

***INFORMATION ON REPACKAGING FOREIGN
CRAB MEAT IN NORTH CAROLINA***



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April 27, 2020

MEMORANDUM

TO: N.C. Marine Fisheries Commission

FROM: Shannon Jenkins, Section Chief and Shawn Nelson, Inspections Program Supervisor, Shellfish Sanitation and Recreational Water Quality Section

SUBJECT: Information on Repacking of Foreign Crab Meat in North Carolina

Issue

Commissioner Doug Cross requested that the Director of the Division of Marine Fisheries develop an information paper to amend N.C. MFC Rule 15A NCAC 18A .0173 regarding the repacking of foreign crab meat. Commissioner Cross requested the DMF to examine the possibility of making it unlawful to repack or possess foreign crab meat in North Carolina unless it remains in the original container.

Findings

- Negative publicity regarding fraud may have an effect on the reputation of the N.C. crab meat industry and decrease consumer confidence in authentic “Product of USA” crab meat.
- A prohibition of foreign crab meat in North Carolina (unless it remains in the original packed container) would have an economic impact on some N.C. crab processors and a significant number of grocery stores and retail outlets that market that type of product.
- A prohibition could result in significant enforcement challenges for DMF Marine Patrol.
- A prohibition may result in legal issues regarding interstate commerce.
- A request for legislative action might be most appropriate for any change in the lawfulness of repacked foreign crab meat in North Carolina. An action taken by the N.C. General Assembly would highlight the importance of strengthening the domestic crab meat market.
- If the MFC considers taking action, 15A NCAC Subchapter 03L Section .0200 (Crabs) would be most appropriate place in the MFC rules for any change in the lawfulness of repacked foreign crab meat in North Carolina.
- If the MFC considers taking action, a more-focused alternative could be to prohibit the repacking of foreign crab meat by N.C. crab processors only, but this would still allow repacked foreign crab meat from other states to be marketed in North Carolina.

Action Needed

For informational purposes only, **no action is needed at this time.**

Information on Repacking of Foreign Crab Meat in North Carolina

April 13, 2020

I. SUBJECT

Provide summary information on the requirements and practice of repacking of foreign crab meat by N.C. permitted crustacea processors and the use of repacked foreign crab meat by N.C. businesses other than permitted processors such as grocery stores and retail outlets.

II. ORIGINATION

During the “Issues from Commissioners” portion of the Feb. 20, 2020 Marine Fisheries Commission (MFC) meeting, Commissioner Doug Cross requested that the Director of the Division of Marine Fisheries (DMF) consider developing an information paper to amend N.C. MFC Rule 15A NCAC 18A .0173 regarding the repacking of foreign crab meat. Commissioner Cross requested the DMF to examine the possibility of making it unlawful to repack or possess foreign crab meat in North Carolina unless it remains in the original container. The Commissioner expressed that recent publicity regarding foreign crab meat being fraudulently represented as local blue crab product hurts North Carolina’s crab meat reputation and that the only reason for foreign crab meat to be repacked is to defraud the consumer. The request did not apply to value-added products such as crab cakes or use of foreign crab meat for restaurant use.

III. BACKGROUND

Crab Picking Industry in North Carolina

Blue crab (*Callinectes sapidus*) supports the largest and most valuable commercial fishery in North Carolina (NCDMF 2019). An important part of this fishery involves the harvest of hard-shell crabs from N.C. waters to be sold to DMF certified and permitted crab processors. In North Carolina, the number of crab processors, otherwise known as “crab picking” facilities, has decreased significantly from as many as 43 in 1990 to 14 currently. Potential factors in the reduced numbers include the live crab or “basket” market where dealers in other states pay higher prices for live crabs, the lack of a steady supply of live crabs due to reduced overall landings during some years, and competition from lower cost crab meat imported from overseas or other states (NCDMF 2020).

Crab processors typically cook baskets of live crabs in a steam retort cooker under pressure to eliminate food-borne pathogens such as bacteria, and produce a product that is shelf-stable. After cooking, the whole crabs are air-cooled prior to being stored in refrigeration. Employees then use sanitary techniques to pick the meat of the crab for subsequent packing, typically into individual plastic containers labeled with their particular brand. Although there is no consensus regarding shelf-life, it appears that N.C. crab processors use a range of 10-14 days, if properly stored, with the extremes being as low as 7 days and as high as 21.

The processor may also use pasteurization as an alternative or additional process to further extend the shelf-life of the product by months. Pasteurization involves an additional heating and cooling process after the meat is placed in a hermetically sealed container, typically a metal can.

Repacking

Processors that are certified and permitted by DMF as a crustacea repacker can also repack crab meat that has been previously cooked and packed initially. Processors who repack usually do so in order to market the product in their own branded containers. Repacking involves transferring crustacea product from the original packed container into the repacker’s branded container using sanitary techniques in accordance with N.C. MFC rules (15A NCAC 18A Section .0100-.0191, *Handling: Packing: and Shipping of Crustacea Meat*). Examples of required sanitary techniques include maintaining a safe temperature during repacking in order to limit bacterial growth, and taking precautions such as sanitizing utensils, tables, etc. to limit possible contamination from the packing process. The repacker is required to label the repacked container with their name, address, certification number followed by the letters “RP”, and a code indicating the repack date.

In addition to repacking domestically sourced crab product, processors can also repack product from foreign sources. Sources include Asia and South America with countries such as Indonesia, Vietnam, China, Mexico, Brazil, and Venezuela. Imports include the meat from two types of “swimming crabs” that are related to blue crab: *Portunidae* (family that includes blue crabs) and *Callinectes* (blue crab genus). Processors who repack meat from foreign sources typically receive pasteurized product in cans and then repack the product directly into their own branded plastic containers. In addition to the labeling requirements for repacked containers described above, containers that are repacked with foreign crab meat are required to be “labeled in accordance with Federal labeling requirements” as directed in MFC rules 15A NCAC 18A .0136 and .0173.

Labeling Requirements

Regarding federal labeling requirements, Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin, or its container, must be legibly, permanently, and conspicuously marked to indicate the country of origin to an ultimate purchaser in the U.S. The primary purpose of the country of origin marking statute is to “mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will” United States v. Friedlaender & Co., 27 C.C.P.A. 297, 302, C.A.D. 104 (1940).

Further, U.S. Customs and Border Protection Headquarters Ruling Letter #732337 dated Aug. 16, 1989 clarified that repacked crab meat does not substantially transform the product and is therefore subject to the marking requirements of 19 U.S.C. 1304. Internal correspondence with U.S. Customs and Border Protection also confirms that the repacker has the duty to mark the new package with the country of where the product originates. Furthermore, although the product may be exempt from the U.S. Department of Agriculture Country of Origin Labeling (COOL) requirements, this has no bearing on the applicability of the Customs and Border Patrol marking requirements and so the product must be marked with its country of origin.

Virginia and Maryland also have significant blue crab industries via the Chesapeake Bay, and like North Carolina have similar crab processing operations. It should also be noted that both Virginia (*Virginia Administrative Code 12VAC5-165-310. Improper Labeling of Foreign Crab Meat*) and Maryland (*Code of Maryland Regulations Sec. 10.15.02.14. Labeling and Marking of Crab Meat Containers*) also currently allow foreign crustacea meat to be repacked, provided the country of origin is properly indicated on the product container.

Negative Publicity

Two recent high profile federal cases involving seafood fraud have received much media attention, with one involving a N.C. crustacea processor and the other a VA crustacea processor. The owner of the N.C. processor was sentenced to 12 months and one day in prison, followed by three years of supervised release, and is required to pay a \$250,000 fine for his role in falsely labeling millions of dollars’ worth of foreign crab meat as “Product of USA.” The business is also required to pay a fine of \$500,000. A U.S. Department of Justice news release stated “Seafood mislabeling is consumer fraud that undermines efforts of hardworking, honest fisherman [*sic*] and the free market by devaluing the price of domestic seafood,” said Acting U.S. Attorney General Norman Acker III for the Eastern District of North Carolina. “In this case, the fraudulent scheme artificially deflated the cost of domestic blue crab and gave...an unacceptable economic advantage over law-abiding competitors.”

The owner of a VA processor pleaded guilty in federal court to falsely labeling millions of dollars’ worth of foreign crab meat as “Product of USA”. According to a U.S. Department of Justice news release, “As part of the plea, he admitted that part of the conspiracy was to purchase discounted foreign crab meat, some of which was referred to as “distressed” because it was approaching or beyond its posted “best used by” dates. He admitted to knowing that company employees “re-conditioned” the “distressed” crab meat by re-pasteurizing it, and then packaging the re-conditioned meat into the company’s containers” thus passing on a potential health hazard by introducing the seafood of unknown origin.

In both cases, the firms admitted that they were not able to process sufficient quantities of domestic blue crab to meet customer demands. The companies used foreign crab meat to fulfill customer orders to make up for the shortfalls.

IV. AUTHORITY

U.S. Constitution

Article 1, Section 8, Clause 3 “Commerce Clause”

U.S. Code

19 U.S.C. § 1304 Marking of imported articles and containers

N.C. General Statutes

§ 113-134. Rules.

§ 113-182. Regulation of fishing and fisheries

§ 113-221.2. Additional rules to establish sanitation requirements for scallops, shellfish, and crustacea; permits and permit fees authorized

§ 143B-289.52. Marine Fisheries Commission – powers and duties.

N. C. Marine Fisheries Commission Rules (April 1, 2020)

15A NCAC 18A .0136 Applicability of Rules

15A NCAC 18A .0173 Repacking

V. DISCUSSION

The MFC request to examine the possibility of making it unlawful to repack foreign crab meat or possess foreign crab meat in North Carolina that has been repacked brings forward a few issues that need to be evaluated. A change as described would affect a portion of the existing crab meat industry in North Carolina. An informal poll of processors by DMF staff indicates that there are currently three crustacea processing facilities in North Carolina that engage in repacking of foreign crab meat as described above, out of the 14 total permitted processors in the state.

A change as described would also affect grocery stores and retail outlets in North Carolina statewide that market foreign crab meat that has been repacked into a container other than the original. The sheer number of outlets and geographic spread would also create a significant enforcement challenge for DMF Marine Patrol.

It should also be noted that grocers and retail outlets also market foreign crab meat that remains in the original containers as initially packed in the source country, as some firms in other states also own crab picking operations overseas. Although the request would not apply to this situation, enforcement would have to differentiate repacked foreign crab meat vs. foreign crab meat that is in the original container to identify legal vs. unlawful product. Foreign crab meat that has been repacked should be able to be identified as “repacked” product by locating the required state crustacea certification number and “RP” designation on the container.

The fact that Virginia and Maryland would still allow repacked foreign crab meat with import avenues into North Carolina is also an issue to examine. The *Commerce Clause* is a provision of the U.S. Constitution (Article 1, Section 8) that authorizes Congress to regulate commerce “among the several states.” The *Commerce Clause* has been viewed as a grant of congressional authority and a limitation on the regulatory authority of the states. With that said, there have been a number of interpretations on the clause and the balance of power between the federal government and the states. One example is the “Dormant Commerce Clause”, which is a doctrine inferred from the *Commerce Clause* by the U.S. Supreme Court. The “Dormant Commerce Clause” allows the federal government to prevent economic discrimination between states by protectionist policies. An example would be that a state should not be permitted to pass laws benefiting itself that also burdens another state (interstate commerce).

There appears to be some precedent in N.C. MFC rules and policies regarding commerce between states. An example is the minimum oyster size requirement during the open oyster season. Rule 15A NCAC 03K .0201 allows the DMF Director, via proclamation, to specify a minimum size of oysters that can be possessed. Rule 03K .0207 exempts an oyster Aquaculture Operation from that size limit. This rule prohibits non-Aquaculture Operation oysters from another state that are under the current size limit to be in North Carolina even if legal in the source state. The reasoning behind this requirement is an oyster resource issue, not an issue of public health or commerce. Regardless of applicability, the potential interstate issue for repacked crab meat should be evaluated by legal staff.

If a change in the lawfulness of repacked foreign crab meat in North Carolina is considered, it appears that the Subchapter 18A .0100-.0191 Section of the N.C. MFC rules (Handling: Packing: and Shipping of Crustacea Meat) would not be the most appropriate place to address it. N.C. General Statute 113-221.2 (Additional rules to establish sanitation requirements for scallops, shellfish, and crustacea) gives the MFC the authority to adopt rules establishing sanitation requirements for the harvesting, processing and handling of scallops, shellfish, and crustacea “for the protection of public health”. When conducted in accordance with sanitary rules, the repacking of foreign crab meat into another container does not pose a health issue.

Subchapter 03L Section .0200 of the N.C. MFC rules (Crabs) might be more appropriate for this type of restriction if rulemaking is considered. N.C. General Statutes 113-134, 113-182 and 143B-289.52 give N.C. MFC the authority to regulate and adopt rules regarding the marine and estuarine resources within its jurisdiction. With that said, the proposal to restrict foreign crab meat in North Carolina that has been repacked may be a difficult issue to promulgate via rulemaking due to the potential interstate commerce issue.

The most appropriate avenue for a restriction of this type may be a request for a legislative change. A change put in place by the N.C. General Assembly may be a more significant signal about the importance of strengthening the domestic crab meat market.

An alternative change, if any, with less effect would be to only prohibit the repacking of foreign crab meat by NC processors. This could result in unfair competition issues for the NC processors that currently participate in this activity. In this scenario, North Carolina crab processors would be prohibited from repacking foreign crab meat, while repacked foreign crab meat from processors in other states could still be marketed in North Carolina grocery stores and retail outlets. Also, this scenario may not resolve the original concern expressed which was the opinion that foreign crab meat in a container other than the container that it was initially packed in could deceive the customer even if it is labeled with the country of origin.

VI. SUMMARY FINDINGS

- Negative publicity regarding fraud may have an effect on the reputation of the N.C. crab meat industry and decrease consumer confidence in authentic “Product of USA” crab meat.
- A prohibition of foreign crab meat in North Carolina (unless it remains in the original packed container) would have an economic impact on some N.C. crab processors and a significant number of grocery stores and retail outlets that market that type of product.
- A prohibition could result in significant enforcement challenges for DMF Marine Patrol.
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- A request for legislative action might be most appropriate for any change in the lawfulness of repacked foreign crab meat in North Carolina. An action taken by the N.C. General Assembly would highlight the importance of strengthening the domestic crab meat market.
- If the MFC considers taking action, 15A NCAC Subchapter 03L Section .0200 (Crabs) would be most appropriate place in the MFC rules for any change in the lawfulness of repacked foreign crab meat in North Carolina.
- If the MFC considers taking action, a more-focused alternative could be to prohibit the repacking of foreign crab meat by N.C. crab processors only, but this would still allow repacked foreign crab meat from other states to be marketed in North Carolina.

VII. REFERENCES CITED

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