

# Declaratory Ruling





January 28, 2016

Richard Allyn  
American Eel Farm, LLC  
1633 Highway 41  
Trenton, NC 28585  
(252) 448-0037

Mr. Sammy Corbett  
Chairman, North Carolina Marine Fisheries Commission  
P.O. Box 769  
Morehead City, NC 28557

Re: American Eel Farm Aquaculture Permit #1634393

Dear Mr. Corbett,

The North Carolina Eel Farm began operating in 2002 under the ownership of George Koonce. It operated successfully until 2010 and restarted again in 2013 under the new ownership of American Eel Farm LLC (AEF). AEF is proposing to continue to rear American eel (*Anguilla rostrata*) elvers/glass eels to a marketable size for the local bait and food markets. As well as consider the market opportunities in overseas markets. This project meets a growing demand for American eel consumption both overseas and in the U.S. It complements and enhances the mission statement of the U.S. Department of Commerce in promoting job creation and economic growth that is environmentally sound. Also, it is supported by the National Aquaculture Act approved by Congress on September 26, 1980. Additionally, it meets the goals of the North Carolina Rural Economic Development Center by creating job opportunities in economically depressed counties, like Jones County, which has a population of approximately 10,300 and is classified as a Tier 1 area by the North Carolina Department of Commerce. This classification indicates the county is economically distressed.

American Eel Farm, LLC currently holds an Aquaculture Operation Permit from North Carolina Department of Agriculture valid until 2017 and has had the same from the North Carolina Division of Marine Fisheries since 2013 renewing each year as required.

There is no successful commercial hatchery for the American eel in the U.S. For that matter there is no successful hatchery for this species of eel anywhere on the planet. This is the case in spite of millions of dollars spent on this research all over the globe. As a result the AEF is forced to do what all eel farmers do in other countries which is to purchase its seed stock from fisherman/dealers that have caught them in the wild.

AEF proposes to harvest American eel elvers/glass eels from North Carolina coastal fishing waters in accordance with the North Carolina Aquaculture Plan for American Eel being voted on at the Atlantic States Marine Fisheries Commission (ASMFC) February 2-4, 2016 winter meeting in Alexandria, Virginia. If the North Carolina Aquaculture Plan for American Eel is not approved by the ASMFC then AEF will withdraw its request for this declaratory ruling. The American eel glass eels will be grown out in a state-of-the-art closed recirculating system located in Jones County. The impact to the economy of Jones County is immeasurable. The AEF operated successfully for many years under the ownership of George Koonce until his health failed. Currently AEF is in full operation with 100% of the facility operable. AEF has already hired several consultants and a farm manager to operate and improve the facility and its operations.

We understand the North Carolina Marine Fisheries Commission (NCMFC) rule regarding possession of American eels under nine (9) inches and the reasoning behind the rule. The AEF would like a declaratory ruling on NCMFC Rule 15A NCAC 03M .0510 allowing the AEF to harvest, possess, and sell undersize American eels in North Carolina for grow out. We are willing to provide all chain of custody documents regarding all American eel glass eels harvested. The facility has been visited by the North Carolina Marine Patrol and will be open for inspection at any time.

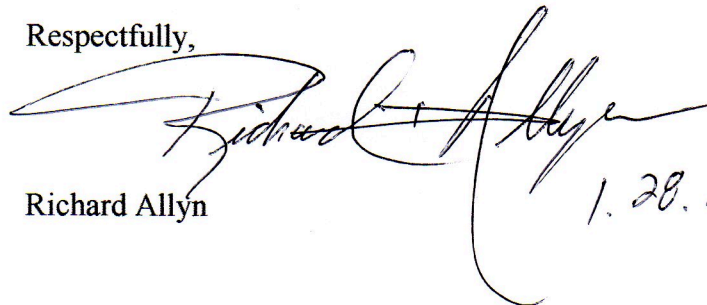
Previously in 2002 the North Carolina Eel Farm (now AEF) received a declaratory ruling allowing the possession of undersize American eel (Attachment 1). Then again in 2015 the AEF received a declaratory ruling allowing the possession of undersize American eel (Attachment 2). The 2015 ruling was necessary because an increase in the minimum size limit from six to nine inches resulted in an amendment to NCMFC Rule 15A NCAC 03M .0510 which invalidated the 2002 declaratory ruling. This declaratory ruling request differs from the previous two in that it would allow the AEF to harvest and sell undersize American eels from North Carolina waters according to the provisions of the North Carolina Aquaculture Plan for American Eel approved by the ASMFC.

Timing is critical for this venture to be successful. The harvest season for American eel glass eels being considered under the North Carolina Aquaculture Plan for American Eel is February 22 to May 31, 2016. We propose to harvest and grow out glass eels once we have permission to

harvest them in North Carolina. The first crop should be ready for market by October 2016. Any delay in receiving a declaratory ruling will cause a full year setback and jeopardize the ability to locate this industry in North Carolina.

We respectfully ask for your prompt consideration for a declaratory ruling allowing the AEF to harvest, possess, and sell undersize American eels for aquaculture purposes in accordance with the North Carolina Aquaculture Plan for American Eel pending approval by the ASMFC. We are available to answer any questions and address any concerns you may have.

Respectfully,

A handwritten signature in black ink, appearing to read "Richard Allyn", written over a horizontal line. The signature is fluid and cursive.

Richard Allyn

1.28.

CC: Dr. Louis Daniel  
Mr. Mark Gorges  
Mr. Chuck Laughridge  
Mrs. Janet Rose  
Mr. Joe Shute  
Mr. Rick Smith  
Mr. Mike Wicker  
Mrs. Alison Willis



Statement of Facts:

I. SUBJECT

Mr. Richard Allyn with American Eel Farm, LLC (Petitioner) requests a declaratory ruling from the N.C. Marine Fisheries Commission (Commission) regarding the applicability of the size limit for American eel. The Petitioner seeks a ruling regarding the applicability of N.C. Marine Fisheries Commission (Commission) Rule 15A NCAC 03M .0510, as it relates to the take, possession, and sale by the Petitioner of American eel under nine inches. The N.C. Division of Marine Fisheries (Division) is joining the Petitioner in this request for a declaratory ruling.

II. ORGANIZATION

By a letter dated January 29, 2016 and received January 29, 2016 the American Eel Farm, LLC requests a declaratory ruling on Commission Rule 15A NCAC 03M .0510 to allow the American Eel Farm, LLC to take, possess, and sell undersize American eels in North Carolina under the conditions in the North Carolina Aquaculture Plan for American Eel being voted on by the Atlantic States Marine Fisheries Commission (ASMFC) at their February 2-4, 2016 winter meeting. Paragraph (a) of N.C. General Statute Section 150B-4, Declaratory rulings, states the “agency shall prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued.” These rules are set forth in Title 15A (Environment and Natural Resources) of the N.C. Administrative Code, Chapter 03 (Marine Fisheries), Subchapter 03P (Hearing Procedures), Section .0200 (Declaratory Rulings).

III. BACKGROUND

Petitioner is requesting a declaratory ruling regarding the applicability of Commission Rule 15A NCAC 03M .0510, prohibiting the take, possession or sale of American eel under the allowable size limit as it relates to an aquaculture operation where glass eels and elvers would be harvested, raised, and sold in domestic and foreign bait and food markets under an Aquaculture Plan once approved by the ASMFC. The Commission amended Rule 15A NCAC 03M .0510 in 2015 to comply with the new minimum size limit adopted by the ASMFC in Addendum III (adopted 2013) to the Interstate Fishery Management Plan for American Eel. In 2014 the ASMFC adopted Addendum IV which granted states the ability to apply for a limited harvest of glass eels. Under an Aquaculture Plan approved by the ASMFC a maximum of 200 pounds of glass eels may be harvested annually from state waters for use in domestic aquaculture facilities.

In 2002 on behalf of North Carolina Eel Farm (now the American Eel Farm), George Koonce and Alexis Blanchard requested a declaratory ruling as to the applicability of the same rule that is the subject of the current request predicated on the applicability of the rule to aquaculture operations. The Commission issued a declaratory ruling allowing the North Carolina Eel Farm (now the American Eel Farm), which had been issued a valid aquaculture operation permit by the Division, to possess (not harvest or sale) American eel under six-inches (termed glass eels) for the purpose of grow out. The Commission’s ruling allowed the North Carolina Eel Farm to

purchase glass eels from Maine or South Carolina and import them into North Carolina with the appropriate permits for grow out.

In 2015 on behalf of American Eel Farm, Richard Allyn requested a declaratory ruling as to the applicability of the same rule that is the subject of the current request predicated on substantially similar facts presented in 2002. The request was necessary because the rule the 2002 declaratory ruling was issued for was amended by the Commission. The Commission issued a new declaratory ruling allowing the American Eel Farm, which had been issued a valid Aquaculture Operation Permit by the Division, to possess (not harvest or sale) American eel under nine-inches (termed glass eels) for the purpose of grow out. The Commission's ruling allowed American Eel Farm to purchase glass eels legally harvested outside North Carolina and import them into North Carolina with the appropriate permits for grow out.

The current request is necessary because the Petitioner is seeking to take, possess, and sell undersize American eels from State waters in accordance with the North Carolina Aquaculture Plan for American Eel. This action was not authorized in previous declaratory rulings.

Petitioner has been issued an Aquaculture Operation Permit annually since 2013 (permits are valid for one year from the date of issuance), and is seeking a declaratory ruling allowing for the take, possession, and sale of American eel under nine inches. Additional facts are contained in Petitioner's request, a copy of which accompanies this document, and will be discussed by the Division during its presentation of the request. Further discussion is also contained in this document, below.

#### IV. AUTHORITY

- a. North Carolina General Statutes  
§§ 113-134, 113-170.4, 113-170.5, 113-182, 143B-289.52
- b. N.C. Marine Fisheries Commission Rules  
15A NCAC 03P .0201-.0203
- c. Atlantic States Marine Fisheries Commission  
Addendum IV to the Interstate Fishery Management Plan for American Eel

#### V. DISCUSSION

American eel are managed by the ASMFC Interstate Fishery Management Plan for American Eel, adopted initially in 2000. Federal law requires the conservation management actions approved through an ASMFC or regional federal council Fishery Management Plan be implemented by the state of North Carolina. In 2014 the ASMFC adopted Addendum IV which allowed states the ability to apply for a limited harvest of glass eels. Under an Aquaculture Plan approved by the ASMFC a maximum of 200 pounds of glass eels may be harvested annually from state waters for use in domestic aquaculture facilities.



American eel is included in the North Carolina Interjurisdictional Fishery Management Plan. The goal of the North Carolina Interjurisdictional Fishery Management Plan is to adopt Fishery Management Plans, consistent with North Carolina law, approved by Councils or ASMFC by reference and implement corresponding fishery regulations in North Carolina to provide compliance or compatibility with approved Fishery Management Plans and amendments, now and in the future.

North Carolina General Statute Section 113-132 authorizes the Commission to regulate aquaculture facilities which cultivate or rear marine and estuarine resources. The Commission is also authorized to issue permits for specialized activities pursuant to N.C. General Statute §113-169.1, and to regulate the importation and exportation of fish pursuant to N.C. General Statute §113-170. The Commission has adopted regulations establishing an Aquaculture Operations Permit which, at the discretion of the Director, may be conditional as to species, quantity, size, time or location (NCMFC Rules 15A NCAC 03O .0501, .0502, and .0503), and has adopted regulations establishing a Permit to Introduce, Transfer or Hold Imported Marine Estuarine Organisms (15A NCAC 03I .0104). These authorities and permits allow the Commission the ability regulate aquaculture facilities, including the size of the species to be reared, and has implemented its statutory authority regarding aquaculture operation permits through its rules.

The Commission's 2002 and 2015 declaratory rulings held that the prohibition on possession of American eels under the minimum size limit did not apply to an aquaculture facility issued a valid Division of Marine Fisheries aquaculture operation permit for the cultivation or rearing of eels legally harvested outside North Carolina and imported into this State. The ruling further held that such facilities were subject to the conditions of the permit issued by the Division.

In December 2015 the Division submitted an Aquaculture Plan to the ASMFC for consideration which would allow the Petitioner to harvest 200 pounds of American eel glass eels for grow out. The ASMFC approved the Aquaculture Plan at its February 2-4, 2016 winter meeting.

The American Eel Farm currently possesses a valid Division of Marine Fisheries Aquaculture Operation permit and has done so since 2013.

As noted above, the Division has joined Petitioner's request, and is in favor of the request being granted by the Commission. The Division notes that, should the Commission grant the request, the Petitioner's facility and operations would continue to be subject to the Aquaculture Operation Permit issued by the Division and any other applicable statutes and regulations.



STATE OF NORTH CAROLINA  
COUNTY OF JONES

BEFORE THE  
NORTH CAROLINA MARINE  
FISHERIES COMMISSION

IN THE MATTER OF: )  
PETITION FOR DECLARATORY RULING BY )  
RICHARD ALLYN )  
CONCERNING THE APPLICATION OF )  
COMMISSION RULE 15A NCAC 03M .0510 )  
TO AQUACULTURE OPERATIONS )

**DECLARATORY RULING**

---

THIS MATTER came before the North Carolina Marine Fisheries Commission (hereinafter the Commission) at its regularly scheduled meeting in Wrightsville Beach, North Carolina on February 18, 2016, as a request for a declaratory ruling pursuant to N.C.G.S. §150B-4 by Mr. Richard Allyn on behalf of American Eel Farm (hereafter Petitioner). As described more fully in the Findings of Fact and Conclusions, below, Petitioner seeks a ruling concerning the application of Commission Rule 15A NCAC 03M .0510, as it relates to an aquaculture operation.

The Petitioner and the North Carolina Division of Marine Fisheries, through its Director, stipulated to the facts presented in Petitioner’s January 29, 2016 Petition for Declaratory Ruling, as supplemented by the Statement of Facts submitted by the Director on January 29, 2016, and the matter was presented to the Commission as a joint request by the Petitioner and the Division. The Fisheries Director presented the joint request to the Commission at its meeting on February 18, 2016. The Commission by proper motion and majority vote granted the Request for Declaratory Ruling, and to proceed to the merits of the applicability of 15A NCAC 03M .0510 to the given state of facts. Upon review of the record documents and stipulated facts, the Commission makes the following:

**FINDINGS OF FACT AND CONCLUSIONS**

1. Petitioner American Eel Farm, through Mr. Richard Allyn, seeks a declaratory ruling on the issue of whether the current prohibition on the take, possession, and sale of American eels less than nine (9) inches (also known as “glass eels” or “elvers”), as provided in 15A NCAC 03M .0510 applies to an

aquaculture facility that is included in a North Carolina Aquaculture Plan for American Eel approved by the ASMFC and is permitted under an Aquaculture Operation Permit and Aquaculture Collection Permit issued pursuant to N.C.G.S. §113-169.1 and Commission Rules 15A NCAC 03O .0501, .0502, and .0503(f).

Petitioner's Operation

2. Petitioner proposes to operate an aquaculture facility located at Highway 41, Trenton, Jones County, North Carolina, for the purposes of rearing American eels. The facility includes a building housing 24 self-contained (closed-loop) 1,000 gallon and two 7,500 gallon, automated, self-cleaning and oxygenated holding tanks in which American eels are to be reared until they reach a marketable size at which they may be legally sold within and outside of the State of North Carolina to bait shops, bait brokers or other markets in accordance with applicable state and federal laws and regulations.

3. Petitioner intends to take, possess, and sell undersize American eels from Coastal Fishing Waters in the State of North Carolina in accordance with the North Carolina Aquaculture Plan for American Eel approved by the Atlantic States Marine Fisheries Commission.

Previous Commission Declaratory Rulings

4. In 2002 on behalf of North Carolina Eel Farm (now the American Eel Farm), George Koonce and Alexis Blanchard requested a declaratory ruling as to the applicability of the size limitation found in Rule 15A NCAC 03M .0510.

5. Predicated on the 2002 Request for Declaratory Ruling filed by North Carolina Eel Farm (now the American Eel Farm), the Commission issued the following Ruling:

The 15A NCAC 3M .0150 prohibition on possession of American eels less than six (6) inches in length does not apply to an aquaculture facility issued a valid Division of Marine Fisheries aquaculture operation permit for the cultivation or rearing of eels legally harvested outside North Carolina and imported into this State. This Declaratory Ruling does not exempt an aquaculture facility permitted by the Division of Marine Fisheries from complying with the requirements of all other applicable State and federal laws and regulations.

6. In 2015 on behalf of the American Eel Farm, Richard Allyn requested a declaratory ruling as to the applicability of the size limitation found in Rule 15A NCAC 03M .0510. This request was

necessary because Rule 15A NCAC 03M .0510 was suspended by the Fisheries Director in November 2014 and amended by the Commission in February 2015 and rendered the 2002 declaratory ruling null and void.

7. Predicated on the 2015 Request for Declaratory Ruling filed by the American Eel Farm, the Commission issued the following Ruling:

The prohibition in Rule 15A NCAC 03M .0510 on possession of American eels less than nine (9) inches in length does not apply to an aquaculture facility issued a valid Division of Marine Fisheries Aquaculture Operation Permit for the cultivation or rearing of eels legally harvested outside North Carolina and imported into this State. This Declaratory Ruling does not exempt an aquaculture facility permitted by the Division of Marine Fisheries from complying with the requirements of all applicable State and Federal laws and regulations

8. Petitioner purchased North Carolina Eel Farm in 2012, renamed the facility the American Eel Farm, and operated the facility pursuant to the Commission's 2002 and 2015 Declaratory Rulings and an applicable Aquaculture Operation Permit as issued by the Fisheries Director.

American Eel Fishery Management Plan, Addendum IV

9. The Atlantic States Marine Fisheries Commission adopted Addendum IV to the Interstate Fishery Management Plan for American Eel in 2014. Addendum IV contains a provision allowing states to submit for approval an Aquaculture Plan that would allow for a limited harvest (take) of American eel glass eels for use in domestic aquaculture facilities. Specifically, states are allowed to request for a harvest of up to 200 pounds of glass eels under an Aquaculture Plan.

10. The North Carolina Division of Marine Fisheries submitted an Aquaculture Plan for review by the Atlantic States Marine Fisheries Commission in December 2015. At their February 2-4, 2016 winter meeting the Atlantic States Marine Fisheries Commission will be voting to approve the North Carolina Aquaculture Plan for American Eel submitted in accordance with Addendum IV to the Interstate Fishery Management Plan for American Eel.

Commission's Authority to Regulate Aquaculture Facilities

11. In accord with its authority to regulate aquaculture facilities which cultivate or rear marine resources pursuant to N.C.G.S. §113-132, to issue permits for specialized activities pursuant to N.C.G.S.

§113-169.1, and to regulate the importation and exportation of fish pursuant to N.C.G.S. §113.70, the Commission has adopted regulations establishing an aquaculture operations permit which, in the discretion of the Director, may be conditioned as to species, quantity, size, time or locations (15A NCAC 03O .0501, .0502, and .0503) and has adopted regulations establishing a permit for the importation and transfer of marine and estuarine organisms (15A NCAC 03I .0104).

12. Legally obtained state stocks of this marine resource, American eel, qualify as “artificially propagated stocks of marine resources” under the rule defining aquaculture operation. 15A NCAC 03I .0101(2)(a)

Based upon the foregoing findings of fact and conclusions, the North Carolina Marine Fisheries Commission makes the following:

**DECLARATORY RULING**

The prohibition in Rule 15A NCAC 03M .0510 on the take, possession, and sale of American eels less than nine (9) inches in length does not apply to an aquaculture facility included in a North Carolina Aquaculture Plan for American Eel approved by the Atlantic States Marine Fisheries Commission and issued a valid Division of Marine Fisheries Aquaculture Operation Permit and Aquaculture Collection Permit for the harvest, cultivation or rearing, and sale of eels legally harvested inside North Carolina. This Declaratory Ruling does not exempt an aquaculture facility permitted by the Division of Marine Fisheries from complying with the requirements of all applicable State and Federal laws and regulations

This the \_\_\_\_ day of March, 2016

---

Sammy Corbett, Chairman  
Marine Fisheries Commission