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February 19, 2019

Via email

Mr. Rob Bizzell
Chairman, N.C. Marine Fisheries Commission
3441 Arendell Street
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Re: Fiscal analysis for the North Carolina Wildlife Federation's Petition for Rulemaking

Dear Chairman Bizzell,

On behalf of the North Carolina Wildlife Federation, I am writing to express disappointment about the Division of Marine Fisheries' handling of the Federation's petition for rulemaking. Over two years ago, the Marine Fisheries Commission approved the North Carolina Wildlife Federation's petition for rulemaking that would overhaul the outdated, ineffective management strategies currently in place in the shrimp trawl fishery with research-based, modern rules for this fishery ("proposed rules"). Since that time, the Commission and the public have waited patiently for the Division of Marine Fisheries to complete its evaluation of the fiscal and economic impacts of the proposed rules so that the rulemaking process can begin and the Commission can solicit public comment on the proposed rules. After two years of closed door conversations, the Division produced a final fiscal note that defies logic, contradicts basic principles of fisheries management, and is unmoored to law. Worse still, deferring entirely to the Division's outlandish estimates of impacts to its budget, the Office of State Budget and Management ("OSBM") declined to certify the fiscal note.

The Commission is not scheduled to take any further action on the fiscal note at the February 2019 meeting, presumably in deference to counsel that there is no further action for the Commission to take. But the rulemaking process *cannot* end here. The Commission must complete the rulemaking process as provided for under the N.C. Administrative Procedure Act. See N.C. GEN. STAT. § 150B-1, *et seq.* The Commission has at least two options at this stage in the process: 1) to vote to disapprove the flawed fiscal note and send the Division back to the drawing board to correct the myriad errors in its analysis, or 2) to vote to publish the flawed fiscal note and notice of proposed text in the N.C. Register and continue with the rulemaking process, as provided for under state law. If the Commission takes neither of these actions, it will have effectively turned its rulemaking authority over to the Division, and the public will be unlawfully denied the opportunity to participate in the legally-required public process as part of the rulemaking process.

I. The Marine Fisheries Commission’s rulemaking authority under state law and the rulemaking process

The North Carolina General Assembly granted the Marine Fisheries Commission the authority to adopt rules to “manage[], protect[], preserv[e], and enhance[] . . . the marine and estuarine resources” of the State, N.C. GEN. STAT. § 143B-289.52(a) (2016), and to “provide a sound, constructive, comprehensive, continuing, and economical coastal fisheries program” for the State. *Id.* § 143B-289.51(b)(2). The Commission’s regulation of commercial and recreational fishing must be “in the interest of the public,” as the marine and estuarine resources of North Carolina “belong to the people of the State.” N.C. GEN. STAT. § 143B-289.52(a)(2) (2016).

The Commission may adopt rules on its own initiative or it may do so in response to a petition for rulemaking. The N.C. Administrative Procedure Act (“APA”) and Commission rules allow any member of the public to petition the Commission to adopt a rule by filing a petition for rulemaking. *See* N.C. GEN. STAT. § 150B-20(a); 15A N.C. ADMIN. CODE 3P.0301. When the Commission grants a petition, it “*must* initiate rule-making proceedings.” N.C. GEN. STAT. § 150B-20(a) (emphasis added); *see also* 15A N.C. ADMIN. CODE 3P.0303 (b)(1) (stating that the Commission “*shall* initiate rulemaking proceedings”) (emphasis added). The rulemaking process is clearly laid out in the APA: the Commission is to publish the text of the proposed rule and any associated fiscal note in the N.C. Register, hold a public hearing on the proposed rule, accept oral and written comments on the proposed rule and fiscal note, and make a final decision whether to adopt the proposed rules. *See* N.C. GEN. STAT. § 150B-21.2.

The APA requires the preparation of a fiscal note when a proposed rule would have a “substantial economic impact,” require the expenditure of state funds subject to the State Budget Act, or require the expenditure of local government funds. *See* N.C. GEN. STAT. § 150B-21.4 (a). The primary function of the fiscal analysis is to provide an objective analysis of the fiscal and economic impact of the proposed rules. *See Id.* 150B-21.4(b2); *see also* N.C. OFF. OF ST. BUDGET & MGMT., North Carolina Budget Manual § 7.1 (2018), https://files.nc.gov/ncosbm/documents/files/BudgetManual_2018July.pdf; *see also* N.C. OFFICE OF ST. BUDGET & MGMT., North Carolina Budget, Fiscal Note Training Presentation 4 (Nov. 2017), https://files.nc.gov/ncosbm/documents/files/2017_FiscalNoteTraining.pdf (noting that the fiscal analysis is conducted to “[i]nform through objective analysis of likely outcomes,” *not* to “[d]efend or criticize policy.”). Preparation of a fiscal note is but one of many essential steps in the rulemaking process. The APA suggests that the OSBM must review a fiscal note and certify the availability of funds for the proposed rule before the notice of text is published in the N.C. Register. *See* N.C. GEN. STAT. § 150B-21.4(a). Typically the Commission delegates the responsibility of preparing a fiscal note to the Division. Once the fiscal note is complete, the notice of proposed text and fiscal note are published in the North Carolina Register, and the Commission receives public comment on both before deciding to adopt a final rule.

II. The Division's biased handling of the petition

In November 2017, after months of consultation with researchers and fisheries managers, the Federation submitted a petition for rulemaking to the Commission proposing rules to modernize and overhaul the outdated rules governing North Carolina's shrimp trawl fishery. The Federation sought to collaborate with the Commission and the Division, going as far as amending the petition to address concerns expressed by the Commission's chairman in January 2017. On February 16, 2017, a majority of the Commission granted the petition for rulemaking.

The Commission charged the Division with a straightforward task: to conduct an objective review of the economic and fiscal impacts of the proposed rules in the petition using the best available data. With fisheries economists, biologists, and fisheries managers in-house, the Division seemed well-suited to carry out this task.

In June 2018, sixteen months after the Commission approved the petition and after several inquiries by the Federation about the status of the analysis, the Division produced a draft fiscal note. Much to the Federation's disappointment, the Division's analysis was fraught with factual and legal errors, which were detailed in a letter to the Commission and Division in August 2018 (Attachment 1). In short, the draft fiscal note was both legally and substantively deficient, constituted a policy position paper, and was almost entirely devoid of any analysis of the economic impacts of the proposed rules. The Division's bias against the proposed rules was plainly evident in the draft document, as it has been since the petition was introduced in November 2017. The draft failed to provide the public or the Commission with reliable information on which to evaluate the proposed rules.

To our knowledge, the Commission was never formally presented with the draft fiscal note or the opportunity to offer comment on the substance of the draft fiscal note. The public likewise had no opportunity to comment on the Division's flawed document.

At some point before January 4, 2019, the Division finalized the fiscal note and sent it to the Office of State Management and Budget for approval.¹ On January 4, 2019, nearly two years after the Commission approved the petition, the OSBM concluded in an email "that sufficient state funds are not available to implement the proposed rule changes without undue detriment to the agency's existing activities." Email from Carrie Hollis, OSBM, to Steve Murphey, DMF (Jan. 4, 2019). This email is the only statement of OSBM's position; OSBM did not produce a separate analysis explaining its decision. Ten days later, on January 14, Director Murphey forwarded the final fiscal note and OSBM's conclusion to the Federation. Email from S. Murphey, DMF, to Tim Gestwicki, N.C. Wildlife Federation (Jan. 14, 2019). To the undersigned's knowledge, the Commission was not provided a copy of the final fiscal note until February 2019. *See* Email from Tricia Smith, DMF, to Blakely Hildebrand, SELC (Feb. 11,

¹ The Southern Environmental Law Center ("SELC") submitted a public records request to the Division on November 13, 2018 requesting records related to the fiscal note. As of this writing, SELC has not received any public records responsive to that request, though SELC understands that the Division is processing the request.

2019) (announcing location, time, and agenda of February 2019 Commission meeting and providing a link to all meeting materials, including a copy of the final fiscal note).

III. The Division's flawed fiscal note

Setting aside the procedural concerns described above, the fiscal note suffers from numerous failures. Put simply, the Division failed to cure the substantive and legal deficiencies outlined in the Federation's August 2018 correspondence to the Commission in its final fiscal note. OSBM compounded this error by accepting and basing its decision not to certify the fiscal note on the Division's flawed document. The errors in the fiscal note are detailed in the attached review prepared by the Federation (Attachment 2).

The Division went to great lengths to make the case for why the proposed rules would have a "detrimental" effect to its current programs, for example, stating that it would need to purchase an airplane and to hire and pay staff for an additional 52,000 hours to enforce the proposed rules. *See* Fiscal Impacts of Proposed Rules from Petition for Rulemaking Submitted by the North Carolina Wildlife Federation 120-21 (undated), http://portal.ncdenr.org/c/document_library/get_file?p_1_id=1169848&folderId=32656904&name=DLFE-140040.pdf. The fiscal note does not justify why these specific, exorbitant expenditures are necessary—or why lesser expenditures could not work. Instead of attempting to find a way to efficiently lower and manage the possible costs of implementing the proposed rules, the Division appears to have approached the fiscal note with the preconceived notion that there is no way to possibly afford implementing the rules. This mentality clearly tainted the process. The Federation concedes that implementation and enforcement of the proposed rules will require Division resources. So does every fishery management plan and regulatory change that the Commission adopts. Like all other agencies facing implementation of a new rule, the Division would be required to shift priorities for enforcement and programming to follow through on its regulatory duties. Taken to its logical conclusion, any proposed rule that will cost the state any money whatsoever will not meet OSBM's threshold. This is a dangerous and ludicrous precedent.

OSBM's decision not to certify flies in the face of logic – but the agency cannot be blamed entirely for this decision. Lacking expertise in fisheries management or fisheries economics, OSBM relied on the Division's flawed analysis to reach its conclusion that state funds are not available to implement the proposed rules. OSBM did not conduct its own independent fiscal analysis, question the Division's unfounded assumptions, or challenge Division's outrageous assessment of state budget impacts. Email from Carrie Hollis, OSBM, to Blakely Hildebrand, SELC (Jan. 18, 2019) (stating that "OSBM reached its determination based on information provided in the agency's fiscal note").

The Division failed to follow through on its straightforward obligations and has deprived the public and the Commission of an unbiased, accurate document. Worse yet, DMF did so behind

closed doors, shrouding in secrecy its entire process for conducting its review of economic and fiscal impacts.

IV. **The Commission must take further action on the petition.**

According to its published agenda for the February 2019 meeting, the Commission is not expected to take up the fiscal note at all. The only mention of the fiscal note is a notation under the Chairman's report. We understand that the Commission has been advised that it may not take up the fiscal note because OSBM failed to certify that the funds necessary for the proposed rule are available in the agency budget. In short, the Commission has been advised that the petition is dead.

This interpretation is wrong for several reasons. First, the North Carolina General Assembly vested the Marine Fisheries Commission, *not* the Division, with rulemaking authority. N.C. GEN. STAT. § 143B-289.52(a). As such, the Commission, *not* the Division, has final say on regulatory matters. A majority of the Commission approved the Federation's petition for rulemaking over two years ago. In a strange turn of events, the Division stacked the deck against the petition. Knowing that OSBM lacks the subject matter expertise to critique the fiscal note and that OSBM will rely on the Division's assessment of its budget impacts, the Division drew up a technically and legally flawed fiscal note that predicts outlandish impacts to the Division's budget. Given this, it is no surprise that OSBM declined to certify that funds are available to implement the proposed rules. The Division used the certification process to its advantage in an attempt to circumvent the Commission's regulatory authority. The Commission can delegate the responsibility to draft a fiscal note; however it did not—and cannot—abrogate its rulemaking authority by delegating this discrete responsibility. The counsel that the Commission has received is plainly in conflict with the letter and spirit of state law.

Second, the Commission *must* initiate the rulemaking process when it grants a petition for rulemaking, which requires the Commission to publish the notice of proposed text and follow through to public comment. N.C. GEN. STAT. § 150B-20(a); 15A N.C. ADMIN. CODE 3P.0303 (b)(1). The APA and the Commission's rules are clear on this point. Nowhere in the APA does the legislature provide an explicit off-ramp for the rulemaking process *before* the rulemaking process even begins. Had the legislature or the Commission intended for OSBM's failure to certify a fiscal note to derail the rulemaking process, the legislature and the Commission could have accounted for this scenario in the statute and the rules.

Finally, the public's role in the rulemaking process is tantamount to the Commission's. *See* N.C. GEN. STAT. § 150B-21.2(a) (requiring public comments on all proposed rules). To the extent there is any ambiguity about the next steps in this process, that ambiguity must be resolved in favor of allowing the maximum public participation afforded by law. If the Commission takes no further action on the petition, the public will be unlawfully denied the opportunity to participate in the legally-required public process protected as part of the rulemaking process.

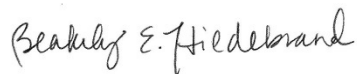
V. Conclusion

What transpired over the last two years has been nothing short of a charade designed to shut out the Federation and the public and advance the position of the Division over the wishes of the majority of the Marine Fisheries Commission. In the process, the Division has damaged its credibility as an objective and neutral agency and threatened the public trust resources the Division and Commission are obligated to protect.

While some current commissioners may disagree with the petition itself, it is undeniable that the Division has attempted to thwart the Commission's authority with these procedural shenanigans. The Commission must act on the petition; this is its statutory duty. As noted above, the Commission may: 1) vote to disapprove the flawed fiscal note and send the Division back to the drawing board to correct the myriad errors in its analysis, or 2) vote to publish the flawed fiscal note and notice of proposed text of the proposed rules in the N.C. Register and solicit public comments on the proposed rules and fiscal note, as provided for under the N.C. Administrative Procedure Act. The decision about how to move forward is the Commission's alone.

Thank you for your consideration of these comments. I welcome the opportunity to discuss this matter with you. Please contact me at 919-967-1450 or bhildebrand@selcnc.org.

Sincerely,



Blakely E. Hildebrand
Staff Attorney

Attachments (2)

CC: Cameron Boltes, Commissioner, Marine Fisheries Commission
Tom Hendrickson, Commissioner, Marine Fisheries Commission
Pete Kornegay, Commissioner, Marine Fisheries Commission
Brad Koury, Commissioner, Marine Fisheries Commission
Chuck Laughridge, Commissioner, Marine Fisheries Commission
Mike Blanton, Commissioner, Marine Fisheries Commission
Doug Cross, Commissioner, Marine Fisheries Commission
Sam Romano, Commissioner, Marine Fisheries Commission
Michael Regan, Secretary, Department of Environmental Quality
John Nicholson, Chief Deputy Secretary, Department of Environmental Quality
Steve Murphey, Director, Division of Marine Fisheries
Nancy Fish, Liaison to Marine Fisheries Commission, Division of Marine Fisheries
Shawn Maier, Counsel to Marine Fisheries Commission
John Batherson, Assistant General Counsel, Department of Environmental Quality

Attachment 1



North Carolina Wildlife Federation

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August 15, 2018

Via hand delivery and e-mail

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Re: Comments on N.C. Division of Marine Fisheries Draft Fiscal Note for Proposed Rules in N.C. Wildlife Federation Petition for Rulemaking

Dear Chairman Bizzell:

On behalf of the N.C. Wildlife Federation (“the Federation”), we offer these comments on the draft fiscal note written by the N.C. Division of Marine Fisheries and currently under review by the Office of State Budget and Management. The draft fiscal note is intended to address the rules proposed in the Federation’s petition for rulemaking (“proposed rules”) that were approved by the Marine Fisheries Commission in February 2017. As described in detail below, the Federation has significant concerns about the substance and form of the document. We offer these comments to the Commission with the hope that the Division can address the deficiencies outlined below while the fiscal note is still in draft form.

The Division of Marine Fisheries’ (“DMF” or “the Division”) chief objective in drafting a fiscal note is to inform the public; the Division is required to conduct an objective economic analysis of the proposed rules. DMF’s draft analysis is neither objective nor constitutes an economic analysis. The draft fiscal note is a policy paper almost entirely devoid of any analysis of the economic impacts of the proposed rules. Moreover, the Division’s bias against the proposed rules is plainly evident throughout the document. This one-sided document, if left unchanged, fails to provide the public with reliable information on which to evaluate the proposed rules, and importantly, threatens the credibility of the Division as a neutral and objective agency.

In summary, the Federation believes that the draft fiscal note is both legally and substantively deficient. The draft fiscal note fails to fully consider economic benefits of the proposed rules or to consider alternatives to the proposed rules, as required by the N.C. Administrative Procedure Act, N.C. Gen. Stat. § 150B-1, *et. seq.*, and the regulations

promulgated thereunder. In addition, the draft fiscal note selectively and inconsistently relies on data that supports the Division's clear bias against the proposed rules.

These comments highlight only a handful of the Federation's myriad concerns with the draft fiscal note. The Federation will continue to review the draft document and looks forward to providing more extensive comments during the public comment period once the final fiscal note and notice of proposed text are published in the North Carolina Register.

I. The Draft Fiscal Note is Legally Deficient.

DMF's fiscal note is not only scientifically dubious – it also fails to meet the requirements outlined by applicable law. Specifically, by ignoring statutory, executive, and administrative mandates to monetize or quantify costs and benefits, failing to adequately address alternatives to the proposed rules, and overtly criticizing the proposed rules,¹ DMF violated both the letter and spirit of state law.

a. Failure to Consider Economic Benefits of Proposed Rules

The North Carolina Administrative Procedure Act (“APA”), N.C. Gen. Stat. § 150B-1 *et seq.*, Executive Order No. 70,² and Office of State Budget and Management's (“OSBM”) budget manual³ all provide specific guidance on what agencies must include in a fiscal note. All of these authorities highlight that monetization or quantification of costs and benefits is the *primary* goal of such an analysis.⁴ Specifically, both the APA and Executive Order No. 70 direct that “[e]ach agency shall quantify the costs *and benefits* to all parties of a proposed rule to the greatest extent possible.”⁵ The budget manual goes even further, additionally requiring that:

Where [costs or] benefits are not monetized, they must be listed and described in detail and include quantification of factors related to benefits in non- monetary terms where feasible (e.g., the number of persons, facilities, or localities affected). In cases where precise benefits estimates are infeasible, estimating a range of benefits under various plausible assumptions may be appropriate.⁶

¹ N.C. OFF. OF ST. BUDGET & MGMT., NORTH CAROLINA BUDGET, Fiscal Note Training Presentation 4 (Nov. 2017), https://files.nc.gov/ncosbm/documents/files/2017_FiscalNoteTraining.pdf.

² N.C. Exec. Order No. 70, 25 N.C. Reg. 1160 (Nov. 15, 2010) (as amended by N.C. Exec. Order No. 48, 28 N.C. Reg. 2708 (May. 15, 2014) (repealing section 3 of Executive Order No. 70, which addressed the review of existing rules, and clarifying fiscal note exemption rules to bring Order No. 70 in line with N.C. Gen. Stat. § 150B-1 *et seq.*)).

³ N.C. OFF. OF ST. BUDGET & MGMT., NORTH CAROLINA BUDGET MANUAL § 7 (2018), https://files.nc.gov/ncosbm/documents/files/BudgetManual_2018July.pdf.

⁴ *See, e.g., id.* at § 7.5.3 (noting the economic impact section of the fiscal note “is the heart of the analysis and must describe the estimated impact on affected parties”).

⁵ N.C. GEN. STAT. § 150B-19.1(e) (emphasis added); *see also* N.C. Exec. Order No. 70, 25 N.C. Reg. at 1162 (“Agencies shall quantify the costs and benefits to all parties of a rule to the greatest extent possible. The level of analysis shall be proportional to the significance of the rule.”).

⁶ N.C. OFF. OF ST. BUDGET & MGMT., *supra* note 3, at § 7.5.3.

In contrast, DMF's draft fiscal note failed to detail *any* monetized or quantified benefits of the proposed rule in the entire 171-page document.⁷ Only five pages of the entire document are allegedly dedicated to discussing economic benefits. Three of those pages, however, don't discuss the proposed rules at all; instead DMF continues its attack on the proposed rules by discussing what the Division argues are negative outcomes to fisheries management practices in other states.⁸

DMF repeatedly noted that prospective habitat and fish abundance benefits are either "unmeasurable" or "unknown," while species' responses to "reducing fishing mortality" are "uncertain."⁹ DMF did not estimate benefits to the resource, the industry, or other stakeholders resulting from improved habitat or stocks. In contrast, DMF has no trouble estimating costs to stakeholders resulting from the proposed rules.¹⁰ In addition, no attempt was made to estimate ranges under "plausible assumptions," even where such assumptions plainly existed.¹¹ In some circumstances, DMF even engaged in rhetorical acrobatics to *avoid* quantifying benefits. For example, DMF inexplicably suggested that "[b]enefits to the fishing industries in the form of increased stock abundance is [sic] difficult to evaluate without data both before and after the proposed rules are implemented."¹² If it was true that agencies had to wait for rules to take effect to fully evaluate them, then there would be no reason to engage in prospective fiscal impact analyses at all. Moreover, DMF fails to consider economic benefits to different parts of the commercial fishing industry, including to smaller vessels and fishing operations. DMF ignores potential economic benefits from reduced operating costs for lay days, higher catches during fishing days, or any other benefits resulting from reducing fleet capacity, bycatch, and habitat disturbance.

Suspect logic¹³ and omission of key analyses¹⁴ were employed throughout the draft note to avoid monetizing, quantifying, or even estimating ranges of benefits for the proposed rules. In

⁷ See, e.g., N.C. DIV. MARINE FISHERIES, DRAFT FISCAL IMPACTS OF PROPOSED RULES FROM PETITION FOR RULEMAKING SUBMITTED BY NORTH CAROLINA WILDLIFE FEDERATION 7 (June 27, 2018) (on file with Southern Environmental Law Center) ("Many of the benefits identified by Petitioner, such as improved habitat quality and increases in fish stock abundance, do not happen immediately after rules are put in place, rather may occur after a period of years or decades. As a result, these benefits are difficult to quantify.").

⁸ See *id.* at 108-112.

⁹ *Id.* at 7.

¹⁰ See, e.g., *id.* at 81.

¹¹ See, e.g., *id.* at 70, 112 (choosing not to present recent, scientifically-vetted and published research on stock projections and associated economic impact projections for Atlantic Croaker and Weakfish in part because of "uncertainty in the data" and the fact that "the size of the reductions in the fishing and natural mortality created by the proposed rules is unknown").

¹² *Id.* at 108 (emphasis added).

¹³ See, e.g., *id.* (suggesting that "[t]o assess if any improvements would occur in recreational fishing due to the proposed rules, data on the number of recreational trips, licenses sold, and surveyed expenditure information before and after the rules were implemented would be needed, and the change in the quality of recreational opportunities would need to be evaluated," which would, if true, entirely invalidate the use of fiscal notes to estimate impacts at all).

¹⁴ See, e.g., *id.* at 74-78 (including a section entitled "Benefits from Reducing Fishing Mortality" that explores how Atlantic Striped Bass and Summer Flounder increased in abundance following reductions in fishing mortality, but entirely failing to analyze, monetize, or quantify how the proposed rules would affect abundance of Weakfish, Spot, and Atlantic Croaker).

doing so, DMF ignored both the spirit and the letter of the law which requires enumerating benefits to the greatest extent possible. The Federation is confident that the proposed rules would result in myriad economic benefits to the commercial and recreational fisheries as the health of these fisheries and habitat rebound, and encourages the Division to use existing data sets, such as IMPLAN, and existing DMF research¹⁵ to inform its calculation of the proposed rule's economic benefits to participants in all fishing sectors and other stakeholders.

b. Failure to Properly Evaluate Alternatives

Another statutory requirement is almost entirely absent from the draft fiscal note: the alternatives analysis. The APA requires that fiscal notes analyzing rules with “substantial economic impact” describe “at least two alternatives to the proposed rule . . . and the reason the alternatives were rejected.”¹⁶ The budget manual echoes that the fiscal note must provide the “reasons why the agency rejected those alternatives.”¹⁷ However, the Division hardly articulated clear alternatives in the fiscal note nor did it did not even attempt to list the reasons why the supposed-alternatives were rejected by Commission.¹⁸ Instead, DMF simply listed a hodge-podge of additional options with scant fiscal and regulatory analysis¹⁹ and nary a mention of why they were discarded by Commission, as required by law.²⁰

The draft note also reveals DMF's fundamental misunderstanding of what an “alternative” actually is. The statutory language of the APA makes clear that “alternatives” are options “that were considered *by the agency*.”²¹ However, several of DMF's listed alternatives were never truly considered by MFC. For example, DMF listed headrope restrictions and trawling day restrictions considered by Advisory Committees and DMF--not the MFC--in the early stages of the development of Amendment 1 to the Shrimp Fishery Management Plan (“FMP”) as viable alternatives, notwithstanding the fact that these proposals were subsequently

¹⁵ See, e.g., John Hadley, An Economic Analysis of Recreational and Commercial Fisheries Occurring in the Middle and Lower Cape Fear River, North Carolina, N.C. DIV. OF MARINE FISHERIES (March 2015), <https://files.nc.gov/ncdeq/documents/files/05%202015%20-%20An%20Economic%20Analysis%20of%20Recreational%20and%20Commercial%20Fisheries%20Occuring%20on%20the%20Middle%20and%20Lower%20Cape%20Fear%20River.pdf>.

¹⁶ N.C. GEN. STAT. § 150B-21.4(b2)(5) (2018); see also N.C. OFF. OF ST. BUDGET & MGMT., *supra* note 3, at § 7.5.3 (“Agencies must demonstrate that the proposed rule change achieves the regulatory objective in a cost-effective manner by describing at least two alternatives considered, evaluating their impacts to the extent practicable, and stating reasons why the agency rejected those alternatives.”).

¹⁷ N.C. OFF. OF ST. BUDGET & MGMT., *supra* note 3, at § 7.5.3.

¹⁸ See N.C. DIV. MARINE FISHERIES, *supra* note 7, at 125–27 (identifying general provisions of N.C. GEN. STAT. § 150B-19.1(f) as the relevant authority while failing to cite or reference the more specific and pertinent section of N.C. GEN. STAT. § 150B-21.4(b2)(5), cited above).

¹⁹ See *id.* at 127 (identifying only one cost estimate in the entire “Alternatives section: the cost of a “Before-After Control-Impact study”).

²⁰ See, e.g., *id.* at 126 (identifying the Petitioner's original proposal to restrict trawling to three days in the Atlantic Ocean as an alternative, but failing to note it was never rejected or even formally considered by MFC); *id.* at 125–26 (identifying management recommendations considered during the development of Amendment 1 to the Shrimp FMP that were not ultimately considered by the MFC).

²¹ N.C. GEN. STAT. § 150B-21.4(b2)(5) (2018) (emphasis added).

modified and therefore never formally considered by MFC.²² This flawed inclusion of these long-discarded proposals is troubling.

The budget manual mandates that “[w]hen there is a “continuum” of alternatives to address a particular problem, an agency must examine a preferred option, a more expensive or stringent option, and a less expensive or stringent option.”²³ While it is not made explicit in the budget manual, it can safely be presumed that the “preferred option” would be the option actually selected by the agency (especially as the fiscal note must explain why other alternatives were rejected). However, in this situation, the only “more stringent” options identified by DMF were precisely those that were never truly considered (or rejected) by the Commission: the gear restrictions considered for Amendment 1 to the Shrimp FMP.²⁴

DMF then compounded this error by deciding not to recognize a clearly more stringent alternative that was actually considered and rejected by MFC in 2015—a complete closure of the Pamlico Sound to shrimp trawls.²⁵ DMF’s reasons for doing so, namely claiming this alternative “include[d] gears outside the scope of the Petition,”²⁶ is bizarre. Simply because an alternative includes additional gear restrictions does not somehow invalidate its standing as a secondary option.²⁷ It is worth noting that while DMF refuses to evaluate a “net ban” as an alternative to the rules, DMF discusses in detail all of the downsides to a “net ban” in Florida in the so-called Benefits section. This selective discussion of a “net ban” highlights DMF’s tendency to elevate its own bias over substance throughout this document. DMF improperly constructed a regulatory continuum where the proposed rules were the most restrictive option, in clear contravention to OSBM mandates.

II. The Draft Fiscal Note is Substantively Deficient.

The draft fiscal note is not only legally deficient, it is also substantively flawed. The purpose of a fiscal note is to evaluate the economic impacts of proposed rules in order to inform the public – not to pass judgment on the agency’s policy choices. OSBM made this abundantly clear in a presentation to agency rulemaking coordinators, in which OSBM stated that the purpose of a fiscal note is to “inform analysis through objective analysis of likely outcomes” and explicitly not to “defend or criticize policy.”²⁸ To the extent that the Division must discuss fisheries management policies and practices in order to evaluate the economic impact of the proposed rules, it should do so in a way that is accurate, objective, and consistent with the best available science. The Division’s draft fiscal note veers from this charge.

²² See N.C. DIV. MARINE FISHERIES, *supra* note 7, at 126.

²³ N.C. OFF. OF ST. BUDGET & MGMT., *supra* note 3, at § 7.5.3.

²⁴ See N.C. DIV. MARINE FISHERIES, *supra* note 7, at 126.

²⁵ N.C. Marine Fisheries Comm’n, Motions from Aug. 29-30, 2013 Marine Fisheries Commission Business Meeting 1 (Aug. 29, 2013), <http://portal.ncdenr.org/web/mf/nov-2013-briefing-book> (showing that the MFC unanimously rejected the petition for rulemaking offered by Tim Hergenrader).

²⁶ N.C. DIV. MARINE FISHERIES, *supra* note 7, at 127.

²⁷ It is worth noting that DMF incorrectly asserts that the proposed rules will impact gears outside of the shrimp trawl fishery. See *id.* at 97.

²⁸ N.C. OFF. OF ST. BUDGET & MGMT., *supra* note 1.

The draft fiscal note is full of contradictions and statements that the Federation finds are inconsistent with basic fisheries management principles; this section provides a non-exhaustive list of examples of these flaws. Instead of conducting a fiscal analysis of the proposed rules, DMF completely reinterprets the underlying science and accepts information—while uncertain or not approved for management—that promotes the status quo. At the same time, DMF discounts studies and data that contain any degree of uncertainty if they do not bolster the Division’s clear preference against the proposed rules. In addition, DMF ignores cardinal fisheries management principles including adherence to the precautionary principle, in conducting its analysis. These substantive deficiencies render the draft fiscal note incomplete and unable to serve its purposes of informing the public.

a. Inconsistent Application of Scientific Data

The draft fiscal note uses a blunt analytical knife to separate what it considers “good” data from “bad,” leaving a trail of inconsistencies and contradictions in its wake. In general, data that support DMF’s overt preference for the status quo are favored, while data and studies supporting the proposed rules are categorically discounted. Uncertainties in the data are also used inconsistently to both support continued management practices and debase the proposed rules. As a result, DMF fell far short of its mandate to produce an objective fiscal analysis.

i. Selective bias

Perhaps nowhere is DMF’s data bias in favor of the status quo more overt than in its stunted and conclusory analysis of the economic effects of reducing the number of shrimp trawling days. This analysis is perhaps the *only* actual economic analysis in the entire document. While DMF correctly notes that the “Petition document does not address which days of the week to close . . . and that [the] decision is best left to the Fisheries Director”²⁹ it entirely fails to account for one likely scenario: allowing shrimping in estuarine waters on Monday-Wednesday-Friday, providing lay days on Tuesday and Thursday.³⁰ Although DMF admits that “the best catches of shrimp are usually immediately after” closures and notes that “recoupment may occur,” it does not account for these factors—or potential increases in catch per unit effort, price, or reduced operating costs—when calculating economic impacts.³¹

The Federation contends that DMF greatly overestimates the economic losses; instead, the reduced operating costs of lay days, coupled with higher catches during fishing days, may mitigate losses to the shrimp fleet. However, DMF’s analysis entirely discounts these potential economic benefits by bizarrely noting that “reducing allowable days to three per week does not take into account days lost to weather, unfavorable tides, and moon phases.”³² These conditions cannot be controlled and serve as natural factors that all fishermen, commercial or recreational, contend with regardless of the regulatory regime. Similarly, while DMF is forced to admit that “the efficiency of the fishery may be improved by increasing the number of breaks in the week,”

²⁹ N.C. DIV. MARINE FISHERIES, *supra* note 7, at 82.

³⁰ *Id.*

³¹ *Id.* at 81–83.

³² *Id.* at 81.

its cost estimates entirely forgo the inclusion of any efficiency metric in its final reported values.³³

DMF demonstrates equally biased treatment of data used to make nursery determinations. For example, although DMF itself conducted extensive research on shrimp bycatch in the Shrimp Trawl Characterization Study (Program 570),³⁴ it tries to walk back any conclusions that can be drawn from these data to expand nursery areas. Instead, DMF argues that “it may be inappropriate to designate nursery areas” from any “fishery-dependent characterization study” due to “sampling bias.”³⁵ Fishery-independent studies with “standardized techniques” are proposed as the solution.³⁶ Perhaps coincidentally, “NCDMF currently does not conduct ocean-based fishery independent sampling that could be evaluated for new nursery classifications.”³⁷ Similarly, although DMF does note that it conducts “several fishery-independent surveys in state estuarine waters,” these data only exist for “select species/life stages.”³⁸ In sum, DMF rejects the use of its own datasets used to support the proposed rules because of “sampling bias,” even though it recognizes that “[f]ishery dependent and independent sampling complement one another to provide a more complete picture of the condition of a fish stock.”³⁹ The Division’s selective use of data undermines its overall analysis.

ii. Use of discredited data

DMF appears to embrace rejected science while at the same time, it rejects peer-reviewed science that is contrary to its position. DMF opines that elements of assessments that “did not pass peer review and will not be used for management . . . can still be informative.”⁴⁰ However, the 2017 ASMFC Atlantic Croaker stock assessment repeatedly referenced by DMF to support some of its stock assessments was rejected for a reason—stock status could not be determined because the assessment results were sensitive to modeling assumptions.⁴¹ DMF’s reliance on the study is unfounded. In particular, the assessment noted that the model “. . . indicates increasing abundance [for Atlantic Croaker]; whereas, harvest from directed commercial and recreational fisheries has generally been declining.”⁴² When faced with this choice between these flawed models and hard data, DMF chose the former, parroting the study’s finding that “because base model and all sensitivity runs evaluated suggested the spawning biomass was increasing . . . recent removals [of Croaker] are likely sustainable.”⁴³ This unfortunate reliance on rejected science is further repeated throughout the draft fiscal note; in several instances, DMF admits that

³³ *See id.*

³⁴ *Id.* at 22.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 31.

³⁹ *Id.* at 30.

⁴⁰ *Id.* at 44.

⁴¹ ATLANTIC STATES MARINE FISHERIES COMMISSION, Review of the Atlantic States Marine Fisheries Commission Fishery Management Plan for Atlantic Croaker (*Micropogonias undulatus*) – 2016 fishing year (2017).

⁴² N.C. DIV. MARINE FISHERIES, *supra* note 7 at 44.

⁴³ *Id.* at 41.

this assessment is scientifically unsound before proceeding to repeat its primary conclusions anyway.⁴⁴

This pattern is repeated throughout the document. For example, the Division also wields its blunt analytical knife to attack the very concept of nursery areas in the first place. At first, DMF pejoratively notes that in “earlier days, an entire estuary was initially considered a nursery area because of the occurrence of juveniles.”⁴⁵ Then DMF suggests adopting a new “concept” of nursery areas, proposing to define nursery areas instead as “a subset of juvenile habitat that contributes disproportionately more to the production of juveniles that recruit into a population than another area of similar size.”⁴⁶ It is entirely inappropriate for the Division to make new policy in a draft fiscal note. Even if it were appropriate, the Federation finds this proposed change in approach to nursery areas concerning because this new concept suggests that not all vital habitat areas are deserving of protection. Moreover, DMF ignores the fact that the studies used to support this new definition, including work by Dahlgren et al. (2006), were refuted by the later research of Sheaves et al. (2006), which provides in relevant part:

We believe that [Dahlgren et al.’s] approach is over-simplistic and does not account for many key aspects of nursery ground value. In particular . . . the effective juvenile habitat concept of Dahlgren et al. (2006) fails to (1) account for the effects of scale, complexity and connectivity, (2) include the crucial resources and processes supporting juveniles, or (3) recognize that nursery ground value cannot just be measured as a numeric contribution to the adult stock, but must include accounting of the contribution to future generations. While protecting habitats has merit, the corollary is that there are habitats that can be allowed to degrade. The explicit assumption is that the preserved areas are “keystone” habitats of particular importance; the implicit assumption is that others are not. There is a basic philosophical problem in considering habitats as individual, independent entities that can be excised from each other and be preserved or allowed to degrade with independent consequences. . . . Even if we can in some way identify habitats that are “of more value” and “more worth saving,” the basic complexity of natural systems means we usually have little clear idea of the likely consequences of concentrating on those habitats at the expense of others, for those high value habitats or for the species we are trying to protect.⁴⁷

We concur with Sheaves et al. (2006) and believe DMF’s interpretation once again fails to consider anything other than impacts to the shrimp fishery. DMF was either aware of Sheaves’

⁴⁴ See, e.g., *id.* at 44 (“The Atlantic Croaker stock assessment, completed in 2017, was not endorsed for management use by a panel of independent fisheries scientists; though, they did agree that immediate management actions were not necessary”).

⁴⁵ *Id.* at 26.

⁴⁶ *Id.*

⁴⁷ Marcus Sheaves, et. al, Marine nurseries and effective juvenile habitats: an alternative view, MARINE ECOLOGY PROGRESS SERIES, Vol. 318: 303–306 (2006).

refutation and simply ignored it, or it did not adequately investigate the relevant scientific literature in preparing its fiscal note.

iii. Misrepresentation of data

DMF also misrepresents the data on which it relies. For example, DMF notes that “it would take about 30 years to see an improvement to recreational fishing from a reduction in shrimp trawl bycatch.”⁴⁸ DMF’s 30-year timeline appears to be based on a misrepresentation of a study by Nesslage and Dumas (2017). In this study, the authors projected fish stocks forward 30 years under various scenarios, which was conceded by DMF.⁴⁹ At first, DMF uses this time-gap to its advantage, noting that it was “not possible to recreate the producer and consumer surplus numbers or the economic impact results presented by Nesslage and Dumas (2017) because the stock projection-harvest relationship from year to year was not provided in the report.”⁵⁰ DMF then completely changes tack and misrepresents the authors’ jump forward in time, arguing this now means it “would take about 30 years for any noticeable improvement” in fish stocks if no bycatch occurred.⁵¹ This interpretation of the study defies logic and common sense. Just because a study happens to look 30 years into the future does not mean it will take 30 years to have measurable impacts. It would be hard for DMF to claim it did not carefully review the study: the Nesslage and Dumas paper is cited 54 times in the draft fiscal note.

In several instances, DMF’s inconsistent application of data catches up with it, creating glaring contradictions. For example, early on DMF notes that shrimp are being “fished at near maximum levels.”⁵² However, DMF then turns around and argues that “[w]e do not know if fisherman are currently maximizing effort during periods when the shrimp are available.”⁵³

iv. Inconsistent treatment of data gaps

DMF identifies countless data gaps in conducting its analysis: the words “uncertain” and “unknown” occur 33 and 34 times, respectively, in the draft fiscal note. While it is not unexpected that data gaps exist, DMF’s inconsistent treatment of data gaps is entirely unacceptable. Where data do not exist, DMF almost unfailingly interprets these data gaps in a way that supports continued management practices. Perhaps nowhere is this more egregious than in DMF’s underdeveloped analysis of the impacts of increased stock abundance and decreased mortality. Throughout the document, DMF variously reports that “[i]t is unclear what effect the proposed rules would ultimately have [sic] stock abundance or their life history”⁵⁴ and “[h]ow an increase in stock abundance for species important to North Carolina would affect commercial and recreational fisheries is also unknown.”⁵⁵ DMF’s analysis also indicates that, despite decades of experience, it can no longer presume that reducing mortality provides a

⁴⁸ N.C. DIV. MARINE FISHERIES, *supra* note 7 at 156, 112.

⁴⁹ *Id.* at 70, 111.

⁵⁰ *Id.* at 111.

⁵¹ *Id.* at 112.

⁵² *Id.* at 31.

⁵³ *Id.* at 81.

⁵⁴ *Id.* at 78.

⁵⁵ *Id.* at 7.

benefit to stocks.⁵⁶ DMF's inconsistent treatment of data gaps is also on display in the so-called Benefits section of the fiscal note, in which the Division repeatedly argues that it does not have sufficient data to estimate benefits resulting from the proposed rules.⁵⁷

b. Lack of Consideration for Basic Fisheries Management Principles

The draft fiscal note also exhibits a fundamental disregard for basic fisheries science and sound management policy. In particular, DMF's failure to properly discuss fish size limits and the precautionary principle is deeply concerning. As a more general matter, DMF notes several times in the document that although "[o]ther species have responded positively to management measures that focus on reducing fishing mortality including Atlantic Ocean Striped Bass and Summer Flounder . . . [t]here is uncertainty that Atlantic Croaker, Spot, and Weakfish would respond in a similar way under the proposed rules."⁵⁸ This unsupported statement is contrary to the most basic tenet of fisheries management—that an increase in the abundance of a species currently below the optimal biomass will result in a positive impact and that reducing mortality benefits fish stocks.⁵⁹

i. Fish size limits

A well-established concept in fisheries management is that fishes should be provided the opportunity to spawn at least once prior to being harvested.⁶⁰ More recently, data indicate that the egg quality and fecundity of first time spawners is less than optimal and that a better approach is to permit species to spawn at least twice prior to harvest.⁶¹ Regardless, the primary management approach that achieves this most basic objective—reproductive success—is the use of species size limits.⁶² North Carolina fisheries currently provide many textbook examples of how to manage fisheries by using size limits to allow juvenile fishes to spawn at least once.⁶³ Even the draft fiscal note identifies that "[a]ppropriate size limits can allow fish to spawn at least once, contributing to the overall population, before being removed from the population due to mortality."⁶⁴

⁵⁶ *Id.* at 78 (noting that reduced mortality *may* lead to increases in abundance).

⁵⁷ *See, e.g., id.* at 108-09 ("It is unclear, and likely impossible to predict, how many years after the Petitioned rules are implemented would need to pass before improvements could be detected or the magnitude of any impact on expenditures, sales, income, or jobs."). *See also supra* Sect. I.

⁵⁸ N.C. DIV. MARINE FISHERIES, *supra* note 7 at 8.

⁵⁹ *See* Hilborn, R. and C.J. Walters. Quantitative Fisheries Stock Assessment: Choice, Dynamics, and Uncertainties (1992).

⁶⁰ Wallace, R., et. al. Understanding Fisheries Management: A manual for understanding the Federal Fisheries Management Process, Including Analysis of the 1996 Sustainable Fisheries Act (1997)

⁶¹ Berkeley, S., et. al., *Fisheries Sustainability via Protection of Age Structure and Spatial Distribution of Fish Populations*. FISHERIES, AM. FISHERIES SOCIETY (Aug. 2004).

⁶² *See supra* note 60.

⁶³ *See, e.g.,* N.C. MARINE FISHERIES COMM'N, Supplement A to the N.C. Spotted Seatrout Fishery Management Plan (2014), http://portal.ncdenr.org/c/document_library/get_file?uuid=2f5fa2ad-3ec2-4c53-893c-e808694ea3f0&groupId=38337 (establishing a 14-inch minimum size to ensure that over 80% of the landed spotted seatrout will have spawned at least once).

⁶⁴ N.C. DIV. MARINE FISHERIES, *supra* note 7 at 77.

However, when considering the size limits in the proposed rules to reduce harvest, reduce mortality, and allow fish to spawn at least once, DMF overlooks its own analysis of the biological benefits to this management strategy, which it included in several FMPs.⁶⁵ Astonishingly, DMF finds that *no* benefits to Atlantic croaker and spot fisheries would occur as the result of the proposed size limits.⁶⁶ In contrast, DMF has no trouble coming up with a litany of purported downsides to such a restriction, including both biological⁶⁷ and economic drawbacks.⁶⁸

ii. Precautionary approach

DMF wholly ignores the precautionary principle in its analysis. The data indicate that North Carolina fish stocks are collapsed or collapsing, and DMF's fiscal note advises inaction in the face of these trends. The precautionary approach has been widely accepted as the preferred approach for the management of marine fisheries in the face of uncertainty, contrary to established management principles.⁶⁹ Notably, Principle 15 of the Rio Declaration of the United Nations Conference on Environment and Development provides that "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage."⁷⁰ The precautionary principle has been summarized as "the application of prudent foresight" and provides that:

- Consideration of the needs of future generations and avoidance of changes that are not potentially reversible;
- Prior identification of undesirable outcomes and of measures that will avoid them or correct them promptly;
- That any necessary corrective measures are initiated without delay and that they should achieve their purpose promptly;
- That where the likely impact of resource use is uncertain, priority should be given to conserving the productive capacity of the resource;
- That harvesting and processing capacity should be commensurate with estimated, sustainable levels of resource (production), and that increases in capacity should be further contained when resource productivity is highly uncertain.⁷¹

⁶⁵ See *supra* note 63.

⁶⁶ N.C. DIV. MARINE FISHERIES, *supra* note 7 at 77 (finding the 10-inch Croaker size limit "would not be adequate to allow 100% of females to reach minimum spawning size" and an 8-inch Spot size limit "would likely have little effect on allowing a majority of female Spot to reaching spawning size").

⁶⁷ See *id.* (suggesting that size limits would "shift harvest to primarily females, resulting in unknown consequences on the stocks," in complete contradiction to all other North Carolina FMPs imposing size limits).

⁶⁸ See *id.* (suggesting a size limit would cause shrimp trawlers potentially thousands of dollars in lost profit).

⁶⁹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, The Precautionary Approach to Fisheries and its Implications for Fishery Research, Technology and Management: An Updated Review (undated), <http://www.fao.org/docrep/003/w1238e/w1238e01.htm>.

⁷⁰ UNITED NATIONS, Report of the United Nations Conference on Environment and Development (June 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

⁷¹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, The Precautionary Approach to Fisheries and Species Introductions 6-7 (1999), <http://www.fao.org/3/a-w3592e.pdf>.

In applying the precautionary principle, the standard of proof to be used in decisions regarding authorization of fishing activities should be commensurate with the likely risk to the resource.⁷²

Yet, DMF's analysis and its clear preference for the status quo represent the antithesis of this principle: whenever data gaps or uncertainty exists, DMF uses this ambiguity to promote current management practices; where DMF notes ambiguities in data, they are interpreted to support the status quo; and even when basic fisheries management principles warn against current practices, these tenets are ignored or twisted to favor inaction. The precautionary approach would suggest that in the face of this uncertainty—especially when all empirical data shows decreasing fish stock abundance—management measures to improve survival and increase spawning stock biomass are prudent. Yet DMF supports the status quo.

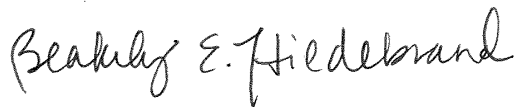
III. Conclusion

The Federation encourages the Division to resolve the legal and substantive errors previewed above. Taking policy position in a fiscal note, as DMF has done here, is entirely inappropriate. Should DMF insist on including technical analyses in its final fiscal note, we strongly encourage DMF to treat data gaps consistently, interpret the best available science appropriately, and embrace accepted management principles in its document. In addition, to remedy the legal deficiencies in the fiscal note, DMF must fairly evaluate benefits and costs of the proposed rules and articulate and properly analyze alternatives to the proposed rules.

The Federation requests an opportunity to address the Commission and respond to the final fiscal note when it comes before the Commission for consideration.

Thank you for consideration of these comments. Please contact us if we can offer any assistance to the Division as it makes final edits to the draft fiscal note.

Sincerely,



Blakely E. Hildebrand
Staff Attorney
Southern Environmental Law Center



Tim Gestwicki
CEO
N.C. Wildlife Federation

⁷² *Id.*

Mr. Rob Bizzell

August 15, 2018

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CC:

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Attachment 2



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Response to the Fiscal Note prepared by the N.C. Division of Marine Fisheries on the N.C. Wildlife Federation's Petition for Rulemaking

Executive Summary

The fiscal note ("FN") produced by the NC Division of Marine Fisheries ("NCDMF") and reviewed by the North Carolina Office of State Budget and Management ("OSBM") evaluating the North Carolina Wildlife Federation ("NCWF" or "petitioner") petition for rulemaking ("petition" or "petitioned rules") is incomplete and ripe with statements that are inconsistent with the most basic fisheries management and economic principles. The general tenor of the document promotes status quo by accepting uncertain technical information that has not been approved for management and that conforms to the agency position while discounting any data with any degree of uncertainty if it does not conform. The most basic, general fisheries principle is that reduced mortality yields more fish that often benefit the fishery, ecosystem, and economy; acknowledgement of this basic principle is absent from the document. Despite what we identify as significant scientific shortcomings, the document is intended to be an analysis of economic impacts. The analysis is rudimentary in regards to fiscal analysis, misleading in regards to the history of fisheries management in North Carolina, and contrary to other developing fishery management plans and to the facts.

The NCDMF projections of costs were exaggerated, unnecessary, and unjustified. Projections of benefits were mostly nonexistent and when mentioned were low or in many cases discounted or dismissed into the category of unknown or unable to be estimated. The time period for completion of the FN—two years from date of submission and approval by North Carolina Marine Fisheries Commission ("NCMFC")—was inordinately long. Communication with NCDMF and the Department of Environmental Quality ("NCDEQ") was mostly nonexistent even with much outreach from Petitioner (In fact, numerous efforts by Petitioner to meet with NCDEQ and NCDMF leadership were either ignored or refused. To date, no meeting has taken place to discuss these issues). Much of the volume of the FN consisted of irrelevant annual fishery harvest statistics that contributed little to the analysis and impaired understanding of the conclusions being presented. Overall the FN did little to present an accurate and fair picture of the true costs and benefits of the Petition.

The review by OSBM is concerning. The fact that the fiscal note is replete with technical inconsistencies notwithstanding, the myriad positive impacts of the petitioned rules to the resource and marine fisheries are not considered. For example, if fishing were reduced from five to three days per week, expenses would be reduced. This is not even mentioned in the fiscal

note. Less fishing activity should require less rather than more law enforcement activity. The OSBM does not appear to question the NCDMF estimates on increased costs, rendering the petition moot in the eyes of the state. The Federation firmly believes the state's analysis and review of the petition for rulemaking and preparation of the fiscal note is egregiously malfeasant and should be rigorously peer reviewed.

Our basic disagreement with the FN arises with the conclusion of NCDMF that the FN represents an objective fiscal analysis of the economic impacts of the petitioned rules and meets the requirements of the APA. The FN appears to be a contortion of unsubstantiated statements designed to present an exaggerated picture of high cost to prejudice the case against the petition in favor on the *status quo*.

Technical Deficiencies

The NCDMF begins their analysis with a justification for the Fisheries Reform Act of 1997 ("FRA") as if the resultant Fishery Management Plans ("FMP") have accomplished any of the original goals. Much has changed since 1997 and the simple fact that plans have been developed is meaningless. One must examine the impacts and successes of these plans that were intended to "ensure long term viability of these fisheries." The document cites the original blue crab FMP. Twenty years and 2 amendments later, the stock is overfished, the fishery is over capacity, and landings are at historical lows. North Carolina has failed in its management of the blue crab resource.

As another example, the southern flounder FMP was approved in 2006 to end overfishing and rebuild this overfished stock. The FRA required ending overfishing in 2 years and rebuilding the population to a sustainable level in 10 years. In 2019, the stock remains overfished and overfishing is occurring.

Reviewers of the fiscal note, particularly staff with OSBM, must understand that no stocks have been rebuilt under the Fisheries Reform Act and virtually all stocks are in far worse condition today than in 1997. The fiscal note would have one believe that this legislation has somehow been successful. This is factually incorrect. The fiscal note suggests that the federal Councils and the Atlantic States Marine Fisheries Commission ("ASMFC") also address these issues and have been successful. However, for fisheries managed solely by the state, or those species in which the federal plan is rudimentary, we observe very low levels of abundance, e.g., spot, Atlantic croaker, weakfish, southern flounder, blue crab, some to the point of collapse.

The fiscal note suggests that studies are needed to examine current habitats in the newly proposed areas for protection could take 18 years. The data are clear from 30 years of sampling: these newly proposed areas serve as important nursery habitat.

The NCDMF begins their defense by citing studies that indicate overfishing is not unique to North Carolina and that many fish stocks are improving. This is an "apples to oranges" comparison as the cited studies refer to federally managed species and do not address the unique conditions in North Carolina. We reject this logic as a reason to take no action and it most certainly has nothing to do with a fiscal note.

The fiscal note adequately defines the causes of the problem: fishing mortality, bycatch, habitat loss, and water quality. The petition addresses three of the four, yet no action needs to be taken?

The document discusses the general life history of spot, croaker, and weakfish, natural and fishing mortality, as well as bycatch. The take home message is a tremendous amount of uncertainty in the estimates of fishing and natural mortality. In the face of precipitous declines in the abundance of these species, the NCDMF appears to exercise caution on taking action that could impact the fishery while ignoring the precautionary principle of erring on the favorable side of a public trust resource. This position is inconsistent with the mission of the NCDMF.

The document would have the reader believe that bycatch has and is being addressed adequately. We wholly disagree. Bycatch mortality at the population level remains unknown and unaddressed. Reducing mortality on juvenile fish will provide a net benefit to North Carolina and its' marine resources. The document indicates we would not know this for generations and that the model used indicates that reducing bycatch means less fish in the population. Does this make intuitive sense to anyone? The model provides one result that is contrary to logic while the true, empirical data indicate a stock that has collapsed. How is this reconciled?

As a prime example of cherry-picking data to support taking no action, the fiscal analysis suggests that the State has taken on a new "concept" of nursery areas. The analysis cites Beck et al. (2001), Dahlgren et al. (2006), and Peterson (2003), to suggest that nursery areas are actually just a subset of juvenile habitat that contributes disproportionately more to the production of juveniles that recruit into a population than another area of similar size. The NCDMF suggests that while all waterbodies may have juvenile fish present at any given time, a combination of factors may not align, resulting in low nursery value (Beck et al. 2001; Peterson 2003). The state suggests that shrimp trawling is restricted in the majority of these optimal nursery areas through habitat designations and area and gear restrictions. Yet nowhere are these areas specifically defined

We find this line of reasoning concerning as it appears to suggest that only the most optimal nursery areas need to be protected to justify the lack of adequate protection for what the State now calls "sub-optimal" habitats. While we agree that some habitats may be more important than others, the Coastal Habitat Protection Plan ("CHPP") argues that all of the various habitat types, including soft bottom habitats, provide the basis for long term fish production and that the integrity of the entire system depends upon the health of areas and individual habitat types within the system. The new concept, as interpreted by the State appears to suggest that if habitats are not optimal, there is no need to protect them. Is this the new Department position on habitat protection? Why is shrimp trawling not prohibited in all of these optimal nursery areas? Can the State provide those optimal nursery areas where trawling is permitted? Can the State provide the analysis that defines all the optimal habitats? Again, this interesting debate about optimum versus minimum habitat areas contributes nothing to a meaningful fiscal note of the economic impacts of the petitioned rules.

The logic here defies reason and past efforts. On one hand we acknowledge that we are losing habitat and need to protect what we have to avoid no net loss. On the other hand, we now say that is no longer a concern, that only "optimal" habitats need to be protected? The new NCDMF "concept" appears to better coincide with the Strategic Habitat Areas program in the CHPP, the "best of the best" areas defined. Those areas have been defined after spending hundreds of

thousands of dollars on meeting with experts, yet nothing has been done. We fully support something being done with this sound analysis.

Most concerning, however, is the fact that an article published in the prestigious Marine Ecology Progress Series in 2006 by Sheaves et al. (Vol. 318: 303–306), refutes the work cited by the NCDMF to support their new optimal habitat position. The Sheaves et al. (2006) paper refutes the States interpretation, justification, and intent of their “new concept.” Sheaves et al. (2006) state:

The recent paper by Dahlgren et al. (2006), which builds on the earlier paper of Beck et al. (2001), proposes a classification system to identify important marine nursery habitats to aid in directing future research and to provide managers with a tool for the protection of important habitats. This work is important in recognizing the need for a clearer nursery ground definition, and particularly in emphasizing that the value of a nursery ground goes beyond the abundance or density of juveniles it supports (Beck et al. 2001, Sheaves & Molony 2001, Dahlgren et al. 2006). However, we believe that this approach is over-simplistic and does not account for many key aspects of nursery ground value. In particular, the approach focuses solely on one aspect of nursery ground function, the provision of a physical area of habitat occupied by juveniles, and one measure of importance, the proportion of individuals contributed by a nursery ground. Consequently, the nursery ground concept of Dahlgren et al. (2006) fails to (1) identify and account for the effects of scale, (2) recognize the importance of complexity and connectivity, (3) recognize the importance of ecosystems, resources and processes in supporting juveniles, and (4) recognize that the value of a nursery ground is a function of the reproductive output of individuals from the nursery and not just the numbers of individuals it provides. Reproductive output, not numbers of recruits. Dahlgren et al. (2006), and Beck et al. (2001) before them, measured the value of nursery grounds in terms of numbers contributed to adult populations, either the average number of individuals per unit area (Beck et al. 2001) or the proportion of individuals (Dahlgren et al. 2006). This approach relates to the value of a nursery from a purely exploitive, short-term, fisheries perspective; it does not recognize that—in an evolutionary, ecological and a sustainable fisheries sense—it is the contribution to the production of succeeding generations that determines real nursery-ground value.

We concur with Sheaves et al. (2006) and believe the State’s interpretation once again fails to consider anything other than the impacts to the fishery. Additionally, the concepts of Sheaves et al. (2006) appear to closely mirror the concepts of the CHPP. Is the State aware of this paper that refutes their hypothesis?

The fiscal analysis indicates that “Reducing the number of days in a week to fish would reduce shrimp trawling effort (i.e., fewer trips); however, it may be difficult to quantify associated reductions in bycatch. It is possible that recoupment may occur (e.g., increased number of tows during open periods resulting in a minimal reduction of bycatch).” An alternative view would include an analysis that a reduction in effort will result in an increase in catch per unit effort, offsetting economic losses through efficiency (see Southern Flounder Amendment 2 discussion below)

As cited earlier, the analysis concurs that the best catches of shrimp are usually immediately after the existing weekend closure. Shrimp FMP Amendment 1 states there are as much as twice as many pounds of shrimp caught early in the five-day trawling week than later in the week. We

agree with the analysis that our proposed “*time restrictions could improve the efficiency of the shrimp fishery.*” Yet no analysis was performed and the concept was not even mentioned.

The analysis appears to discount these potential economic positives by indicating that “*reducing allowable days to three per week does not take into account days lost to weather, unfavorable tides, and moon phases.*” These acts of God cannot be controlled and serve as natural controls with which all fishermen, commercial or recreational, must contend with. The analysis goes on to cite Johnson (2006), “that the efficiency of the fishery may be improved by increasing the number of breaks in the week, either by having two one-day closures during the week rather than one two-day closure, or by reducing the number of total days during the week for which trawling is allowed.” The analysis however, points out that there is a current weekend closure for shrimp trawling in internal coastal waters (non-ocean waters) that has been in place since 1991 (15A NCAC 03L .0102) and indicates that the Petitioner did not address how the proposed rules limiting the number of allowable trawling days would affect this current rule. We disagree.

Petitioned rules to set minimum size limits on spot and croaker of 8 and 10 inches respectively are designed to allow at least 75 per cent of the fish of these species reaching the minimum size limit to be mature so that they will have the opportunity to spawn. The cost of missed sales of these juvenile fish due to escapement, avoidance, and release from nets is offset by the conservation need to rebuild these stocks. Increasing survival of smaller, immature fish so that they can reach maturity thus increasing the spawning biomass to a level that enables population growth is the goal of setting minimum size limits.

Many of the questions raised by the NCDMF with regards to the petition could have been adequately addressed had the agency provided the petitioner with an opportunity to work with us rather than against. That opportunity never presented itself.

Fiscal Deficiencies

Here NCDMF presents a litany of reasons why an accurate fiscal analysis cannot be accomplished due to many factors, known and unknown, which are difficult to quantify and relate to costs and benefits. The fact that many parameters pertinent to fisheries management are unknown or difficult to assess, especially as they may relate to economic analysis, is not a valid reason to reach the conclusion that the costs of petitioned rules are too high.

The OSBM, however, determined that state funds were not available to implement the proposed rules without undue detriment to the agency’s existing activities. Based on our review, the agency’s existing activities have failed to provide sustainable fisheries and should be re-examined to include the provisions of the petition.

The fiscal analysis states: “*The biggest cost from the Petitioned rules would be on the commercial fishing industry, specifically those participating in the shrimp trawl fishery. There are uncertainties in how the proposed rules would be implemented with regards to existing management actions, especially concerning closing days of the week (see section 6.1.1). The Petitioner commented that the days to be closed to satisfy the Petition would be picked by the Fisheries Director, but the Petitioner did not comment on how the current weekend closure fits into their proposed rules. The weekend closure is for estuarine waters only and occurs from 9*

p.m. Friday to 5 p.m. Sunday. Ocean waters are currently not restricted. To estimate potential losses to the commercial fishing industry from closing four days in estuarine waters and three days in the ocean, the landings by weekday were used, but these represent the day of landing or unloading at the seafood dealer, not the fishing day. Landings could not be evaluated by fishing day because the North Carolina Trip Ticket Program does not collect those data. Based on date of landing, limiting trawling to three days in estuarine waters could have an annual impact of \$2.4 million to \$10.7 million in the shrimp fishery and an additional impact from \$48,589 to \$73,405 per year for non-shrimp species caught in shrimp trawls, depending on which four days are selected to be closed. Limiting trawling to only four days in State Ocean waters could have an annual impact from \$1.0 million to \$1.4 million in the shrimp fishery and an additional impact of \$28,876 to \$37,399 per year for non-shrimp species caught in shrimp trawls, depending on which three days are selected to be closed.”

Logically, the days that shrimping would be allowed in the estuarine waters would be Monday-Wednesday-Friday, providing lay days on Tuesday and Thursday. Lay days would result in greater shrimp catches after those lay days, just like the increased catches immediately following a week-end closure now. The NCDMF points out in the FN, that recouping by extra trawling hauls may reduce the “uncertain” losses from limiting the number of trawling days to three per week.

Consequently, based on data discussed in the report, it is probable that catches will increase during fishing days and allow recouping of those shrimp not caught on Tuesday and Thursday. We contend that the negative economic impacts are greatly overestimated here and would argue that the reduced operating costs of lay days, coupled with higher catches during fishing days, would mitigate, to a large degree any losses to the shrimp fishery.

The analysis suggests that effort is down in the shrimp fishery—yet concedes that there is no reliable measure of daily effort from the trip ticket data. The reduction in effort is a major tenet of the NCDMF position, yet is unfounded based on the data. For example, a single trip reported to the trip ticket program could be a 40-foot boat pulling a 45-foot net for a 10-hour day and landing the catch that same day. Alternatively, a single trip reported to the trip ticket program could be a 90-foot boat pulling four 55-foot nets from Monday through Friday around the clock. If the number of multi-day trips increases, and we believe they have, then any projected reduction in effort is erroneous.

The majority of the shrimp catch in North Carolina estuarine waters, however, is caught during multi-day trips by larger vessels with the highest capacity. We also believe that the trend in effort would be far less of a reduction, if any reduction at all, if effort were standardized. It is not.

We suggest that allowing fishing only on Monday-Wednesday-Friday during daylight hours would standardize effort to a single one-day trip regardless of vessel size or capacity. As a result of lay days, shrimp catch would improve during open days and catches would come to the dock on a daily basis.

At present, the majority of vessels in the fishery are smaller day boats owned by small, single operators. However, the majority of the shrimp are caught by larger corporate boats. Larger boats, many from outside North Carolina, offload large quantities of shrimp at the end of a multi-

day trip, often flooding the market and impacting price to the smaller, North Carolina family owned vessels.

The document does not address shrimp costs at the dock or the impacts of large offloads on prices to the fishermen.

By implementing the provisions of the petition to limit fishing to three days per week, effort is standardized so that proper analyses can be conducted. Shrimp caught and off loaded on the same day would be a higher quality and likely command a higher price, partially offsetting any loss of shrimp during the two lay days. Reduced effort from lay days would reduce physical bottom disturbance and habitat/water quality impacts from trawls, and reduce the bycatch of juvenile fishes and crustaceans that are discarded, mostly dead. The economic costs to operate the boat, e.g., food, ice, fuel, crew, would likely be reduced 40% or more under the three-day-per-week trawling regime.

Again, the majority of shrimp landed in North Carolina are taken by large corporate and/or out-of-state vessels that fish large quantities of gear for multiple days. By eliminating multi-day trips and the large capacity of these vessels, effort will be reduced significantly. Smaller, family-owned and -operated vessels that make up the bulk of the commercial fleet will be economically advantaged by this leveling of the playing field. This change will provide more economic multipliers to North Carolina communities than shrimp either being taken out of state for sale or being sold and the monies spent at home ports in Mississippi, South Carolina, or Florida. Small vessels are North Carolina vessels, and the positive economic impacts to local economies resulting from prioritizing our fishermen has not been addressed.

It is very important to note that the larger and corporate trawl vessels have multiple alternatives for fishing outside of the estuarine and near shore coastal waters of our state. These larger vessels have the ability, and do, shrimp in federal waters from North Carolina to Florida, as well as trawl for summer flounder, scup, black sea bass, scallops, squid, and other fish species. The majority of the resident fleet in North Carolina do not have those same options, but are limited to shrimp trawling, mostly in the estuary. The economic impacts of this expected benefit to the majority of North Carolina shrimpers are absent from the analysis.

The analysis indicates “The proposed rules for night-time trawling restrictions, opening the shrimp season based on shrimp size, reducing headrope length, and limiting tow times would have impacts to both the shrimp trawl fishery and non-shrimp fisheries, but because of a variety of uncertainties surrounding implementation of these rules and a lack of data to evaluate the impacts for these specific management strategies, the total impact cannot be calculated or monetized (see sections 6.1.3–6.1.5).”

At present, shrimp season opens based on a date, not a count size. Shrimpers fish as soon as the season opens whether the size of the shrimp are desirable to dealers or not, resulting in low quality and low prices at a time when bycatch is high. Opening on a shrimp count removes this variable and prevents fishermen from spending time and money to shrimp when sizes are suboptimal. The cost of determining an opening date based on shrimp size will be minimal and can be achieved within normal duties of fish managers. This factor is not mentioned in the NCDMF review.

Maximum headrope length simply limits gear capacity in a fishery that is overcapacity. This gear restriction, again, levels the playing field for the small family trawler versus the large corporate, mostly out-of-state, vessels. Many of the projected benefits are biological and habitat related versus fiscal. No actual loss of revenue from the shrimp harvest should result from the maximum headrope restrictions; a similar number of shrimp will be caught; but revenue will be realized by more local, North Carolina vessels.

By limiting headrope length and reducing tow times, fewer juvenile fishes and endangered species will be encountered. The impacts to the resources would be reduced mortality. The benefit to the fishermen would be less time and effort required to sort and grade smaller individual catches thus reducing total cost of operation.

The cost of enforcement of the petitioned rules is discussed in uncertain terms relating to the need for additional officers. The presentation meanders without reaching any conclusive number or sound justification for adding to the work force. The current number of officers (50) is woefully inadequate to begin with, so a reasonable number of additional officers is justified just to do the current job of enforcement. But, NCDMF is unable to come up with a projected number of additional officers necessary to meet the expanded demand for enforcement.

Then, in the next paragraph, the FN goes on to express a concern for balancing existing duties against new requirements to enforce petitioned rules. The unsubstantiated and preposterous estimate of 52,000 hours to enforce the petitioned rules is given, which projects that each of the 50 officers will spend 20 hours per week for the entire year (52 weeks) on these new duties. The opportunity cost for lost enforcement of other rules is given as \$1,677,520 using the average salary rate of \$32.26 per hour. Implementation of new rules does not work this way. Priorities are evaluated and allocations of manpower and other resources are made accordingly. Multitasking and overlaying of responsibilities are employed. Additional responsibilities are incorporated into ongoing ones and time is used to accomplish all duties as efficiently as possible. This presentation is unrealistic and highly exaggerates the cost of enforcement of the petitioned rules.

Presentation of additional costs to sample Pamlico Sound to determine the opening shrimp trawling date based upon attainment of 60 count shrimp is not worthy of including in a FN. An acceptable procedure to estimate the appropriate opening date based upon this parameter could readily be developed and implemented by existing personnel in conjunction with current duties. Again this involves setting priorities and allocating resources.

The document finally suggests that commercial fishing license sales may decline as a result of the proposed rules. It is highly unlikely that the large corporate trawlers will exit the fishery entirely. What is likely is that the fisheries will begin to recover due to a reduction in juvenile fish mortality. Fish abundance will increase and benefit the commercial gill netters, pound netters, beach seiners, and recreational fishermen. We argue it is far more likely that license sales will increase as a result of the petition but this is not mentioned.

Interestingly, the NCDMF produced a draft of Amendment 2 to the Southern Flounder Fishery Management Plan dated February 2019. The socio-economic section for the commercial fishery is a single paragraph and supports our claims in the petition. Specifically, the draft Amendment

2 indicates that while management measures proposed will result in landings going down, the price will go up, mitigating economic impacts. Further, the section concludes by stating that even though economic impacts will be “acute” for the proposed management actions, those actions are needed to improve the fishery to ensure long-term viability of the stock and, “short-term economic costs are expected to be mitigated by the long term sustainability of the fishery yielding positive economic returns into the fishery.” This most basic tenet is true for all fisheries and is precisely the point we made in the petition for rulemaking for the shrimp trawl fishery. Why was this same generic policy not stated in the fiscal note? The draft Amendment 2 provides us the proof that NCDMF can provide these basic, fisheries management principles when they choose, but chose not to include this same language in the fiscal analysis of the NCWF petition for rulemaking. We believe this underscores our analysis and underlying theme that NCDMF purposefully omitted information in order to torpedo the petition.

OSBM Conclusion

The OSBM provides a simple conclusion in their email, which apparently constitutes their review, by stating that “*OSBM has determined that sufficient state funds are not available to implement the proposed rule changes without undue detriment to the agency’s existing activities.*”

This conclusion assumes that the data provided in the fiscal note is complete and accurate. It is not. We have pointed out numerous examples where the NCDMF has failed to consider any alternative to negative consequences where we know positive impacts would occur. The sections on impacts to communities, consumers, the state, and others are troubling.

The NCDMF indicates that consumers prefer wild caught, sustainable seafood and that the petition would somehow impact those choices. How? We know that many folks prefer shrimp taken by other methods, e.g., channel nets, over trawling because of the bycatch issue and product quality concerns. Keep in mind that many of these multi-day trips are up to five days—five days that many shrimp have been kept in the hold prior to even being unloaded for sale as fresh and local. The NCDMF states that the rules **may** have a negative impact on availability of local product, **might** negatively affect business revenues, and **may** decrease demand. Quite the contrary; recovering fishery stocks and more productive fisheries will increase availability, revenues, and demand. No “may” or “might” about it.

Alternatively, the petitioned rules could provide a more sustainable, long term product. Fresh shrimp could become more available as multi-day shrimp trips are replaced by smaller day boats that land a fresher product more frequently during the week. Consumers have shown they are willing to pay more for a more sustainably harvested product. Business revenues would certainly go up if expenses go down and shrimp catches increase. A proper analysis would examine the data to provide an alternative situation where the rules may have a positive impact on availability, might positively affect business revenues, and may increase demand.

The NCDMF further provides only negative impacts to the rules that may alter the labor force, municipal tax revenues, unemployment rates, and social service costs in small fishing communities. The basis is a loss in shrimping revenues, yet no definitive analysis showing that the rules would result in a net loss are provided. The analysis is purely speculative and one-

sided. An alternative analysis may include benefits to other fisheries besides just shrimp. Gill netters and pound netters would benefit from greater fish abundance and hire more people. Recreational fishing effort would increase and provide visitors and their dollars for bait, tackle, groceries, lodging, guide services, and restaurants. The whole dynamic of these local fishing communities, currently ripe with unemployment and under-employment would be positively impacted by these rules.

The impacts suggested for the state agency is troubling. The agency suggests that these rules may cause an undue hardship on staff and an unknown impact to enforcement. Numerous fisheries rules are difficult to enforce. Some are nearly impossible, such as the requirement that recreational fishermen use circle hooks when fishing for large red drum. Yet they are on the books. Why? Most fishermen obey the rules and the result is a positive resource impact. Fishermen also police themselves. To suggest that a reduction in the number of days fishing would somehow increase enforcement costs appear contrary to logic. The NCDMF provides an overblown analysis of these exorbitant costs with no basis or alternative. Likewise the costs to open the fishery based on a count size is exaggerated and is actually inconsequential. The NCDMF knows this does not have to be as complicated as they have made it here. Simple solutions are readily available that would reduce these costs significantly.

It is crystal clear that the NCDMF does not want these rules and prefers no action so as not to upset the status quo. Simply compare the economic information provided in the FN with the economic section in draft Amendment 2 to the Southern Flounder plan. The Fisheries Reform Act has been an abject failure, and the current NCDMF calls it brilliant. Every effort is made in the fiscal note to maintain status quo and avoid any changes or impacts to the shrimp fishery. The OSBM must understand that many more fisheries exist in North Carolina than just the shrimp fishery, all of which would benefit from the proposed rules. None of this is considered. The OSBM must also understand that for every negative point made by the NCDMF, it can be significantly offset or fully mitigated by a logical and reasonable, positive, counterpoint missing from the analysis.

The OSBM states that the rules would be a “*detriment to the agency’s existing activities.*” Perhaps it is time for the agency’s existing activities to change. If no stocks have recovered in 20 years under the Fisheries Reform Act, the conflict between recreational and commercial fishermen and lack of confidence in the NCDMF is at its zenith, then why is a change so concerning?

In summary, the Federation responds that the FN represents a contortion of the true cost of implementation of the petitioned rules that exaggerates the costs and dismisses the benefits and the conclusion that the costs of the petitioned rules would exceed the level of available funds and adversely affect ongoing programs is unworthy of certification and does not meet the requirements of the North Carolina Administrative Procedure Act (“APA”). The proposed rules in the petition should go forward to Rulemaking as provided by the APA.