benefitting affected stakeholders and Marine Patrol officers.

## **I. Summary**

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

Small, but unquantifiable potential State benefits could result from the proposed changes, as all finfish species with a possession limit would be subject to the mutilated finfish requirements unless the Fisheries Director issued a proclamation under separate authority excepting a species from these requirements to allow it to be used as cut bait. The proclamations could preserve acceptable practices for cutting species that are occurring now and specify practices for cutting species that are prevented by the current rule but would be acceptable to occur after the rule is amended. This allowance could provide private benefits resulting from additional species being available to be used as cut bait, potentially providing more effective and more cost-effective bait for finfish harvest. The decision to issue such proclamations would be under the authority of the Fisheries Director at the time the amended rule would be effective, consistent with the variable conditions provided in 15A NCAC 03H .0103. The described changes would help close potential loopholes, resulting in increased resource protection and ease of enforcement.

There could be small private costs to fishers through species potentially having variable use as cut bait in response to variable conditions. In other words, the Fisheries Director could use their discretion to prevent cutting species that are occurring now based on then-variable conditions. The flexibility to respond to such variable conditions and fluctuating stocks could allow for more effective management and quicker responses to struggling species. Impacts are not expected to be substantial as there are only two species that could be impacted (striped mullet and hickory shad).

## **II. Introduction and Purpose of Rule Change**

During the August 2021 MFC quarterly business meeting, a motion was passed requesting the N.C. Division of Marine Fisheries (DMF) to develop an issue paper for rulemaking examining the mutilated finfish rule. Discussions during the meeting identified potential issues with the rule, current limitations of the rule, and potential changes needed. Specifically, it was noted there have been recent issues with the public unknowingly failing to abide by requirements of the rule by using species that are not allowed as cut bait. The rule was not originally promulgated to manage cut bait per se, but rather to protect finfish species regulated by a size limit, bag limit, or other possession limit, and discourage fishers from intentionally deceiving Marine Patrol officers and evading regulations. Due to stock changes in many species, there were fewer finfish species

subject to the rule in 1991 than there are today. As more species were managed by possession limits the mutilated finfish rule started to apply to species that had historically been used as cut bait. For example, spot and Atlantic croaker have historically been used as cut bait in many fisheries and were not subject to bag limits until April 2021. Upon implementation of bag limits, the mutilated finfish rule did not allow for either of these species to be used as cut bait. To allow for alignment with existing management and the mutilated finfish rule the MFC identified the need for flexibility with the mutilated finfish rule. Several species have been identified for possible rule exceptions or changes to current exceptions based on communications from stakeholders, feedback from Marine Patrol officers, and implications from stock assessments and FMPs.

One explicit example of public confusion regarding the mutilated finfish rule was an interaction between commercial trotline fishers and Marine Patrol officers in 2021. The commercial trotline fishers contacted the Fisheries Director in June 2021, after an interaction with Marine Patrol officers where violations of the mutilated finfish rule were identified. The issue stemmed from the fishers switching bait from gizzard shad, which is not subject to the mutilated finfish rule, to American eel. Using American eel for cut bait is prohibited under the mutilated finfish rule, as eel is subject to a minimum size limit and bag limit. This scenario applied to about a dozen fishers in the Albemarle Sound region who participated in the blue catfish trotline fishery that year. Since the current mutilated finfish rule specifies cut bait requirements and exceptions within the rule itself and not within the finfish species rules, there was confusion by fishers about whether American eel could be used as cut bait. At its February 2022 quarterly meeting, the MFC determined the mutilated finfish rule needs to be amended to better adapt to species level changes in stock needs and in response to fishers' behavior.

Due to current possession and size limits, use of American eel, spot, Atlantic croaker, and bluefish as cut bait creates conflicts with the current mutilated finfish rule based on communication from stakeholders, feedback from Marine Patrol officers, and implications from stock assessments and FMPs. Though the division does not collect data on how impactful cut bait allowance is on species, there is information on the size of each commercial fishery and their ex-vessel values. From 2010 to 2020 the average pounds and ex-vessel value of the species discussed are: American eel (18,833lb. and \$35,866), spot (352,687lb. and \$488,327), Atlantic croaker (1,318,548lb. and \$1,444,154), and bluefish (1,164,834lb and \$700,694). DMF collects extensive data on recreational fisheries including the pounds harvested and number of trips targeting each species. The average pounds harvested, and number of trips targeted of each species listed above between 2016 and 2020 is as follows: spot (643,183lb. and 1,007,051 trips), Atlantic croaker (258,711lb. and 1,292,747 trips), and bluefish (2,951,388lb. and 2,823,652 trips). Recreational pounds and trips for American eel are minimally, if ever, encountered.

American eel has become a popular bait in the commercial trotline fishery for catfish and as bait in the recreational catfish fishery replacing other baits like gizzard shad. In the commercial trotline fishery, fishers were unknowingly harvesting American eel without complying with regulations requiring all commercial fishers harvesting American eels by eel pots to participate in a monthly logbook program designed to monitor the fishery. Because American eel are subject to a nine-inch minimum size limit, commercial and recreational fishers using American eel as cut bait were unknowingly violating the mutilated finfish rule.

Another example (referenced above) is spot and Atlantic croaker, which both became subject to bag limits in April 2021 to address stock concerns that indicated harvest and abundance triggers were above monitoring thresholds indicating moderate concern and requiring management action. As required by Addendum III to the FMPs for spot and Atlantic croaker, a 50 fish bag limit was implemented by proclamation, automatically subjecting spot and Atlantic croaker to the mutilated finfish rule and prohibiting their use as cut bait.

In the case of bluefish, from June 2003 until January 2020 the bag limit was set at 15 fish. In 2019 the bluefish stock assessment determined bluefish was overfished but not experiencing overfishing. In response to the overfished status, a rebuilding plan designed to rebuild the stock in seven years was approved. Management measures used to help rebuild the stock include lower bag limits for the recreational fishery and commercial trip limits for the commercial fishery. Bluefish are managed as a coastwide stock from Maine through Florida, under the joint ASMFC and Mid-Atlantic Fishery Management Council Bluefish FMP, and management measures in North Carolina are implemented by proclamation to comply with and meet the FMP goals.

Striped mullet and hickory shad are the only species that could potentially lose their exception status in response to the proposed amendment to the mutilated finfish rule. The exception for tuna in the current mutilated finfish rule was only put in place to maintain consistency with NOAA Fisheries regulations. For tuna and the State requirements in 15A NCAC 03M .0520. The tuna-specific exception has been replaced by the language "unless otherwise specified in a rule of the Marine Fisheries Commission" in the proposed rule. Requirements for tuna under the current rule and the proposed rule are identical and are therefore not discussed further in this analysis.

Changes to the current exception for mullet may be needed based on the outcome of the striped mullet stock assessment, which is currently underway. Through the FMP process, management changes may be needed. Mullet is popular as a cut bait in many recreational fisheries and despite being subject to a 200 mullet per person per day bag limit, is excepted from the requirements of the current mutilated finfish rule. A striped mullet stock assessment completed by NCDMF in 2022 indicates the stock is overfished and overfishing is occurring. This represents a variable condition where the exception provided by the current mutilated finfish rule for mullet may need to be reconsidered based on any management changes that may occur through the FMP to end overfishing and rebuild the stock. Having flexibility based on this proposed rule modification would allow these potential changes to be implemented to meet these changing conditions for the protection of the stock in a timely fashion.

In North Carolina, hickory shad are included in the North Carolina FMP for Interjurisdictional Fisheries, which defers to the ASMFC for FMP compliance requirements. The exception for hickory shad in the mutilated finfish rule allows hickory shad to be used as cut bait while still allowing enforcement of current regulations. In the proposed amendment hickory shad would require a proclamation at the discretion of the Fisheries Director to respond to then-variable conditions to continue to be used as cut bait. There is no information available at this time that indicates a change will be needed.

The factors that have led to this proposed rule change come from the need for clarity in the mutilated finfish rule, adaptation to variable environmental and stock needs, responses to changes in angler preferences, and the need to continue to protect the finfish resource. In response to changes in prices and bait availability there have been cases, like American eel for use in the catfish fishery, where fishers switched their bait preferences to more economic and effective options. Fishers are adaptive participants in the fisheries they participate in and have historically responded efficiently to changes in available species. Though their access to species can be variable, they are equally variable in their preferences and are historically able to substitute between species in response to management changes based on the best available science and data. When anglers are adapting to the variable environmental conditions and switching their preferences there is a need for clear regulation to ensure maximized compliance and ensure management is being implemented in the best way possible to balance resource needs and user preferences. To allow for anglers to better understand regulations, this rule could consolidate species-specific regulations to a single rule or proclamation for each species.

It is likely that species beyond the six outlined could require similar consideration in the future. Therefore, the proposed changes amend the rule in a way that could resolve current conflicts with species used as cut bait, provide flexibility to manage variable conditions, and allow all requirements for a particular finfish species to be aggregated in a single proclamation (including for bait usage) for more comprehensive management, all while continuing to protect fisheries resources.

### **III. Fiscal Analysis**

This rule amendment is expected to produce small, but unquantifiable benefits to the State and to fishers. Each finfish species with a possession limit will be subject to the mutilated finfish rule unless otherwise stated in a rule of the MFC or a proclamation issued pursuant to a rule of the MFC. The change will allow fishers to better understand and follow regulations and ease enforcement. Species that could be used for cut bait may vary in response to variable conditions and updated data per the authority already granted to and at the discretion of the Fisheries Director. The mutilated finfish rule will defer to proclamation or other MFC rule that dictates whether a species is subject to the mutilated finfish rule, allowing for more consolidated species management regulations. Implementation of the amended rule will follow current operational procedures and is not expected to produce costs to the State. Due to the lack of counterfactual and breadth of the small stream of benefits to the State and fishers, the benefits are not quantifiable.

#### **a) Summary of Potential Economic Benefit**

The primary economic impacts from the proposed rule amendments will occur as a small stream of benefits due to increased efficiency and clarity in enforcement for fishers and Marine Patrol officers with the end goal of greater compliance and species protection for species that are already subject to the limitation. Through the proposed amendments to the mutilated finfish rule, the Fisheries Director could remove and implement species-specific exceptions to the rule, through proclamation, to achieve resource management goals. Proclamation use can allow for a more responsive way to implement management measures based on updated stock assessments

and FMPs and may accommodate changes to species being used for cut bait as new data is made available to DMF. Stock assessments and FMPs are updated at various times, and the need to protect a stock from fishing pressure or allow expansion of fishing effort is necessary to meet stock management goals while balancing use of the marine and estuarine resources for all users. Managing cut bait at the species level will allow DMF to meet its goals of effectively managing the State's marine and estuarine fisheries resources more efficiently.

The amended rule will harmonize existing species-specific management measures with any needed cut bait exceptions that could be implemented via existing proclamation authority to comprehensively manage various finfish fisheries of the State, at the discretion of the Fisheries Director. Providing the public with more clarity surrounding the proper legal use of cut bait will allow for small private benefits in the form of fishers being able to make more informed decisions when using cut bait and complying more efficiently with requirements. The lack of counterfactual and the unknown scope of proclamations potentially needed under future variable conditions make the benefits unquantifiable. Though the benefits from this rule change are not explicitly quantifiable, they are real and will enable better management of the State's marine and estuarine finfish stocks.

#### **b) Summary of Potential Costs**

The scope of potential costs to the State is negligible. There could be variable conditions that could lead to species being precluded from being used as cut bait. The limitation to no longer allow species as cut bait could be in response to variable environmental and stock conditions. Allowing cut bait management to be managed within a single rule or proclamation by species and any exceptions to be made on a species-specific basis will bring clarity and help eliminate loopholes. The DMF issues news releases and proclamations and updates the recreational size and bag limit information routinely for stakeholders. Additionally, Marine Patrol officers, port agents, and other DMF staff conduct ongoing outreach about new requirements. Five of the six finfish species examined here (American eel, spot, Atlantic croaker, bluefish, and hickory shad) already have proclamations in place, so if management changes are needed in the future or if a mullet proclamation is needed, there are established processes that are part of existing job duties the DMF utilizes for reissuing and issuing proclamations with which the public is familiar. Any changes in proclamations in the future regarding mutilated finfish could occur as part of normal job duties and are not expected to incur additional costs to the State.

1 **Appendix I: Proposed Rule**

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3 **15A NCAC 03M .0101 MUTILATED FINFISH**

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

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

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

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

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

14 *Eff. January 1, 1991;*

15 *Amended Eff. January 1, 1991;*

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

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

18 *Readopted Eff. April 1, 2019.*

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

## Appendix II: Related Current Rules

### 15A NCAC 03H .0103 PROCLAMATIONS, GENERAL

(a) It is unlawful to violate the provisions of a proclamation issued pursuant to a rule of the Marine Fisheries Commission, as provided in G.S. 113-221.1.

(b) If specific variable conditions are not set forth in a rule of the Marine Fisheries Commission that grants proclamation authority to the Fisheries Director, the Fisheries Director shall consider the following variable conditions in exercising proclamation authority:

- (1) compliance with changes mandated by the Fisheries Reform Act and its amendments;
- (2) biological impacts;
- (3) environmental conditions;
- (4) compliance with Fishery Management Plans;
- (5) user conflicts;
- (6) bycatch issues;
- (7) variable spatial distributions; and
- (8) protection of public health related to the public health programs that fall under the authority of the Marine Fisheries Commission.

*History Note:* Authority G.S. 113-134; 113-135; 113-182; 113-221.1; 113-221.2; 113-221.3; 143B-289.52; Eff. January 1, 1991;  
Amended Eff. March 1, 1994; September 1, 1991;  
Temporary Amendment Eff. July 1, 1999;  
Amended Eff. May 1, 2017; April 1, 2011; August 1, 2000;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. January 9, 2018.

### 15A NCAC 03I .0102 TEMPORARY SUSPENSION OF RULES

The Fisheries Director is authorized to suspend, in whole or in part, until the next meeting of the Marine Fisheries Commission, or for a lesser period, the operation of any rule of the Marine Fisheries Commission regarding coastal fisheries which may be affected by variable conditions.

*History Note:* Authority G.S. 113-134; 143B-289.52;  
Eff. January 1, 1991;  
Recodified from 15A NCAC 3I .0002 Eff. December 17, 1996;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. January 9, 2018.

### 15A NCAC 03M .0502 MULLET

(a) It shall be unlawful to possess more than 200 mullet per person per day for recreational purposes.

(b) The Fisheries Director may, by proclamation and pursuant to 15A NCAC 03H .0103, impose any of the following restrictions on the taking of mullet:

- (1) specify time;
- (2) specify area;
- (3) specify means and methods;
- (4) specify season;
- (5) specify size; and
- (6) specify quantity, except as provided in Paragraph (a) of this Rule.

*History Note:* Authority G.S. 113-134; 113-182; 113-221.1; 143B-289.52;  
Eff. January 1, 1991;  
Amended Eff. July 1, 2006;  
Readopted Eff. April 1, 2019.



**15A NCAC 03M .0510 AMERICAN EEL**

- (a) It shall be unlawful to possess, sell, or take American eels less than nine inches in length.
- (b) It shall be unlawful to possess more than 25 American eels per person per day for recreational purposes, except the master and each mate of for-hire vessels that hold a valid for-hire license may possess 50 eels each per day.
- (c) It shall be unlawful to possess American eels from September 1 through December 31, except when taken by baited pots.

*History Note:* Authority G.S. 113-134; 113-182; 143B-289.52;  
Eff. July 1, 1993;  
Temporary Amendment Eff. August 1, 2000;  
Amended Eff. May 1, 2015; April 1, 2001;  
Readopted Eff. April 1, 2019.

**15A NCAC 03M .0512 COMPLIANCE WITH FISHERY MANAGEMENT PLANS**

(a) In order to comply with management requirements incorporated in Federal Fishery Management Council Management Plans or Atlantic States Marine Fisheries Commission Management Plans or to implement state management measures, the Fisheries Director may, by proclamation, take any or all of the following actions for species listed in the Interjurisdictional Fisheries Management Plan:

- (1) Specify size;
- (2) Specify seasons;
- (3) Specify areas;
- (4) Specify quantity;
- (5) Specify means and methods; and
- (6) Require submission of statistical and biological data.

(b) Proclamations issued under this Rule shall be subject to approval, cancellation, or modification by the Marine Fisheries Commission at its next regularly scheduled meeting or an emergency meeting held pursuant to G.S. 113-221.1.

*History Note:* Authority G.S. 113-134; 113-182; 113-221; 113-221.1; 143B-289.52;  
Eff. March 1, 1996;  
Amended Eff. October 1, 2008;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. January 9, 2018.

**15A NCAC 03M .0519 SHAD**

- (a) It is unlawful to take American shad and hickory shad by any method except hook-and-line from April 15 through December 31.
- (b) It is unlawful to possess more than 10 American shad or hickory shad, in the aggregate, per person per day taken by hook-and-line or for recreational purposes.
- (c) It is unlawful to take or possess American shad from the Atlantic Ocean.

*History Note:* Authority G.S. 113-134; 113-182; 113-221.1; 143B-289.52;  
Eff. October 1, 2008;  
Amended Eff. April 1, 2012.

**15A NCAC 03M .0520 TUNA**

- (a) It shall be unlawful to possess for recreational purposes any of the following:
  - (1) yellowfin tuna less than 27 inches curved fork length;
  - (2) bigeye tuna less than 27 inches curved fork length; and
  - (3) more than three yellowfin tuna per person per day.
- (b) It shall be unlawful to possess in a commercial fishing operation any of the following:
  - (1) yellowfin tuna less than 27 inches curved fork length or 27 inches from the fork of the tail to the forward edge of the cut of beheaded tuna;

- (2) bigeye tuna less than 27 inches curved fork length or 27 inches from the fork of the tail to the forward edge of the cut of beheaded tuna;
- (3) Atlantic bluefin tuna less than 73 inches curved fork length or 54 inches pectoral fin curved fork length; and
- (4) tuna subject to a size or harvest restriction without having the tail attached.

*History Note: Authority G.S. 113-134; 113-182; 143B-289.52;  
Eff. October 1, 2008;  
Amended Eff. April 1, 2011;  
Readopted Eff. April 1, 2019.*