

20CV012925

NORTH CAROLINA

WAKE COUNTY

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WAKE COUNTY, C.S.C.

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

20-CVS-_____

COASTAL CONSERVATION ASSOCIATION,
d/b/a CCA NORTH CAROLINA;
BRUCE C. ABBOTT; CHARLES P. ADAMS,
JR.; CONSTANTINE A. ARETAKIS, II;
FREDERICK L. BERRY; ANDREW R. BOYD;
HARRY T. BRANCH; TROY D. BRANHAM;
RUPERT D. BROWN; JUDITH C.
BULLOCK; WILLIAM L. BYRD, JR.;
JOHNNY L. CANUP; MICHAEL D. CARTER;
WILLIE T. CLOSS, JR.; KENNETH D.
COOPER, JR.; L. AVERY CORNING, IV;
PAUL N. COX; BENJAMIN M. CURRIN;
DANIEL E. DAWSON; MARY F. DAWSON;
CHARLES B. EFIRD; FRANK K. EILER;
CHRISTOPHER ELKINS; DAN E. ESTREM;
ANDREW P. GILLIKIN; LELAN E. HALLER,
JR.; JOHN M. HISLOP; RAYMOND Y.
HOWELL; JOEY S. HUMPHREY; THOMAS
G. HURT; CLARK W. HUTCHINSON, JR.;
ANDREW G. JONES, JR.; GEORGE M.
KIVETT, JR.; JOHN C. KNIGHT, JR.;
BRADFORD A. KOURY; CHARLES H.
LAUGHRIDGE; CASEY M. LLOYD;
MARILYN R. LOWE; CHARLIE LOYA, JR.;
NICKIE N. LUCAS; BRUCE D.
MACLACHLAN; EULISS D. MADREN;
WILLIAM W. MANDULAK; DARRELL G.
MCCORMICK; TERESA A. D.
MCCULLOUGH; SAMUEL B. MCLAMB, III;
JAMES M. MCMANUS, JR.; JOHN W.
MCQUAID; GEORGE R. MODE; JOHN V.
MOON; DENNIS K. MOORE; KENNETH N.
MOORE, JR.; WARREN S. MOORING;
ELIJAH T. MORTON; DANIEL J. NIFONG;
SADIE R. NIFONG; ROBERT B. NOWELL,
JR.; ELBERT W. OWENS, JR.; WYATT E.
PARCEL; VAN B. PARRISH; JAMES H.
PARROTT; BRYAN C. PATE; ALEXANDRA
S. PEYTON; HUNTER L. PEYTON;
JEFFREY P. PICKERING; ROBERT R.
RICE, II; ROBERT T. RICE; ORICE A.
RITCH, JR.; MARK A. RUFFIN; PEARCE
RUFFIN; ERIC J. SATO; SEAN P. SCULLY;
LENNY T. SMATHERS; CARROLL W.
SPENCER; JOHN R. SPRUILL; DAVID M.
SUMMERS; JOHN B. TAGGART; JESSE H.
WASHBURN, II; ANDREW J. WEBSTER;
MELISSA N. WILLIAMS; VANDEXTER
WILLIAMS; DONALD A. WILLIS, JR.;

COMPLAINT

A. REXFORD WILLIS, III; JAN L. WILLIS;
PHILLIP R. WOOD; RAYE P. WOODIN, III;
JOSEPH G. YAGER,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

INTRODUCTION AND OVERVIEW

1. This lawsuit is about the State of North Carolina’s failure to satisfy its obligations under the public-trust doctrine—a legal doctrine that is as old as the State itself, and which the people of North Carolina have ratified as a permanent part of their Constitution.

2. The public-trust doctrine originated in ancient Roman law, was adopted by the British Crown, and was ultimately passed on to the thirteen original American colonies, including North Carolina. The doctrine remains one of the sacred components of the compact that the State has with its citizens. It imposes on the State a legal duty to hold and manage in trust, for the benefit of its current and future citizens, all of North Carolina’s public-trust resources.

3. These public-trust resources include all navigable waters, including those in North Carolina’s coastal regions, as well as the lands they submerge. These public-trust resources also include the public’s use of those navigable waters, including the public’s right to navigate those waters and fish for personal use and enjoyment. And these public-trust resources include the fish that swim in those public waters, which the State holds in trust for the benefit of all North Carolinians.

4. The public-trust doctrine operates according to the same basic trust principles that govern the trust relationship between trustees and beneficiaries. Under those principles, the trustee (the State) owes a fiduciary duty to hold the trust property (public-trust resources) in trust for the benefit of the trust beneficiaries (current and future citizens). That fiduciary duty includes the obligation to preserve and protect the trust property (public-trust resources) from human overexploitation or waste.

5. Thus, for North Carolina's coastal fisheries resources, the public-trust doctrine imposes a fiduciary duty on the State to manage and regulate the harvest of coastal finfish and shellfish in a way that protects the right of current and future generations of the public to use public waters to fish. As a result, the State may not allow finfish or shellfish harvest gears or methods in public waters that generate undue wastage or impair the sustainability of coastal fisheries resources, which in turn threaten the rights of current and future generations of the public to use public waters to fish.

6. The State cannot disclaim or otherwise avoid its duties as trustee under the public-trust doctrine. In other words, the State does not have the option to simply "resign" as trustee. Nor may the General Assembly abrogate the State's legal duty under the public-trust doctrine. To the contrary, the duties of the State in managing public-trust resources for the benefit of the public are inviolable.

7. To that end, the people of North Carolina in their Constitution have mandated that the State uphold its public-trust obligations and respect their public-

trust rights. Article I, Section 38 of the North Carolina Constitution provides in pertinent part:

The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing.

N.C. Const. art. I, § 38.

Furthermore, Article XIV, Section 5 of the North Carolina Constitution, entitled "Conservation of Natural Resources," provides in pertinent part:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to . . . preserve as a part of the common heritage of this State its . . . estuaries [and] beaches.

N.C. Const. art. XIV, § 5.

8. In contrast to these public-trust rights of the public, the right of any business or individual to fish in public waters for profit is a narrow, limited privilege, afforded only by statute. Thus, that limited privilege is subject to legislative discretion. When the State is determining appropriate policies or plans for managing coastal fisheries resources, that limited privilege granted to a relative few citizens or companies to fish for profit must yield in priority to the constitutionally protected public-trust rights of the broader public. Accordingly, the State cannot allow the for-profit harvesting of finfish or shellfish in quantities or through methods that cause overexploitation or undue wastage to North Carolina's coastal fisheries resources.

9. When private entities are freely allowed to profit from the use of public, natural resources, it almost always results in the demise of those resources. That is because there is no incentive to conserve resources jointly shared with others, and there is every incentive to harvest such resources before someone else does so. This is the sad “tragedy of the commons” that characterizes the use of coastal fisheries resources in North Carolina. That tragedy can only be prevented or reversed by intentional and decisive government action by the State, the resource trustee, in meeting its public trust and constitutional obligations owed to all current and future citizens.

10. In the case of North Carolina’s coastal fisheries resources, however, the State has failed to take decisive action to preserve and protect those resources from overexploitation and waste. The State has facilitated the tragedy of the commons by, in many instances, allowing the commercial-fishing industry to dictate or exert a disproportional influence on the State’s coastal fisheries resources management policies and plans. The State has thereby allowed the overexploitation of coastal fisheries resources by those who possess the privilege to harvest those resources for profit, even though they represent less than one-tenth of one percent of the North Carolina citizens for whom those resources are held in trust. As described below, that disparate control or influence of State policy and State agencies by a small segment of North Carolina’s citizens reflects “regulatory capture,” where the State’s regulatory agencies become co-opted to serve the commercial interests they are charged with regulating.

11. The root cause of the demise of North Carolina’s public-trust coastal fisheries resources is the State’s mismanagement of those resources. Commercial fishing licensees generally use only those gears and harvest methods that the State allows by law. Consequently, while commercial overharvest or waste of public-trust resources has been the major factor in the decline of coastal fisheries resources, it has occurred only because the State has permitted it to occur. The State has extended the industry’s collective privilege to fish for profit beyond what is permissible in light of the State’s public trust and constitutional duties owed to all current and future citizens of North Carolina.

12. As described more fully below, the State has breached its duties under the public-trust doctrine by mismanaging North Carolina’s coastal fisheries resources, resulting in a decades-long, uninterrupted, dramatic decline in these resources overall, as well as a decline in the health of multiple, specific species and/or stocks of these fish.¹

¹ This complaint refers to North Carolina’s coastal fisheries resources both in terms of “species” and “stocks.” “Species” is a biological unit; it is the scientific designation for an interbreeding population, or “kind” of fish—for example, Southern Flounder (*Paralichthys lethostigma*). “Stock,” by contrast, is simply a management term—that is, “stock” is a designation of a fisheries resource unit that is used for management purposes. A single fish species may have more than one management unit, and, therefore, more than one stock.

For example, this complaint describes the species “Striped Bass” (*Morone saxatilis*), as well as the two North Carolina management stocks of Striped Bass—a northern and a southern stock—within that species. Because “stock” is an artificial management unit rather than a biological unit, it may also include more than one fish species. (*continued* on page 7)

13. For example, the State has continued to allow—and even facilitated—several commercial fishing practices that result in substantial wastage of coastal fish stocks or their prey species, or result in critical habitat destruction. Those commercial fishing practices include trawling in estuarine waters with significant populations of juvenile finfish, and using “unattended” gillnets. The State’s tacit approval of these destructive practices is a fundamental failure of its duties as the trustee charged with managing and protecting coastal fisheries resources in North Carolina.

14. Sadly, North Carolina is the last bastion of these two wasteful fishing practices. Long ago, all other southeastern states either banned or severely curtailed these commercial fishing practices because of the waste in fisheries resources they generate. But not North Carolina. The State has consequently earned a reputation among its sister states as an outlier in coastal fisheries management.

15. As a result, stocks of multiple fish species (for example, Spot (*Leiostomus xanthurus*), Atlantic Croaker (*Micropogonius undulatus*), and Weakfish (*Cynoscion regalis*)) have declined precipitously—84 to 98 percent—since the last major fisheries management reform legislation was enacted in North Carolina in 1997. The once vibrant public fishing for those species in North Carolina’s coastal waters has all but vanished.

(*continued*): As another example, this complaint refers to the “River Herring” stock, which actually consists of two species that live and travel together in mixed groups. For that reason, it makes sense to treat them as one group for management purposes. By convention, where a single fish species is also managed as a single stock, the terms “species” and “stock” are often used interchangeably in describing that species.

16. In addition, the State has tolerated chronic, long-term overfishing of multiple species. One such stock, “River Herring” (collectively Blueback Herring (*Alosa aestivalis*) and Alewife (*Alosa pseudoharengus*)), has been overharvested to the point of local extirpation due to the intentional inaction by North Carolina’s fisheries management agencies to halt or prevent commercial overfishing. Although commercial landings historically exceeded twenty million pounds annually, the State’s inaction caused a stock collapse. River Herring may never recover to the point that any harvest is biologically sustainable.

17. The State’s decades-long tolerance (and, indeed, even promotion) of commercial overfishing, as well the use of commercial practices that result in overfishing or enormous resource wastage, have resulted in the decline of other fish species. Southern Flounder (*Paralichthys lethostigma*) and Striped Bass are examples. Draconian measures will likely be needed to save these stocks from suffering the same fate as the River Herring.

18. The consequence of the State’s mismanagement of coastal fisheries resources is that it has eliminated or, at a minimum, severely curtailed the public’s right to fish for those species. Increasingly more restrictive “public fishing limits” is one indicator of that curtailment. Examples are “open” seasons, minimum size limits, and the number of fish of any species the fishing public is lawfully allowed to keep. In North Carolina, public fishing limits have steadily become more restrictive over time for many coastal fish species that have been historically important to the public.

Many North Carolina residents who once avidly pursued coasting fishing have, out of frustration over the inability to catch fish, given it up for other pursuits.

19. While North Carolina statutes expressly recognize the historical importance of public subsistence fishing in our State, the State's mismanagement and resultant stock declines have rendered subsistence fishing virtually impossible coastwide.² Piers that once dotted the coast, where citizens often stood shoulder-to-shoulder to harvest the reliable annual "runs" of migratory fish species, have slowly disappeared. The piers that remain sit empty much of the time.

20. As another indicator of the poor health of our coastal fisheries resources, commercial landings of most coastal finfish stocks or species in North Carolina have likewise steadily declined since the 1980s to historic lows. Managing coastal fish stocks in the overall public interest would result not only in the ability of the fishing public to exercise its constitutionally-protected, public-trust right to fish, but would mean an overall increase in stock size, with more fish allocable to the commercial sector as well.

² N.C. Gen. Stat. § 113-351(d) provides for the issuance of Unified Inland/Coastal Recreational Fishing License Waivers at no charge to income-qualified residents, for the purpose of subsistence fishing of state fisheries resources, including public-trust fish stocks. In the 2019-2020 license year, the State issued 22,635 such waivers to North Carolina citizens in all of North Carolina's 100 counties. In the last five years, the State has issued an average of 31,959 such subsistence license waivers each year. These are the citizen resource owners who financially *need* the sustenance provided by public harvest from properly managed public-trust fish stocks. Yet, as explained below, under the coastal fisheries management policies of the State, that sustenance is simply not available to subsistence fishers or any other public fisher on a reasonable or consistent basis.

21. As described below, both the General Assembly and the State's administrative agencies have been culpable for the long-term demise, current poor condition, and continuing decline of our coastal fisheries resources. The cumulative result of these failings has been unimpeded, staggering resource wastage; chronic overfishing of multiple species of coastal finfish; an inability to reach the stated statutory objective of sustainable harvests and stock viabilities, as independently required under the public-trust doctrine; and resultant economic harm to North Carolina's coastal economy.

22. With North Carolina's public-trust, coastal fisheries resources in continuing decline and in serious jeopardy, the Plaintiffs bring this action to hold the State accountable.

PARTIES

23. Plaintiff Coastal Conservation Association, d/b/a CCA North Carolina, Inc. ("CCA NC") is a non-profit corporation headquartered in Raleigh, North Carolina. CCA NC's mission is to promote sound management of public-trust marine and estuarine resources in North Carolina, and it works to protect those resources for the enjoyment of current and future generations. Many of the individual Plaintiffs, all of whom are citizens and residents of North Carolina, are life or current annual members of CCA NC. The vast majority of CCA NC's other members are also North Carolina citizens and residents who would also have standing as plaintiffs in this action, and who have suffered direct injury or, alternatively, threatened injury, as a result of the State's acts and failures to act described herein.

24. All of the individual Plaintiffs are citizens and residents of North Carolina. They represent a broad cross-section of the North Carolina public in terms of race, gender, age, and geography. They include five former members of the North Carolina Marine Fisheries Commission. All of the individual Plaintiffs have suffered direct injury or, alternatively, threatened injury as a result of the State's acts and failures to act described herein.

25. The Defendant, the State of North Carolina, is responsible for the management of North Carolina's navigable waters, submerged lands, and coastal fisheries resources. The State is also responsible for protecting and preserving its citizens' rights to use public waters to fish for personal use. At all relevant times, the State acted or failed to act through the General Assembly's enactment of legislation and agencies' enforcement of that legislation and adoption of agency rules.

JURISDICTION AND VENUE

26. This Court has subject-matter jurisdiction over this action because Plaintiffs seek declaratory and injunctive relief directly under the public-trust doctrine and the North Carolina Constitution, and no other adequate remedy at law is available or appropriate. Therefore, sovereign immunity is inapplicable.

27. Wake County, the seat of state government in North Carolina, the county in which CCA NC is headquartered, and the county in which seven of the individual Plaintiffs reside, is the proper venue for this action.

FACTUAL ALLEGATIONS

28. The factual allegations in this Complaint are organized as follows:

Section I begins with a background discussion of: (a) the history, current structure, and inherent failings of “modern” fisheries management in North Carolina, which has been in place since 1997; and (b) multiple, statistical and qualitative indicators of the decades-long decline in the overall state of our coastal fisheries resources in North Carolina.

Section II describes the State’s first critical failure in managing coastal fisheries resources: permitting, sanctioning, and even protecting two methods of harvesting coastal finfish and shrimp in State public waters that result in enormous resource wastage. Those two methods are: (a) shrimp trawling in areas populated with juvenile fish of multiple species; and (b) the use of “unattended” gillnets. As described more fully below, these methods are severely detrimental to North Carolina’s public-trust resources by resulting in staggering wastage of juvenile finfish and their prey species, and bycatch of both forage fishes and critical mature fish of multiple species in overfished stocks.

Section III describes the State’s second critical failure in managing coastal fisheries resources: refusing to address and remedy chronic overfishing of several species of fish that are historically popular among the fishing public.

Section IV describes the State’s third critical failure in managing coastal fisheries resources: tolerating a lack of reporting of any harvest by the majority of commercial fishing license holders for more than a decade. That practice of allowing “latent” commercial fishing licenses obscures the true degree of overfishing that is

occurring in North Carolina, calls into question the validity of the State’s coastal fish stock assessments and the true status of North Carolina’s coastal fish stocks, and poses an enormous threat to public-trust fish stocks.

I. Background

A. The History and Structure of the State’s Fisheries Management, and its Legislative and Agency Shortcomings

29. For the better part of a century following the creation of State fisheries management agencies in the late nineteenth century, North Carolina’s coastal fisheries resources were so abundant that overharvest and allocation were seldom, if ever, at issue. During those times of abundance, the State’s primary objective was to promote development of an important state economic resource in a relatively isolated, impoverished area of the State.

30. In the middle and latter part of the twentieth century, however, the State’s population began to grow. That growth came at the cost of environmental degradation and habitat destruction. Making matters worse, remarkably improved gear and harvest technologies in the commercial fishing industry revolutionized commercial harvest and exponentially increased the size of commercial harvests.

31. These new pressures quickly caused traditional stock abundances to decline precipitously. Despite this seismic shift, the State—and especially the North Carolina Division of Marine Fisheries (the “Division”)—remained fixated on promoting the State’s commercial fishing industry at the expense of other North Carolinians, who were left with ever-dwindling fish stocks.

32. After decades of stock declines, concerns over the State's coastal fisheries resources mounted, and the General Assembly responded in 1996 by creating the Fisheries Moratorium Steering Committee. The Steering Committee was tasked with examining coastal fisheries management issues over the course of a year, identifying management problems and making recommendations to the General Assembly about the changes to state law needed to remedy those problems. Unfortunately, in light of the fact that coastal fisheries resources are held in trust for all North Carolina citizens, the makeup of that Steering Committee was substantially biased in favor of the commercial fishing industry.

33. As a result of the Steering Committee's report, the General Assembly enacted the Fisheries Reform Act of 1997 (the "Act") to govern coastal fisheries resource management.³

34. While the Act compromised some of the Steering Committee's recommendations and ignored others, the Act sets an express goal for North Carolina coastal fisheries management "to ensure the long-term viability of the State's commercially and recreationally significant species or fisheries." N.C. Gen. Stat. § 113-182.1(b).

35. To achieve that goal of stock viability, the Act requires the management use of fisheries management plans ("FMPs"). FMPs must be developed and implemented for each recreationally or commercially significant species. When a

³ The North Carolina statutes governing coastal fisheries management, like all statutes, must comport with the public-trust doctrine and the North Carolina Constitution.

species suffers from overfishing, the FMP must specify a time period of two years or less from plan adoption to end overfishing, and a period of ten years or less from plan adoption to achieve a sustainable harvest.

36. The Division is charged with developing and recommending FMPs to the North Carolina Marine Fisheries Commission (the “Commission”). That Commission in turn makes policy and has rulemaking authority relating to North Carolina marine and estuarine resources, and for implementing the FMPs. *See* N.C. Gen. Stat. §§ 113-182.1(a), (d).

37. Although the Act was laudable in its goal to standardize coastal fisheries management and address overfishing concerns, the Act as implemented by the State’s administrative agencies has been an ineffectual statutory framework for ensuring that the State meets its long-standing public-trust obligations and constitutional obligations to properly manage coastal fisheries resources. After twenty-three years of management under the Act, many fish stocks have continued to decline due to chronic overfishing or bycatch wastage.

38. The Act lacks both legislative direction for how fisheries management decisions should be made and adequate enforcement provisions to ensure that overfishing ends, and sustainable harvests are realized. The cumbersome process for review of FMPs under the Act is also a significant impediment to timely, efficient, and objective management decisions.

39. The State’s administrative agencies are also culpable for the State’s failure to meet its public-trust and constitutional obligations through implementation

of the Act. The Division of Marine Fisheries is the successor to the early 20th Century “Division of Commercial Fisheries,” an agency that was originally formed to promote commercial fisheries in North Carolina. Time and circumstances have changed the landscape, however. Yet the Division has failed to adapt to the increased pressures put on coastal fish stocks from a variety of sources.

40. At the management level, the Division is a classic example of “regulatory capture” in its historical relationship with the commercial fishing sector that it once was charged with promoting, but now is charged with regulating. As is typical in instances of regulatory capture, the Division adamantly denies its bias in favor of the regulated community and commercial exploitation of coastal fisheries resources. And yet, there is no other possible explanation for the fact that the State’s fisheries management policies are, and have been for decades, primarily based on the commercial interests of individuals representing less than one-tenth of one percent of North Carolina’s citizens.

41. For decades, moreover, there has been intense political pressure exerted by members of both the legislative and executive branches of State government on the Director of the Division of Marine Fisheries, or “Fisheries Director,” to manage coastal fish stocks for maximal exploitation, with little regard to conservation measures prudent and necessary to protect a public-trust resource.

42. As a result of these factors, North Carolina’s coastal fisheries resources have suffered. The Division and Commission have seldom been synchronized regarding adequate resource protection. When the Division has made reasonably

protective management recommendations for a species, the Commission has often refused to implement them. When the Commission has adopted policies aimed at conserving coastal fisheries resources, the Division's response has generally been to either implement the policy only in the short-term or to minimize it in the longer term. And the hard-fought gains that have been made in the conservation of coastal fisheries resources have typically been short-lived, as Governors have come and gone, and new Commissioners and Fisheries Directors have been appointed.

43. Furthermore, FMPs are typically biased in favor of species exploitation, rather than true stock viability, containing no protective buffers for imperfect or incomplete stock data, modeling error, or for unforeseen environmental perturbations like disease or weather extremes. Once implemented, FMPs are virtually locked into place for almost a decade, no matter what happens to the stock in the meantime.

44. The problem is exacerbated by North Carolina's "fox guarding the henhouse" system for the management of coastal fisheries resources. The Commission is statutorily an "interested" commission, where a full one-third of its members have a financial interest in the private, for-profit harvest of coastal fisheries resources, despite the fact that commercial-license holders comprise less than one-tenth of one percent of the State's citizens.

45. In the exceptionally rare instances where the Commission has gone further to protect a stock than has been recommended by the Division, the effects have been minimal. In such cases, either the Commission has been harshly criticized by legislators or members of the Governor's own administration, or the Division has

thwarted those efforts by ignoring or reversing prior Commission policy in implementing management decisions long-term.

46. Sadly, there is no indication that either the General Assembly or the State's administrative agencies will voluntarily institute the changes needed to reverse the decades-long decline of our coastal fish stocks or protect the rights of citizens to harvest those fish.

B. The Multiple Indicators of Decades-Long Decline in the Overall State of Our Coastal Fisheries Resources

47. There are overwhelming data, in addition to other indicators, of the decades-long decline in the overall state of our coastal fisheries resources. After more than two decades of management under the Fisheries Reform Act, stocks have continued to decline due to unmitigated overfishing, enormous resource wastage and other mismanagement. In addition to other specific data referenced elsewhere in this complaint, general indicators of fish stock declines include the following: (1) severe age structure truncation of multiple fish stocks important to the fishing public; (2) the Division's annual stock status reports; (3) annual data on commercial landings; and (4) the decline in public harvest limits for fish stocks. Each of these is addressed below.

1. Severely Truncated Age Structure of Multiple Fish Stocks

48. The first indicator providing empirical evidence of the overall decline of North Carolina coastal fisheries resources is the moderate to severely truncated age

structure exhibited by many species or stocks historically important to the fishing public.

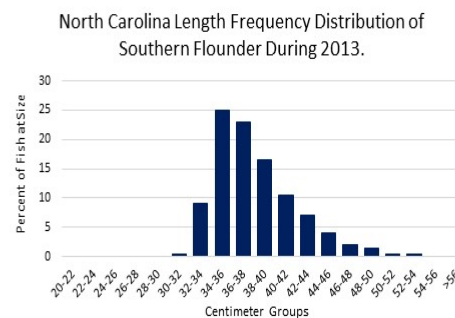
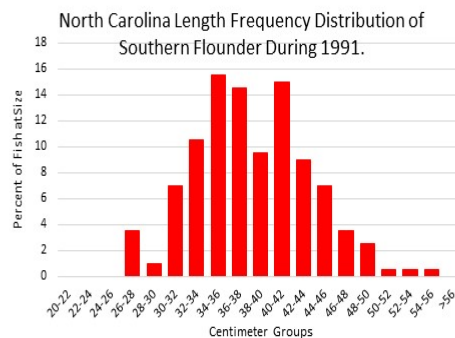
49. In terms of population dynamics, a statistically “normal” population age distribution for a fish stock (as would typically occur in an unfished stock) exhibits many younger and middle-aged individuals, with gradually decreasing numbers of older fish in each stock year-age class within the species’ lifespan, but still with some survivors in most older-aged year classes.

50. When a species or fish stock is targeted for human harvest, the older-aged individuals in the stock are typically the first to be removed by that harvest. Accordingly, the removal of those older fish changes the stock age structure from its normal distribution. The continued removal of older-aged fish results in an age distribution where the stock is dominated by juvenile and other younger-aged fish, and the older-aged year classes expected in a normal population distribution are increasingly “cut off,” leaving the age distribution curve truncated.

51. Age truncation is prevalent and often severe in exploited marine fish populations. As harvest pressure increases on a species or stock, population age truncation gets progressively worse. Where a stock is overfished, meaning the current level of harvest is biologically unsustainable over time, age truncation becomes extreme, and few—if any—large, older-aged fish remain in the population. An overfished stock typically consists of only juvenile (non-spawning) and young, but sexually mature individuals.

52. Southern Flounder, which the State knows have been overfished for more than thirty years, are an example. Southern Flounder live to be around nine years old. The majority of the current harvest in North Carolina is ages two and three fish, however, and few Southern Flounder age four or older are found in North Carolina waters.

53. The plight of Southern Flounder is illustrated by looking at their length frequency distributions in different years for all harvested fish (both commercial and publicly harvested) from the 2015 Stock Assessment data:



The 1991 graph shows a much more widespread harvest of Southern Flounder in terms of length classes for that stock. In contrast, the 2013 graph—the last year for

which data are available—clearly shows the truncated nature of that harvest regarding larger fish.

54. While actual age at harvest data were not available to Plaintiffs for the Southern Flounder stock, a similar graph of harvest at age (rather than harvest at length) would be even more striking in reference to the severely truncated nature of the Southern Flounder stock. That is because current data show that almost all harvest of Southern Flounder is from only two-year classes, and the situation has only gotten more dire since 2013 because of continued overfishing.

55. Striped Bass are another example. Striped Bass may live up to thirty years-of-age. In most North Carolina estuarine populations young fish dominate, however, with most fish under age four. Fish more than ten years of age are extremely rare.

56. The functional result of that removal of older-aged fish through over-harvest is a marked reduction in the spawning capacity of the species or fish stock. That is because older females, in comparison to younger sexually mature females in the stock, produce logarithmically greater numbers of eggs that are higher quality and exhibit greater genetic fitness.

57. That reduction in spawning capacity decreases the overall stock viability and makes a stock much less resilient to recovery from all sources of stock mortality, including both “natural” sources of mortality such as predation and old age, and harvest mortality.

58. There are numerous species of North Carolina coastal fish stocks historically important to the fishing public that exhibit unduly truncated age structure because of either commercial overfishing or resource wastage allowed or promoted by the State. Southern Flounder, Weakfish, and Striped Bass (each of which is discussed more fully below) are examples of species or stocks that show extreme age structure truncation because of overexploitation. In addition, other North Carolina species traditionally sought by the fishing public and exhibiting truncated age structures as a result of overexploitation include River Herring, Spot, Atlantic Croaker, American Shad (*Alosa sapidissima*) and Bluefish (*Pomatomus saltatrix*).

59. The severely truncated age structure that is typical of an overfished species and characterizes many coastal fish stocks is clear evidence of both a management problem and a potentially non-viable stock (stock viability is discussed in more detail immediately below), in contravention of the State's public-trust obligations.

60. The State has long known about population age truncation as an indicator of the overfished status of North Carolina fish stocks important to the fishing public, but it has ignored or failed to address the implications for public fishing rights.

2. The Division's Annual Stock Status Reports

61. The second indicator of the overall decline in coastal fisheries resources is evidenced by an examination of the Division's annual stock status reports.

62. The Division issues annual stock status reports for many commercially and recreationally significant coastal fish species or stocks. Under the Fisheries Reform Act, for data up to 2017, the Division categorized the status of managed coastal fish species or stocks as being either “viable,” “recovering,” “of concern,” “depleted,” or “unknown.”

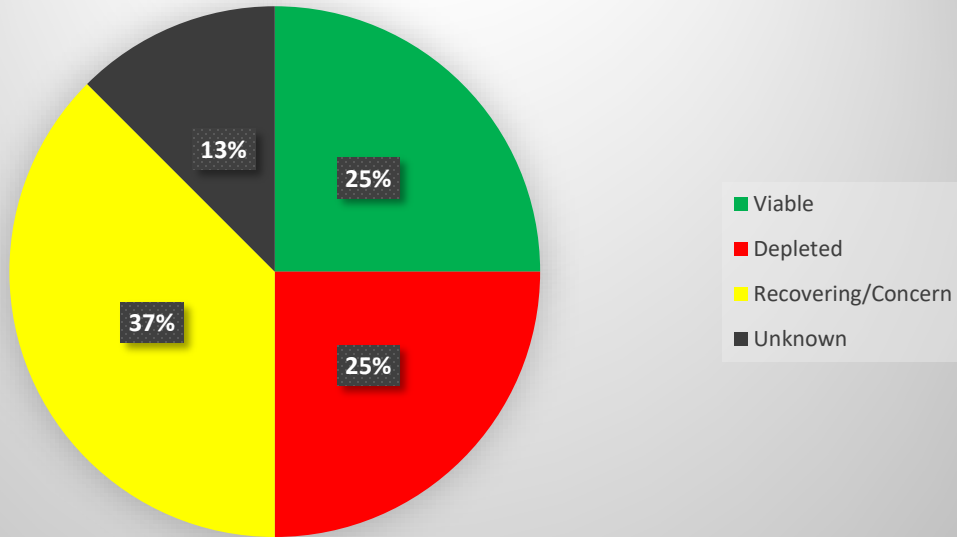
63. N.C. Gen. Stat. § 113-182.1(b) states expressly that “[t]he goal of the [FMPs] shall be to ensure the long-term *viability* of the State’s commercially and recreationally significant species or fisheries.” *Id.* (emphasis added). Under that legislative standard, the key to state coastal fisheries management is the long-term viability—stock health and well-being, including lack of overfishing and harvest sustainability—of each managed fish species or stock. The Division’s annual stock status reports before 2017 were directly reflective of that standard and the requirements of state law.

64. The stock status classifications based on “viability” found in the Division’s annual stock status reports before 2017 were easily understandable by the public and elected officials, and truly reflective of the status of North Carolina coastal fish stocks as they relate to North Carolinian’s public-trust rights to use navigable waters to fish.

65. In any given year before 2017, very few species or stocks were listed by the Division as viable. Instead, most stocks were listed as either depleted (essentially, “overfished”), recovering, of concern, or status unknown.

66. For example, as reflected by the summary chart below for the Division's 2016 stock status report—nineteen years after the Fisheries Reform Act was enacted—the Division classified only four out of the sixteen coastal fish stocks listed as being viable. The other twelve stocks were classified as either depleted, recovering, of concern, or their status was unknown, as the following summary chart (continued on the following page) reflects:

2016 COASTAL FINFISH STOCK STATUS



2016 Status of Coastal Finfish Stocks

Viable	Depleted	Recovering/Concern	Unknown
Black Drum	American Eel	American Shad	Hickory Shad
Kingfishes	Red Drum	Atlantic Croaker	Sheepshead
Spotted Sea Trout	River Herring	Southern Flounder	
Striped Mullet	Weakfish	Spot	
		Striped Bass (ASMA stock)	
		Striped Bass (CSMA stock)	

67. Notably, each of the twelve species or stocks that the Division categorized in 2016 as being “non-viable” have historically been sought after by fishing members of the public.

68. Starting in 2017, under a new Fisheries Director, the Division abandoned the legislative “viability” standard for coastal fish stocks in its annual stock status reports, and adopted a new report format. The new report format is called a “Stock Overview.” The only factors now relevant to a stock’s reported status are: (i) whether a stock assessment has been completed, and (ii) whether, according to that assessment, the stock is “overfished” or “overfishing” is occurring as defined by North Carolina law.⁴ In the Division’s own words, “Stock status in the Stock Overview is described based on overfishing and overfished/depleted status.”⁵

69. Using that new standard for the fourteen coastal fish stocks listed in the Division’s 2020 annual stock status report (issued by the Division in July 2020, based on the Division’s 2019 fisheries data), the Division found that only two stocks, Blue Crab (*Callinectes sapidus*) and Southern Flounder, were overfished with overfishing

⁴ The terms “overfishing” and “overfished” in reference to a public-trust fish stock are defined in N.C. Gen. Stat. §§ 113-129(12c) & (12d). As used in this complaint, “overfishing” practically means that the rate of stock mortality caused by harvest cannot be sustained by the stock long-term, and the term “overfished” means that the stock is depleted in terms of numbers of individuals and age distribution of those individuals as a result of overharvest.

⁵ N.C. Division of Marine Fisheries. (July 2020). <http://portal.ncdenr.org/web/mf/stock-overview>.

still occurring, and that while overfishing is not currently occurring, the River Herring stock remains overfished.⁶

70. Moreover, under the new report format, the Division no longer reports the status of stocks managed in North Carolina only under an interjurisdictional FMP. Thus, the annual stock status of such fishes as Weakfish, Atlantic Croaker, and Spot—fish that are very important to the fishing public, and whose respective viability statuses were included in the annual report before 2017—are now entirely excluded from the report.

71. As a result, the new stock status reports since 2017 not only fail to reflect the legislative stock viability standard set out by statute for coastal fisheries management, but also mislead the public and obscure the true state of health of North Carolina’s coastal fish stocks.

72. For example, the Division’s 2020 overview for the Albemarle Sound/Roanoke River Management Area stock of estuarine Striped Bass gives the public no information on the actual status of that stock, but simply says that results from an ongoing stock assessment are expected in 2020. Those results—fully known at the time of the Stock Overview—were released in August 2020 and show that the stock is currently both overfished and that overfishing is occurring. But the public will not learn that fact from the Division’s Stock Overview until July of 2021, at the earliest.

⁶ The inadequacy of the Division’s new report format is illustrated by the fact that while the 2020 Stock Overview report format suggests there is currently no reason for concern about overfishing with the River Herring stock, the reason that River Herring were not overfished in 2020 is because that stock is under a complete harvest moratorium after its collapse due to the State’s long-term mismanagement.

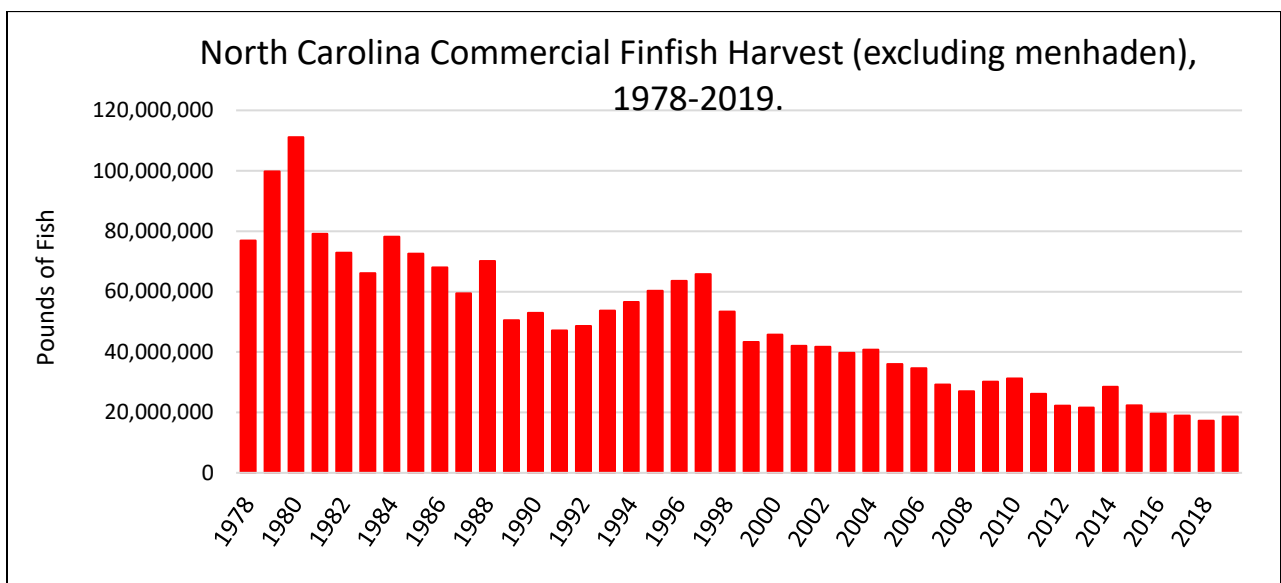
73. Moreover, a careful reading of the respective stock status discussions for each of the fourteen listed stocks in the 2020 report shows that in actuality, there is reason for concern regarding the true viability—the statutory goal for coastal fisheries management—of twelve of the fourteen listed stocks.

3. Trends in Commercial Finfish Landings

74. The third significant indicator of the decline in coastal fisheries resources is the trend in, and overall decline of, commercial finfish landings in North Carolina.

75. Commercial fishing license holders have unique privileges under State law to use extremely effective harvest gears and methods that are not available to the general fishing public. Thus, commercial landings data can be an especially telling indicator of stock status and stock population trends.

76. The Division’s data indicate that commercial finfish landings peaked in the early 1980’s, and have trended downward ever since:



77. This steady, overall decline in North Carolina’s commercial finfish landings is simply indicative of the decline in overall abundances of those stocks under the State’s management policies. If commercial-license holders are increasingly challenged to catch fish with nets or other commercial gear, that challenge is much more so for the average citizen who is generally limited to use of hook-and-line tackle.

4. Reduced Harvest Limits for the Fishing Public

78. The trend in public harvest limits offers a fourth indication of the overall decline of coastal fisheries resources. Public harvest limits include “seasons” (the annual period of time during which it is lawful to harvest a stock), minimum size limits for fish, and what is commonly called a “bag limit”—essentially the number of fish of any stock that individual citizens may lawfully possess when exercising their public-trust right to harvest coastal fish stocks.

79. Data on North Carolina historical public harvest limits are difficult to find for a variety of reasons. Nevertheless, many long-time, resident public fishers can testify about the days when possession limits and size limits for species important to the fishing public were largely unnecessary due to the viability of fish stocks. For those data that are available, it is clear that over time public harvest limits in North

Carolina have steadily declined. The following summary table⁷ illustrates this steady decline:

PUBLIC HARVEST LIMITS FOR COASTAL FISH STOCKS/SPECIES						
SPECIES/ STOCK	1980	1990	1997	2000	2010	2020
Black Drum						
Size Limit:	None	None	None	None	None	>14" < 25"
Bag Limit:	None	None	None	None	None	10
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round
Bluefish						
Size Limit:	None	None	None	None	Only 5 > 24"	None
Bag Limit:	None	-	10	10	15	3
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round
Red Drum						
Size Limit:	Only 2 > 32"	>18" < 32"	>18" < 27"	>18" < 27"	>18" < 27"	>18" < 27"
Bag Limit:	14	5	5	1	1	1
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round
Sheepshead						
Size Limit:	None	None	None	None	None	10" & only 1 > 25"
Bag Limit:	None	None	None	None	None	10
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round

⁷ In the summary table, where data for a value were unavailable, that value is represented by a dash. For Striped Bass and Southern Flounder, the harvest limits reflect only harvest in estuarine waters, and not ocean harvest. In addition, the Striped Bass public harvest limits refer only to the southern North Carolina Striped Bass management stock, as that stock is discussed more fully herein.