

PUBLIC HARVEST LIMITS FOR COASTAL FISH STOCKS/SPECIES						
SPECIES/ STOCK	1980	1990	1997	2000	2010	2020
Southern Flounder						
Size Limit:	None	None	14.5"	13"	15"	15"
Bag Limit:	None	None	10	8	8	4
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Aug. 16-Sept. 30
Spanish Mackerel						
Size Limit:	-	-	12"	12"	12"	12"
Bag Limit:	-	-	10	10	15	15
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Quota closure	Yr.-round
Spotted Seatrout						
Size Limit:	None	-	12"	12"	14"	14"
Bag Limit:	-	-	10	10	10	4
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round
Striped Bass						
Size Limit:	12"	14"	18"	18"	18"	No possession
Bag Limit:	25	3	3	3	2	No possession
Season:	Yr.-round	By proclamation	By proclamation	By proclamation	Oct.—Apr.	Moratorium
Weakfish (Grey Trout)						
Size Limit:	None	None	14"	14"	12"	12"
Bag Limit:	-	-	10	10	1	1
Season:	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round	Yr.-round

80. The summary table above confirms that the trends are clear. From 1980 to 2020, the minimum size limits increased significantly, and the bag limits decreased

substantially for almost every species or stock. The seasons for many species or stocks were shortened as well.

81. The diminished public harvest limits for coastal fish stocks allowed to North Carolina citizens reflect the resource devastation caused by State coastal fisheries management policies. Those diminished limits also reflect the substantial impairment that State management policies for coastal fish stocks have caused to the public's right to fish in North Carolina coastal waters.

82. Furthermore, from a citizen's perspective, public harvest limits simply include the minimum size and number of fish that a member of the fishing public may lawfully possess. Those limits in no way reflect the actual number of fish of any size available to the fishing public, nor the likelihood of being able to catch the lawful size or number of fish, especially given the precipitous decline of coastal fish stocks in North Carolina in recent decades.

83. In sum, the severely truncated population age structure of multiple fish stocks, the Division's own stock status reports, the overall decline in commercial harvest, and diminished public harvest limits make clear that North Carolina's coastal fisheries resources have declined dramatically. Worse, these declines are the direct and entirely foreseeable result of the State's mismanagement of those coastal fisheries resources.

84. As described more fully below, these declines are the result of the State's failure to meet its public-trust and constitutional obligations to regulate the manner and methods of harvest of coastal fish stocks in three critical respects: permitting

methods of harvesting fish and shrimp that result in enormous resource wastage, failing to address chronic overfishing of stocks, and tolerating a lack of harvest reporting by a majority of commercial fishing license holders.

II. To the extreme detriment of public-trust resources, the State has permitted, sanctioned, and protected methods of harvesting fish and shrimp in North Carolina's waters that result in staggering bycatch wastage and overfishing.

A. Shrimp trawling in coastal waters, and especially in estuarine waters, has a devastating impact on juvenile coastal fisheries resources, and detrimentally impacts other public-trust resources.

85. Commercial shrimp boats have plied North Carolina's internal coastal waters for three-quarters of a century. They use bottom trawls, which quite literally "plow" the bottom as they are pulled. At one time, this bottom trawling was once commonly referred to as "dragging."

86. Although there are other kinds of shrimp trawl nets (for example, "skimmer" trawls and "beam" trawls), commercial shrimp boats in North Carolina typically use otter trawls. Otter trawls use a funnel-like net configuration in which the mouth of the net is held open horizontally as it is dragged by water pressure against large steel or wooden rectangular "otterboards" on both sides of the net opening, and held open vertically by a headrope with floats attached that extends the width of the net opening in conjunction with a weighted footrope along the bottom of the net mouth. The length of the headrope determines the width of the trawl net. The net itself is typically made of diamond mesh that decreases in mesh size toward the tail, or "cod end" of the funnel, where the catch accumulates until the net is retrieved from the water and emptied.

87. Shrimp boats trawling North Carolina's sounds and rivers were once limited to small and medium sized boats, but many shrimp boats in state estuarine waters are now larger, typically ocean-going vessels with massive horsepower, employing headropes (and thus making the width of the net opening) more than 200 feet.⁸ Generally, the larger the vessel, the larger the trawl used, and thus the greater disturbance of the benthic ecosystem along the bottoms, as discussed below.

88. North Carolina's trawling regulations for estuarine waters are the least stringent nationwide. Indeed, North Carolina is the only Atlantic coast state that still allows significant shrimp trawling in its estuarine coastal waters. Moreover, the extent of that "significance" is sobering: the Division has estimated that approximately 82 percent of shrimp trawl trips occur in state estuarine waters, the very waters that serve as vital spawning and nursery grounds for many coastal fish stocks.

89. Notably, the State has acknowledged since as early as the mid-20th century that shrimp trawls severely damage coastal fisheries resources. Nevertheless, the State has done little to resolve that issue, nor has it protected coastal fish stocks from those impacts in the seven decades or so following that admission.

90. To be sure, it is not necessary to allow shrimp trawls to operate in State estuarine waters to support a successful shrimp trawl industry. Other states that

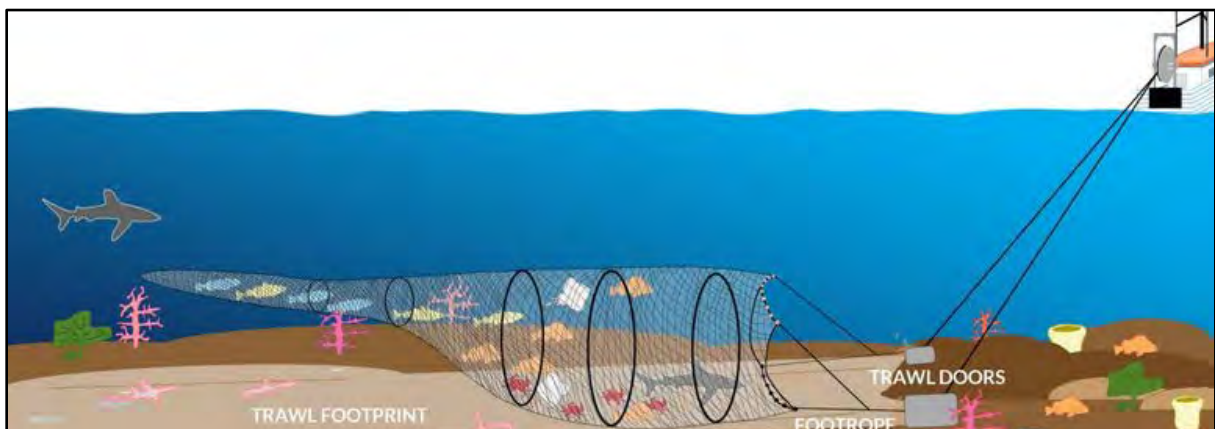
⁸ Marine Fisheries Commission regulations currently allow shrimp trawl vessels to employ headropes up to 220 feet in length in some estuarine waters.

only allow ocean shrimp trawling, including those in the Southeast, support thriving commercial shrimp trawl landings and associated economic activity.

91. As the shrimp trawl industry currently operates in North Carolina, there are three serious public-trust resource issues involved.

92. The first is the physical disturbance that trawl net gears wreak upon publicly owned submerged lands. The non-profit organization Oceana has rightfully likened the practice of coastal trawling to “bulldozing the oceans.” As noted previously, those submerged lands are both held by the State in trust for its citizens under the public-trust doctrine and expressly protected by the North Carolina Constitution.

93. The image below depicts the physical disturbance that trawl net gears wreak upon submerged lands when their heavy steel or wooden doors hold the trawl nets open and hug the bottom. As they are dragged behind the shrimp boats, the doors literally “plow” the bottom, causing long-term destruction of benthic communities and essential fisheries habitats. Bottom disturbance is typically exacerbated in otter trawls by the deployment of heavy “tickler chains” that drag the bottom.



94. A legislative panel pre-dating the Fisheries Reform Act of 1997 found that bottom trawling gear, including shrimp trawls, impacts bottom habitats in estuarine and other coastal waters substantially. These impacts include physical disruption of habitat, changes in functional organization of species, increases in total suspended solids and turbidity, destruction of submerged aquatic habitat, and decreases in habitat complexity.

95. The Division has also identified bottom-disturbing fishing activities as having a negative impact on fish habitats, including the water column, shell bottom, submerged aquatic vegetation, soft bottom, and ocean hard bottom. The elevated turbidity—or cloudiness of the water—impacts the ability of submerged aquatic vegetation to survive and grow, jeopardizing critical habitat for juvenile fish stocks or their prey.

96. In addition, suspended sediment in the water column can clog fish gills, deter successful recruitment of invertebrates onto shell bottom or ocean hard bottom, reduce feeding success of visually oriented predators, and transport bacteria and toxins through coastal waters. When those sediments settle, they can cover shell bottom and ocean hard bottom and fill in shallow creeks and rivers, further decreasing available habitat.

97. Ecologic data shows that it may take bottom habitats decades to recover from the damage done by shrimp trawls.

98. Each of those adverse impacts caused by the shrimp trawl industry to publicly owned, estuarine, public-trust submerged lands ultimately violate the directive in Article XIV, Section 5 of the North Carolina Constitution to preserve North Carolina estuaries as a part of our common ecological heritage.⁹

99. The second resource issue involved with trawling occurs when shrimp trawls entrain sea turtles swimming in the drag path. All species of sea turtles occurring in North Carolina are protected species under the federal Endangered Species Act (the “ESA”), and federal regulations require shrimp trawls to employ turtle-excluder devices designed to protect sea turtles by allowing them to escape from trawl nets. In addition, North Carolina law makes it “unlawful to willfully take, harm, disturb or destroy and sea turtles.” N.C. Gen. Stat. § 113-189.

100. The third and most serious resource issue associated with shrimp trawls is their decimation of juvenile finfish populations and other bycatch wastage. As

⁹ In terms of Article XIV, Section 5 of the North Carolina Constitution’s policy of “preserving estuaries,” Plaintiffs do not suggest that *all* activities that adversely affect the State’s estuaries must be halted *per se*, but rather, that activities that substantially impair public rights in those estuaries are prohibited by that provision. In the case of the public-trust right to harvest coastal fish stocks, Article XIV, Section 5 should be read in conjunction with the common law public-trust doctrine, codified in the constitutional provisions referenced herein and found in Article I, Section 38 of the North Carolina Constitution. Both constitutional provisions refer to the “common heritage” of state citizens, and the public’s common law heritage to harvest coastal fish stocks is also a part of its cultural and ecological heritage in publicly owned estuarine lands and waters. Thus, any activity—like shrimp trawling under the State’s current management policies and rules—that substantially impairs the public’s right to harvest fish violates the North Carolina Constitution with respect to the preservation of its estuaries.

noted previously, North Carolina is the *only* Atlantic coast state that allows significant shrimp trawling in its estuarine waters.

101. At the outset, it is important to note that bycatch wastage in any harvest fishery targeting a species or stock is not inevitable, but is a direct result of the State's choice of fishery management policies to be implemented. There are ways to minimize or eliminate unintended injury and bycatch wastage by using "cleaner" gears, avoiding areas and times where vulnerable species are known to be present, and imposing and enforcing seasonal bycatch limits. As discussed below, the State has ineffectively implemented the first two of these wastage-avoidance strategies, and has simply refused to consider or implement bycatch limits for the shrimp trawl fishery in North Carolina coastal waters.

102. Most North Carolina estuarine waters serve, at least seasonally, as nursery areas for juvenile finfish. Consequently, according to the Division's latest claims for gear required in the North Carolina shrimp trawl fishery, for every pound of shrimp a trawl harvests in estuarine waters, it also "harvests," on average, some 3.6 pounds of living bycatch, and 3.3 pounds of that total bycatch is juvenile finfish. The following picture from the North Carolina shrimp trawl fishery illustrates this bycatch wastage, which holds true across nearly all of North Carolina's public, coastal waters:



103. In the process of being entrained in the trawl net and tail bag, many juvenile finfish are crushed or drowned. Those that survive are dumped on the deck, out of the water, where they often lie in the hot sun for an hour or more while shrimp are sorted from the bycatch. Few of these juvenile finfish survive. They cannot be released alive to grow and spawn, nor even to serve as forage for other species, so they do not functionally contribute to the estuarine ecosystem in their normal manner. Instead, the dead juvenile finfish are typically shoveled off the trawler.

104. While shrimp trawling is prohibited by Commission rule in limited, designated fish nursery areas and some beds of submerged aquatic vegetation found within coastal waters, that prohibition is entirely inadequate to protect juvenile fish because of the ecologic complexity of the State's estuarine systems.

105. As evidence of this point, when the Division was originally defining nursery areas for Pamlico Sound in 1991, it expressly rejected the abundance of juvenile Spot as an indicator species for areas that should be designated as protected critical, juvenile finfish nursery areas. That was because Spot were so ubiquitously

distributed within the Pamlico Sound estuarine complex as “to be useless” in differentiating areas important for public-trust resource protection and areas that could be opened to shrimp trawling and other destructive, commercial harvest activities. In other words, if juvenile Spot were included as an indicator species of areas worthy of protection from public resource wastage associated with trawling, no trawling could be allowed *at all* within Pamlico Sound.

106. Moreover, the salinities in coastal estuarine waters change annually, seasonally, and locationally as a result of complex environmental factors. Likewise, the abundances of both juvenile finfish and their prey species change annually, seasonally, and locationally because of those same factors. As a result, many, and perhaps most, estuarine areas within state coastal waters that provide critical juvenile finfish nursery habitat have not been designated as protected nursery areas and remain open to trawling at one time or another.

107. In addition, there is now substantial evidence that North Carolina nearshore coastal waters (0 to 3 miles out) seasonally serve an important nursery function for juvenile finfish stocks important to the fishing public, and thereby also require management policies that adequately protect public-trust stocks from bycatch wastage in the ocean shrimp trawl fishery.

108. As a result of the State’s mismanagement, many stocks of finfish that utilize North Carolina’s coastal waters as a juvenile nursery area have been seriously depleted by the ongoing estuarine and ocean shrimp trawl fisheries.

109. In the aggregate, the amount of finfish bycatch is staggering. According to Division data, from 2010 to 2019, the annual average shrimp harvest taken from Pamlico Sound was 4,910,130 pounds. Thus, in Pamlico Sound alone, there has been over 16 million pounds (16,203,429 pounds) of finfish bycatch wastage every year under current State management policies.

110. Those same data show that, in the period since enactment of the Fisheries Reform Act for which data are available (1997-2018), the average annual shrimp harvest from all North Carolina coastal waters has been 7,382,787 pounds. Using the Division's current finfish bycatch ratio for the shrimp trawl industry of 3.3 pounds of finfish killed for every pound of shrimp harvested (even using the best available bycatch reduction devices), that means that on average during those twenty-two years under the policies of the State shrimp trawls have killed and removed from North Carolina's coastal waters a minimum of 24,363,197 pounds of juvenile finfish annually—primarily Spot, Atlantic Croaker and Weakfish. That result—nearly 25 million pounds every year—is unconscionable, public-trust resource wastage.

111. But perhaps the most alarming evidence regarding the magnitude of this wastage comes from the Division's own 2018 analysis of the respective losses of juvenile Spot and Atlantic Croaker in the North Carolina shrimp trawl fishery—the two finfish species that comprise the largest portion of the juvenile finfish trawl bycatch. The Division's analysis sets out estimates of the numbers *of individuals* of

juvenile Spot and Atlantic Croaker lost to bycatch in the South Atlantic shrimp trawl fishery from 1989 to 2014. Those numbers are summarized below:

SPECIES / STOCK		
	Spot	Atlantic Croaker
Estimated Annual NC Shrimp Trawl Bycatch, 1989-2014	6.1 million to 945 million fish	195 million to 2.8 billion fish
Estimated 2014 NC Shrimp Trawl Bycatch	100 million fish	800 million fish
Estimated 2014 Combined Total Shrimp Trawl Bycatch in SC, GA & FL	20 million fish	100 million fish

112. There are several important points to note from the chart:

(a) Although the incredible, historic magnitude of the North Carolina shrimp trawl finfish bycatch has diminished since bycatch reduction devices were required by the Commission in shrimp trawls in 1991, the current estimated annual bycatch levels in North Carolina of numbers of fish, nearing a billion Spot and Atlantic Croaker, remain unconscionable, and violative of the State’s duty to protect public-trust fisheries resources;

(b) The current finfish bycatch levels reflect the inadequacy of the State's currently required bycatch reduction devices to reasonably protect juvenile finfish stocks from being killed and wasted in the shrimp trawl fishery; and

(c) North Carolina's shrimp trawl Spot and Atlantic Croaker bycatch surpasses the *combined* Atlantic shrimp trawl fishery Spot and Atlantic Croaker bycatch for South Carolina, Georgia, and Florida by a margin of 7.5 to 1.

113. Giving further context to these wastage numbers, Division studies indicate that in the North Carolina ocean shrimp trawl fishery, a mere 21 percent of the biotic (living organisms) trawl catch is shrimp, while 25 percent of that catch is Atlantic Croaker, 7 percent of the catch is Spot, 2 percent of the catch is Weakfish, 9 percent of the catch is other commercial finfish, and the remaining 36 percent of the catch is miscellaneous living organisms whose ecosystem function is prematurely and summarily ended by death.

114. Similarly, for the North Carolina estuarine shrimp trawl fishery, only 23 percent of the living harvest is shrimp, while 33 percent of that catch is Atlantic Croaker, 13 percent of the catch is Spot, 6 percent of the catch is Weakfish, 4 percent of the catch is other commercial finfish, and the remaining 21 percent of the catch is miscellaneous living organisms whose ecosystem function is summarily ended.

115. While the Division has contended that wastage in the shrimp trawl fishery has declined in recent decades not only because of the 1991 requirement of bycatch reduction devices (discussed below) but also because of substantial effort

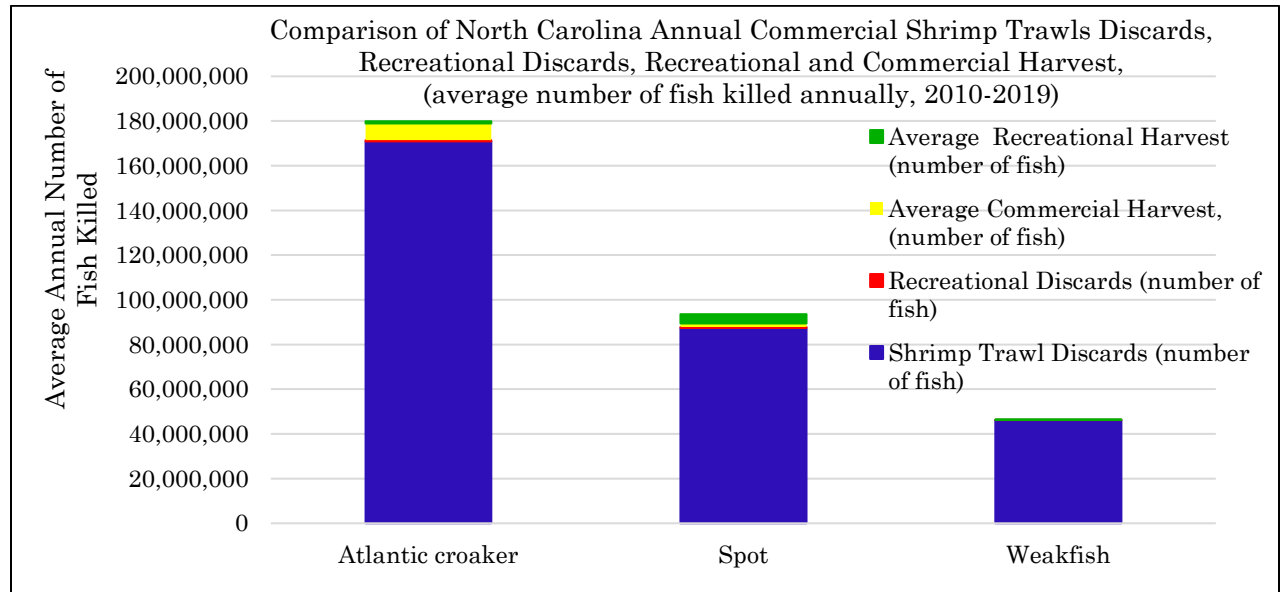
reduction in that fishery, the facts simply do not support that effort-reduction claim.¹⁰ According to Division data, the average annual shrimp trawl harvest during the last five years has been 10,127,570 pounds of shrimp landed, 28 percent higher than the 7,382,787 pound average over the last twenty-two years. Those higher landings numbers belie the Division's claims of reduced shrimp trawl effort, and instead mean that over the last five years, the annual finfish bycatch wastage in the North Carolina shrimp trawl fishery has averaged some 33,420,982 pounds. And it continues today, unabated, to the extreme detriment of public-trust fisheries resources.

116. Juvenile Spot, Atlantic Croaker, and Weakfish make up the majority of the total shrimp trawl finfish bycatch in North Carolina estuaries. These three species were historically important in North Carolina for both the fishing public and commercial fishing. Each species also serves a critical ecosystem function by serving as forage for other species of finfish widely utilized by the public.

117. A 2011 North Carolina study estimated that every year, 100 million juvenile Atlantic Croaker, 50 million juvenile Spot, and 25 million juvenile Weakfish are killed and wasted by otter trawls in Pamlico Sound alone. By contrast, the annual number of pounds of these three finfish species that are taken by *combined* public

¹⁰ Although the number of shrimp trawl trips may have been reduced over recent time, "trips" is no longer a useful parameter for measuring effort in the shrimp trawl fishery because: (1) the increased size of the average vessel used in the trawl industry means that boats can pull huge trawls with harvest capacity in excess of several smaller vessels—indeed, shrimp vessels greater than 55 ft. in length now produce over three quarters of the state's shrimp landings; and (2) many of the huge trawl vessels that now ply state waters have on-board refrigeration and are capable of making multi-day trips.

and non-shrimp trawl commercial harvests is only a tiny fraction of the Pamlico Sound shrimp trawl bycatch wastage. That contrast is reflected in the following chart:



118. The State has been aware of the magnitude of this wastage from shrimp trawls and its adverse impacts on coastal fisheries resources for decades. Nevertheless, the bycatch problem has to date not been resolved, despite the Division’s claims that its recommended bycatch reduction devices for shrimp trawls have been effective in protecting estuarine, juvenile finfish stocks. Those devices—and the Division’s dubious claims for them—are discussed more fully below.

119. The Division’s position on the effect of estuarine shrimp trawl bycatch on finfish stocks has noticeably changed over time, and without explanation. In the Division’s assessment of commercial finfisheries in 1993, in reference to the condition of the North Carolina Spot stock, the Division stated:

The NCDMF began requiring Bycatch Reduction Devices (BRDs) in all shrimp trawls in 1992. The purpose of this measure was to minimize the incidental

catch of finfish and other living marine organisms. Data indicate spot comprise on average 9% of the total biomass in a South Atlantic shrimp trawl fishing operation (NMFS 1995). The extent of benefit gained from these “saved spot” is uncertain but *probably* significant (emphasis added).¹¹

120. That substantially same paragraph with its “probably significant” language in terms of Spot not killed in shrimp trawls was retained in the Division’s 1996 Commercial Finfisheries Assessment. However, in the 2000 Assessment, the language in this paragraph was changed to “possibly significant,” and by 2012, the language about the potential resource benefits of Spot not killed in the shrimp trawl fishery was gone altogether.

121. That language change is entirely in keeping with the Division’s long-term regard of shrimp trawl bycatch wastage. The Division now maintains that the declines in stock abundances for Spot, Atlantic Croaker, and Weakfish are unrelated to the annual wastage of hundreds of millions of pounds—almost a billion individuals—of juvenile finfish of those stocks by shrimp trawls.

122. Contrary to the Division’s position, a study published in 2011 that analyzed the long-term population effects of bycatch mortality of juvenile Atlantic Croaker in the South Atlantic and Gulf shrimp trawl fisheries concluded that “while

¹¹ NCDMF. (1996). “Assessment of North Carolina Commercial Finfisheries, 1991-1993.” N.C. Dept. of Environment, Health, and Natural Resources, Div. of Marine Fisheries. Completion Report for Project 2-IJ-32 (June 1996), p. 7-62. The 1992 shrimp trawl bycatch reduction device (BRD) requirement was the result of a Commission rule adopted in 1991, along with adoption of a policy that required the Division to “establish the goal of reducing bycatch to the absolute minimum and incorporating that goal into its recommendations and actions.” The extent to which BRDs actually reduce bycatch wastage in the shrimp trawl fishery is controversial and speculative.

bycatch mortality may not be the only cause of these declines, bycatch reduction may hold the answer to reversing these trends.”¹²

123. Since 2013, three different petitions for rulemaking have been presented to the Commission that proposed changes to the State’s nursery area rules and designations and other aspects of North Carolina shrimp trawl rules to address the enormous bycatch wastage caused by shrimp trawling. The first petition, filed by a private citizen, was denied. The second petition, filed by the North Carolina Wildlife Federation, was suspended without final decision. The third petition, also filed by the North Carolina Wildlife Federation, was denied. The Division opposed each petition as “unnecessary.”

124. As a part of the reason for opposing additional, “unnecessary” restrictions in the shrimp trawl industry, the Division has touted the great success of its own efforts to address the shrimp trawl bycatch wastage (even though bycatch wastage in that fishery is not, in the Division’s eyes, a resource problem). Those recent Division efforts consisted of a shrimp trawl gear study focused on reducing bycatch. Notably, that study was conducted “in partnership” with the commercial shrimp trawl industry, without any independent peer review or analysis. Those efforts, according to the Division, were highly successful, ending in recommendations to the Commission (subsequently adopted) for “new” trawl bycatch reduction devices that reduced shrimp trawl finfish bycatch by over 40 percent.

¹² Diamond, S., L. Cowell & L. Crowder. (2011). “Population effects of shrimp trawl bycatch on Atlantic croaker.” *Canadian Journal of Fisheries and Aquatic Sciences*. 57. 2010-2021. 10.1139/cjfas-57-10-2010.

125. An objective analysis of the Division’s shrimp trawl bycatch reduction efforts, however, exposes it as another troubling example of regulatory capture, as well as the Division’s strategy for managing coastal fisheries resources to maintain the status quo for the commercial fishing industry. Even a cursory examination of the Division’s bycatch reduction study shows it not only to be seriously flawed methodologically, but also shows that the alleged 40 percent plus reduction in finfish bycatch is an illusion, and that the actual finfish bycatch reduction resulting from implementation of the gear changes touted in those studies *is zero*, not the claimed 40 percent or more.¹³

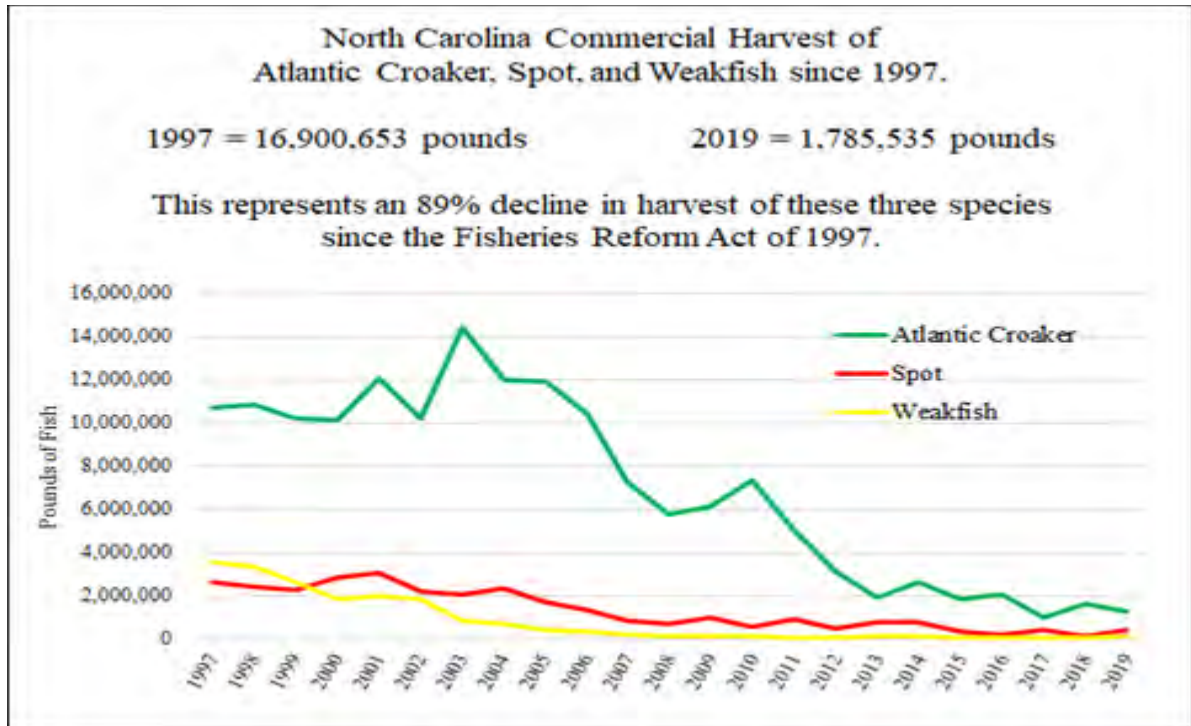
126. Unfortunately, that result is hardly surprising. The ultimate problem with bycatch reduction devices is that Spot, Atlantic Croaker, Weakfish, and other nursery finfish stocks have been depleted to the point that the majority of the

¹³ In the Division’s study, the finfish bycatch to shrimp harvested poundage numbers for the net configuration that provided the greatest bycatch reduction were 167 kg of finfish as compared to 27.27 kg of shrimp for the “control net”—or normal baseline—tows, yielding a bycatch ratio of 6.03:1. That number is *anything but* “normal baseline,” being 55 percent higher than the generally accepted finfish bycatch ratio of 3.3:1 for Pamlico Sound. The touted high-reduction “test net” tows caught, by contrast, 76 kg of finfish for every 23.3 kg of shrimp, a finfish bycatch ratio of 3.26:1. While it is true that the 167 kg to 76 kg reduction in finfish catch weight is a 45.5 percent reduction in bycatch, *it is reduced from an artificially increased “normal” bycatch level*, accomplished by intentional use of a non-standard gear configuration for the “control net” in order to make the reduction in the “test net” appear real and significant. Indeed, the finfish bycatch ratio of 3.26:1 resulting from the Division’s “new” trawl net configuration is nothing other than the existing, “business-as-usual” shrimp trawl industry bycatch ratio of 3.3:1 commonplace for decades in North Carolina’s estuarine waters, which has resulted in the more than half a billion pounds of juvenile finfish wastage for species traditionally sought-after by the fishing public over the 23 years since the Fisheries Reform Act was implemented.

remaining juveniles are essentially the same size as the shrimp being targeted by trawling. That means that the only way to save those fish by excluding them from entrapment is to necessarily lose large numbers of shrimp which also escape through the bycatch reduction device, an occurrence to which the shrimp trawl industry would never agree. But the Division's regulatory capture by the commercial industry prompts it to come to the rescue, thus the subterfuge with respect to bycatch reduction device bycatch savings.

127. Indeed, this sort of ploy is entirely in keeping with long-standing Division policy for the shrimp trawl industry. The Division has for decades opposed virtually all significant restrictions proposed for the shrimp trawlers, and in the rare instance where significant restrictions have made it to the floor before the Commission, they have not been approved or implemented. Meanwhile, State stock abundances for Spot, Atlantic Croaker and Weakfish have plummeted precipitously since the Act was enacted in 1997.

128. Because commercial-license holders have unique privileges of using highly efficient gears not available for use by the public, commercial landings can be a very useful measure of the relative abundances of coastal fish stocks, as described above. Notably here, the total commercial landings of Spot, Atlantic Croaker, and Weakfish have declined by an aggregate 89 percent since 1997, as illustrated in the chart below:



129. As this chart reflects, commercial landings of each of these species have dropped precipitously: Weakfish by 98 percent, Atlantic Croaker by 91 percent, and Spot by 84 percent.

130. The public harvest fisheries for those species shows a similar trend. In 1981, the public’s aggregate landings for those three species were 5.3 million pounds, compared to 1.6 million pounds in 2015, a 70 percent decline. This marked decrease in landings occurred despite increases in angler effort in terms of numbers of public fishers.

131. The fall “runs” of migratory Spot along the North Carolina coast were once legendary, generating millions of dollars of economic activity for coastal ocean

piers¹⁴ and other businesses that catered to tourists and the fishing public, as reflected in this picture:



Many North Carolina citizens planned their annual vacations around those Spot “runs.” Sadly, that economic boon ended when North Carolina’s Spot harvests by the fishing public collapsed. Meanwhile, bycatch wastage in the shrimp trawl industry involving Spot and other finfish stocks continued unabated.

132. Despite this resource depletion in North Carolina coastal waters, the State continues to manage Spot under a coastwide, interjurisdictional FMP that is

¹⁴ It is not simply a coincidence that the number of ocean pier fishing licenses obtained from the Division in 1994 was thirty-three, while the number of such licensed issued in 2019 was nineteen, following a steady decline in the number of ocean pier licenses over more than two decades. Less fish to catch because of dwindling public-trust fish stocks means unoccupied piers, and unoccupied piers are simply not economically feasible.

totally inadequate to protect against impairment of North Carolinians' public-trust rights to harvest this stock.

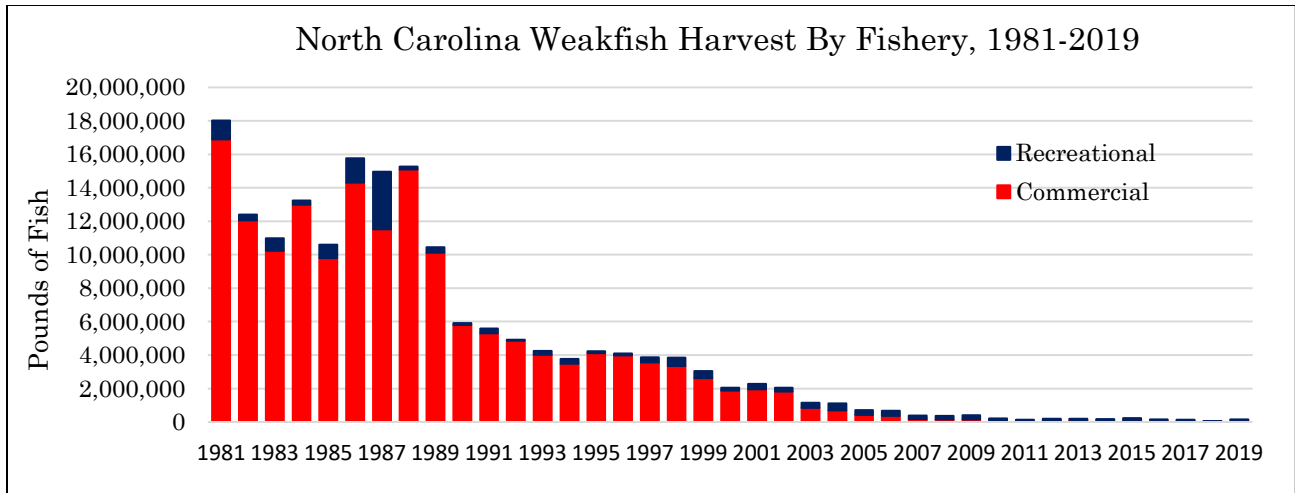
133. Both the Division and the Commission have refused to adopt a state-specific, North Carolina Spot FMP as anticipated by the Fisheries Reform Act to reverse the precipitous stock abundance decline of Spot in North Carolina's waters.

134. Yet the Division and Commission have prepared and approved North Carolina FMPs for a number of other species that are managed under a coastwide, interjurisdictional FMP, because the interjurisdictional plans were inadequate for managing North Carolina stocks of those species. River Herring, Red Drum (*Sciaenops ocellatus*), and Spotted Seatrout (*Cynoscion nebulosus*) are examples.

135. Similarly, the State also manages Weakfish and Atlantic Croaker under multi-state, interjurisdictional FMPs, and refuses to prepare a separate FMP for North Carolina stocks of those species.

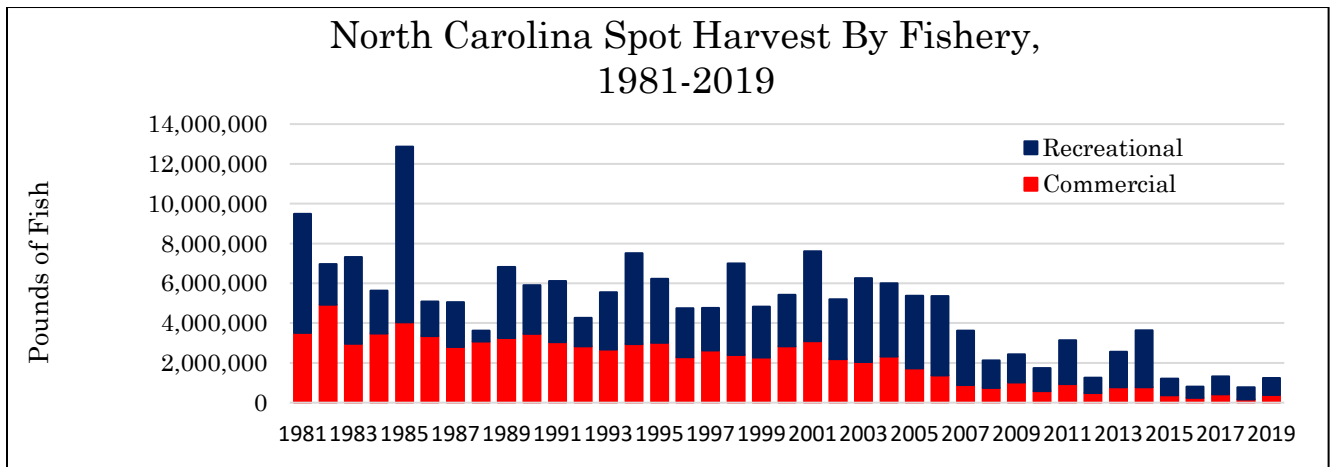
136. A state-specific FMP for any of these three species (Spot, Weakfish, Atlantic Croaker) would require the Division and the Commission to acknowledge and address the primary source of mortality for any of those three stocks: the disastrous effects of the shrimp trawl industry.

137. Looking more specifically at the current, respective statuses of each of the three public-trust stocks decimated by state shrimp trawls over the last half-century, and starting with Weakfish, the overall decline in both the public and commercial Weakfish harvests in North Carolina over recent decades is marked and troubling:

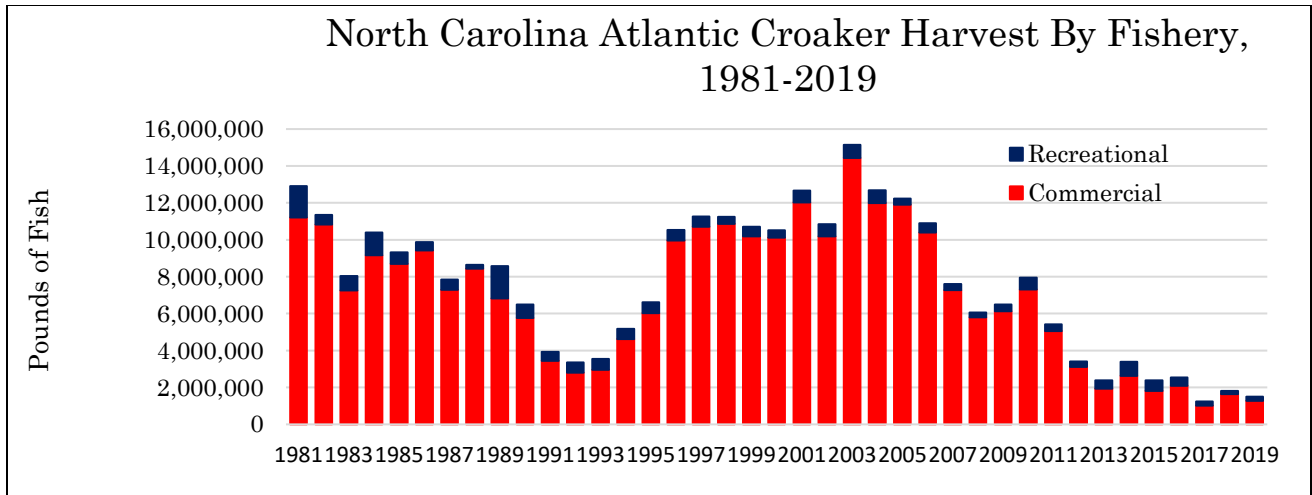


138. Not surprisingly, a 2016 coastwide Weakfish stock assessment (updated in 2019) by the Atlantic States Marine Fisheries Commission under the Weakfish interjurisdictional plan found that the coastwide stock continues to be depleted and has been depleted since 2003.

139. Similarly, over the last five years for which data are available, North Carolina Spot landings—by both the public and commercial fishing—are the lowest on record:



140. Likewise, data show that for Atlantic Croaker, total landings in North Carolina declined by 86 percent from 2003 to 2018, and now stand at historic lows:



141. The precipitous declines in stock abundances for Weakfish, Spot, and Atlantic Croaker resulting from State-permitted shrimp trawling in finfish nursery areas within North Carolina’s coastal waters substantially impair the public’s rights to fish for each of those historically important public harvest species.

142. Because of that undeniable impairment of the public’s right to fish, even under the implausible scenario maintained by the Division that some factor other than shrimp trawl finfish bycatch is in part responsible for the decline of those stocks, the cause of the decline is irrelevant. The State still has the legal duty of taking those actions necessary to reverse the decline and restore the public’s right to harvest those species. Allowing shrimp trawls to annually waste, by killing and removing hundreds of millions of juvenile Spot, Atlantic Croaker, and Weakfish from the public-trust resource corpus, can never fundamentally comport with that duty.

143. Furthermore, allowing ocean-sized vessels, which pull nets wider than a football field, and require enormous, weighted doors to hold the nets on the bottom to ply North Carolina estuarine waters, has an ongoing, substantial and adverse

ecological effect on public-trust estuaries, denying citizens their constitutional right to protection of their ecological heritage.

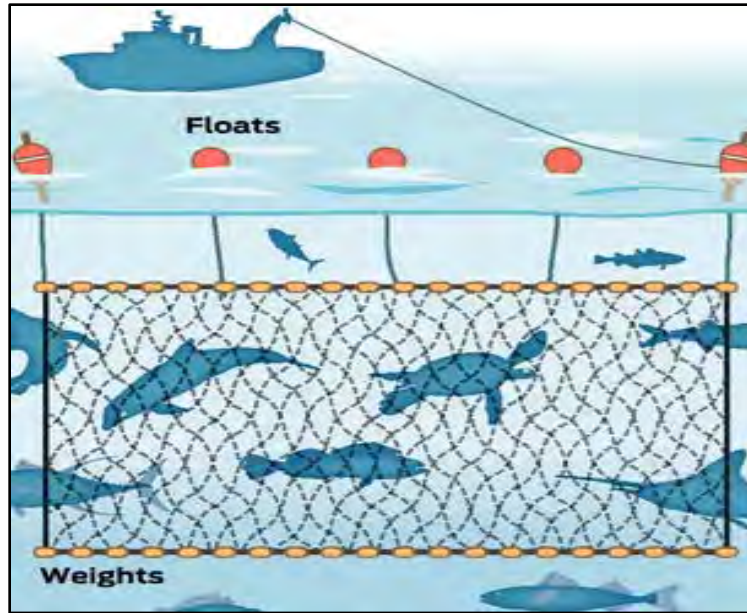
B. The State’s decision to facilitate the continued use of gillnets in North Carolina’s estuarine waters has resulted in extraordinary wastage of North Carolina’s public-trust resources.

1. The wastage caused by gillnets is universally recognized.

144. The use of gillnets in North Carolina estuarine waters is a second source of extraordinary bycatch and public-trust resource wastage that the State has failed and intentionally refused to address.

145. Gillnets are stationary panels of mesh webbing that extend across water bodies. They are traditionally weighted at the bottom with lead weights and buoyed at the top with floats. Today’s gillnets, however, are much more diverse, depending on the depth at which the target species reside and move, the nature of the waterbody, and similar considerations. Some gillnets have float lines, and some gillnets use double lead lines to essentially sink the gillnet “wall” to the bottom and keep it there.

146. In any configuration, however, gillnets hang in the water column, acting like “curtains” that impede the progress of fishes swimming in the water. The individual mesh openings in the net are correlated to fish of specific size so that fishes swim forward into the net but cannot pass all the way through the mesh. If the fish attempts to back out once the net is contacted, the net’s mesh catches in the gills of the fish (“gills the fish”), trapping the fish in the net. The following is a depiction of a typical gillnet:



147. Because gillnetters use different sizes of mesh to catch different sizes of fish, depending on what size fish of the targeted species or stock are lawful to possess, North Carolina has several different “gillnet fisheries” from a management perspective, based both on the net mesh size and the intended target species of the gillnetter. One is an estuarine large-mesh gillnet fishery—primarily targeting Southern Flounder. An estuarine small-mesh gillnet fishery is another—targeting many other species traditionally sought by the fishing public, including Spot, Spotted Seatrout, Striped Bass, and Bluefish. There are also ocean gillnet fisheries.

148. Unless a gillnet is attended,¹⁵ where the net is monitored and “culled” by manually removing fish caught in the net as fish become entangled, the gilled fish are unable to move and quickly drown.

149. Critically, because almost all coastal finfishes in state internal waters reside and move in mixed species groups, gillnets harvest all fishes of a certain size, and not just the species that is being targeted for harvest. “Regulatory discards”—fish that are unlawful to possess under fisheries management rules—are a common result of mixed species fish migration. Because those fish cannot be landed or used, they are discarded—typically dead—and thus are wasted, unable to spawn or fulfill any other ecosystem function. The fact that gillnets kill (and therefore, potentially waste) fish indiscriminately is universally well known and has been documented for decades. The following image shows this indiscriminate killing (and therefore, wastage) of fish:

¹⁵ Gillnet “attendance” is typically viewed in fisheries management as simply requiring a gillnetter to be physically present while the nets are set to trap fish, and to cull the nets as unwanted fish become entangled. However, in a practical sense, gillnet non-attendance may be either actual or “constructive.” Since it is physically impossible for a person to remove fish or other creatures from a long deployment of gillnet yardage before entangled organisms drown, long gillnet sets are constructively non-attended even when physical presence is required by rule. Constructive non-attendance also occurs when gillnet attendance rules only specify that the net “must be fished” within specified time intervals, often just once every twenty-four hours.



150. Gillnets can potentially be an efficient commercial gear if there are requirements in place mandating that sets are of very limited yardage and nets are closely attended so that non-targeted species or fish illegal to be possessed can be released while they are still alive, as they become entangled. The Division and the Commission have a long history, however, of not requiring and resisting calls for the commercial industry to attend its gillnets in most coastal waters. The State has done so for purported reasons of “fisherman safety and convenience,” once again favoring the needs of the regulated community over those of the fishing public.

151. As a result, most gillnets are simply left unattended for long periods of time, acting as indiscriminate fish traps—or “walls of death” as they are appropriately known—where scores of drowned animals that may not legally be possessed or sold are killed and simply discarded:



152. That unintended bycatch and killing of non-targeted species is the source of both substantial public resource wastage and the overfishing of coastal fish stocks. The alarming case of gillnet-induced overfishing of Striped Bass as bycatch in the Southern Flounder gillnet fishery is discussed below. It is certainly not the only example of bycatch wastage of species important to the fishing public, however. Flounder gillnets also catch, and waste as regulatory discards, substantial numbers of Red Drum each year.

153. To be sure, fish are not the only creatures that become ensnared and thereby are killed or injured in a gillnet. Significant numbers of protected sea turtles, dolphins, and sea birds are also killed or injured by gillnets every year in North Carolina's estuarine waters.

154. Gillnets are allowed by the State in virtually all of its coastal waters, both estuarine and near-shore public waters.

155. Public-trust resource wastage and overfishing associated with unattended gillnet usage became more pronounced in the 1990s, when powered net

reels—capable of retrieving enormously long yardages of gillnets—came into use, and the predominant material used for gillnets became monofilament line. Monofilament nets are even more effective (meaning lethal) because of their transparency in the water, giving fish and other animals no warning of the obstacle ahead, such that they cannot avoid the net.

156. In 1991, in one of the rare instances where the Commission has voluntarily acted in the overall public interest, the Commission adopted a policy directing the Division to “establish the goal of reducing bycatch to the absolute minimum and to consciously incorporate that goal into its actions.”¹⁶ In reference to that policy as applied to the estuarine gillnet fishery, the Division stated, “[t]he incidental capture of non-targeted species, endangered species, and undersize market species is a biological and economic problem in this fishery.”¹⁷ However, in the case of gillnets, the Division’s acknowledgement of or adherence to that Commission policy was short-lived.

157. A 2009 Division study of the North Carolina coastwide estuarine gillnet fishery found that in the large-mesh gillnet fishery only 48 percent of gillnet catches were marketable (catch sold to market, used for personal consumption or used for bait), while 47 percent were unmarketable discards (catch mutilated by predation or

¹⁶ NCDMF. (Jan. 2001). “Assessment of North Carolina Commercial Finfisheries, 1997-2000.” Final Performance Report for Award Number NA 76 Fl 0286, 1-3. N.C. Dept. of Environment and Natural Resources, Div. of Marine Fisheries, Morehead City, NC; p. 6-12.

¹⁷ *Ibid.* at p. 6-i.

unwanted, and therefore wastage), and 5 percent were regulatory discards (otherwise marketable catch prohibited from possession because of seasonal closures and size or harvest limits, and therefore also wasted). That same study also found substantial takes of protected sea turtles and Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) in the estuarine gillnet fishery.

158. Most of that resource wastage was in the form of drowned, and thereby wasted, Atlantic Menhaden (*Brevoortia tyrannus*), a species that plays a critical ecosystem role in terms of serving as a forage fish, prey for finfishes traditionally sought by the fishing public.

159. The wastage of over half of the harvest from large-mesh estuarine gillnets, whether in the form of forage fish or finfish regulatory discards, is incompatible with the State's duty to protect the coastal fisheries resources from such wastage or overexploitation.

2. Gillnetting physically interferes with the public's access and use of the State's estuarine waters.

160. In addition to the enormous impact of unattended gillnet bycatch wastage and gillnet bycatch effects on overfishing of fish stocks, gillnets (whether attended or not) also interfere with North Carolinians' right to access and use the State's navigable waters. In doing so, gillnets directly impair North Carolinians' public-trust rights to boat, fish, and swim. That reported, direct interference with public-trust rights includes:

(a) Gillnets posing a threat to navigation by directly entangling the propellers of motorboats being used by the public to traverse navigable, public waterways;

(b) Gillnets being set near or encircling docks, blocking or impeding boat owners from accessing waters from their docks;

(c) Gillnets being set in the mouth of creeks and bays, blocking members of the public, including those who fish, from accessing those navigable waters; and

(d) Gillnet users entering waters (where the fishing public is fishing) to deploy their gillnets, causing an immediate, drastic decline in the public's fishing success.

3. Every southeastern state other than North Carolina has banned or severely curtailed gillnetting because of its adverse impacts.

161. Because of the adverse resource and public use impacts caused by gillnets, every southeastern state but one acted by the year 2008 to protect its respective fish stocks and other natural resources from those impacts by banning gillnet use entirely, or at least severely limiting their use. The only state that did not is North Carolina.

162. The steps taken by every other southeastern state to address the adverse impacts of gillnetting are as follows:

(a) The use of gillnets in Georgia have been legislatively banned since 2008, with the very narrow exception of limited gillnet use for a shad and sturgeon fishery. *See Ga. Code Ann. § 27-4-7 (2008).*

(b) South Carolina enacted a statute severely restricting length of gillnets, size of mesh, areas of allowance, and requiring attendance of nets at all times, effectively eliminating their use. *See* 1990 S.C. Code Ann. § 50-5-500 (2008).

(c) Florida banned use of gillnets in state waters by a constitutional amendment in 1995. *See* Fla. Const. Art. X, § 16.

(d) Louisiana legislatively banned the use of gillnets in all state saltwater areas in 1995. *See* La. Rev. Stat. Ann. § 56:201.

(e) Mississippi in 1997 required all gillnets to be constructed of degradable material, thereby effectively removing gillnets from that state's waters, and further enacted later rules severely restricting areas where gill netting is allowed, length of nets, size of mesh, and requiring attendance of gillnets at all times. *See* 22-5-04 to -05 Miss. Code. R. (2008).

(f) Alabama effectively eliminated the use of gillnets in 2008, by enacting regulations severely restricting length of gillnets, size of mesh, areas of allowance, closing many areas seasonally, and requiring attendance of all gillnets at all times. *See* Ala. Admin. Code r. 220-3-.03 (2008).

(g) Texas legislatively banned the use of gillnets within 500 yards of public coastal waters in 2008. *See* Tex. Parks & Wild. Code Ann. § 66.006 (2008).

(h) Virginia severely restricted the use of gillnets by enacting regulations that limit gillnet length to 100 yards, limit mesh size, require physical presence at all times, and prohibit harvesting of Striped Bass, Red Drum, Spotted Seatrout, Weakfish, Southern Flounder, and River Herring. *See* 4 VAC 15-340-30 (2008).

163. Thus, in the southeast, North Carolina remains the last bastion of the unabated use of gillnets, to the detriment of North Carolina's public-trust resources and its citizens.

4. Despite its adverse impacts, gillnetting has proliferated in North Carolina's estuarine waters.

164. Despite the marked trend in other states to restrict gillnet usage in order to prevent overfishing, public resource wastage, and the impediment to other public-trust rights posed by gillnets, North Carolina has taken the opposite approach. In the latter decades of the 20th Century and the first decade of this century, the State allowed the use of gillnets in State coastal waters to proliferate almost exponentially. Commercial fishers that were no longer allowed to use gillnets in other southeastern states migrated to North Carolina, where they could continue to use gillnets, mostly unattended.

165. Consequently, the extent of actual gillnet usage in North Carolina during the early part of this century is staggering. By the Division's own reckoning, more than 44 million yards (roughly 25,000 miles) of gillnets were set in State coastal waters in 2008, with more than 36 million yards (roughly 20,000 miles) of those nets set in estuarine waters.

166. The only substantial restrictions imposed by the State on the commercial use of large-mesh gillnets in North Carolina estuarine waters were not imposed voluntarily. Rather, they were imposed *circa* 2010 as part of a settlement of a lawsuit filed against the Division and the Commission for violating federal law by allowing commercial gillnet users to take sea turtles in violation of the ESA.

167. However, even after full implementation of the gillnet usage restrictions required by the lawsuit settlement, commercial gillnet usage in North Carolina continued at a rate unsustainably high for coastal fisheries resources. In 2011, over 22.42 million yards—or 12,738 miles—of gillnets were set in North Carolina’s coastal waters. To put that amount in context, that is more than enough yardage to reach halfway around the globe at the Equator.

168. Worse still, the State did not merely allow this proliferation of gillnets to occur in North Carolina’s public waters. Rather, the State (through the Division) took the affirmative steps described below, using substantial public funds to ensure that the widespread commercial use of gillnets could continue in North Carolina estuarine waters.

169. The Division’s actions not only adversely impacted coastal finfish stocks through bycatch wastage, but also served to the detriment of North Carolina’s sea turtle¹⁸ and Atlantic Sturgeon populations, protected under either North Carolina law or the federal ESA.

170. Under the ESA, once a species is listed as “endangered,” it is illegal to “take” one or more individuals of that species, and regulations promulgated pursuant to the ESA prohibit the “taking” of a threatened species. 16 U.S.C. § 1538. “Take” is defined as “[to] harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or

¹⁸ There are five species of sea turtle found in North Carolina coastal waters: Green, Loggerhead, Kemp’s Ridley, Leatherback, and Hawksbill Turtles. Each of these species of sea turtles found in State waters has seen a precipitous population decline in the last hundred years, and each is federally protected by the Endangered Species Act.

collect, or to attempt to engage in any such conduct.” 16 U.S.C § 1532(19); *see also* N.C. Gen. Stat. § 113-189(a) (declaring it is unlawful to “willfully take, harm, disturb or destroy any sea turtles protected under the federal ESA”).

171. The only exceptions to prohibited take under the ESA are those allowed by section 10 of the ESA, which implements an “incidental take” provision potentially allowing for limited numbers of a protected species to be taken incidental to specific, otherwise lawful activities. *See* 16 U.S.C. § 1539(a)(1).

172. A party may apply for such an incidental-take permit for a “take” that occurs incidental to an otherwise lawful activity. In the case of protected sea turtles in coastal waters, these permits are issued by the National Marine Fisheries Service (the “National MFS”) under the authority of the U.S. Secretary of Commerce. Each permit specifies a maximum number of individuals of the protected species that may be taken “incidentally” to the permitted activity. If those take limits are exceeded, the activity must cease to protect the endangered or threatened species.

173. State estuarine waters where Southern Flounder are targeted by gillnet users are also areas where juvenile sea turtles feed. Consequently, gillnets have the potential to ensnare large numbers of sea turtles protected by state and federal law. Gillnets are a highly effective means of killing sea turtles. Indeed, before sea turtles were protected under the ESA, they were regularly harvested and eaten, and the gear of choice for catching them was gillnets.

174. Because of the historical drowning of protected sea turtles in gillnets in North Carolina’s waters, the National MFS halted the Southern Flounder gillnet

fishery in Pamlico Sound and some other State coastal waters on several occasions in the 1990s. Despite full knowledge that gillnet users were violating state and federal law in the taking of protected sea turtles, the State took no action to halt those violations.

175. The State (through the Division and the Commission) reacted to close the large-mesh gillnet fishery only in response to notification by the National MFS that gillnetters in North Carolina were in direct violation of the ESA by continuing to take protected sea turtles. Because the Southern Flounder gillnet season only lasts through the fall months and sea turtles are inactive in the winter months because of cold water temperatures, the gillnet closures lasted only a few months.

176. In the next fishing year, rather than seek to protect sea turtles as required by state and federal law, the Division's response was to actively align itself with commercial gillnetters by seeking (in essence, on their behalf) a series of incidental take permits that would allow large-mesh, estuarine commercial gillnetting to continue in North Carolina relatively unabated.

177. The Division's decision was extraordinarily irregular. Typically, an incidental take permit is applied for and issued to the party who actually does the taking—in this case, those who fish with gillnets—not the State itself. In North Carolina, however, where regulatory capture of fisheries management had taken hold, the State actively sought to do the bidding of the commercial fishing industry it was supposed to regulate, to the detriment of North Carolina public-trust resources.

178. Indeed, a few years later in 2010, the Division went even further to appease its regulatory captors—the commercial gillnetting industry. In an unprecedented move for fisheries management, the Division sought to sidestep violations of the ESA by commercial gillnetters long-term by applying to the National MFS for a ten-year incidental sea turtle take permit for all coastal waters.

179. Unsurprisingly, public comment—other than from the commercial-license holders, which is substantially less than 1 percent of North Carolina’s citizens—was overwhelmingly in opposition to the permit application. That public input served as no deterrent to the Division, however. In September 2013, the National MFS approved the Division’s incidental take permit for statewide gillnetting, effective until September 2023.

180. The extent of the Division’s subservience to the industry representing the tiny fraction of citizens who have the privilege to harvest public resources for profit is further illustrated by the fact that substantial public monies were used to obtain the permit, and the cost of implementing and complying with the permit has already been millions of dollars in public funds.

181. Similarly, that subservience is evidenced by the fact that the State (through the Division) has also ignored and refused to enforce its own statutes in the case of commercial gillnetters, specifically the provision of state law that protects sea turtles in North Carolina. *See* N.C. Gen. Stat. § 113-189(a). That statute contains no provision or process for exempting from its application activities that harm sea turtles.

182. In addition, the State (through the Division) has further embraced its management model of acting on behalf of a small segment of the North Carolina population and contrary to the overall public interest. Following its successful application for the incidental take permit for statewide gillnetting of protected sea turtles, the Division sought and obtained a similar, statewide permit in 2018 that allows commercial gillnetters to take Atlantic Sturgeon, another endangered species protected under the ESA. In the State’s own words:

In 2012, NOAA Fisheries listed the Carolina DPS of Atlantic sturgeon as an endangered species under the [ESA]. This listing determination drastically influenced the management strategy in North Carolina. The largest influence was the requirement of [the Division] to obtain a Section 10 Incidental Take Permit to allow the estuarine gill net fisheries to continue. Without the Section 10 Permit, interactions in the fishery would have been illegal.¹⁹

183. In sum, the State has not only failed to preserve public-trust resources within its waters, but it has actively encouraged the depletion of those resources through at least two wasteful and destructive methods of commercial fishing, shrimp trawling and gillnet usage. The allowance—and indeed, active perpetuation—of each of those practices by the State as discussed above illustrates the extent to which regulatory capture of the Division by the commercial fishing industry drives State fisheries management policy. In doing so, the State has violated its obligations to preserve and protect its waters, and the fisheries and other public-trust resources therein, for the benefit of North Carolinians.

¹⁹ NCDMF (August 2019). “Fishery Management Plan Update, Atlantic Sturgeon.” N.C. Div. of Marine Fisheries, Morehead City, NC.

III. The State has tolerated chronic overfishing and failed to restore fish stocks.

184. The State's second critical failure of its public-trust obligations is its tolerance of chronic overfishing of multiple coastal fish stocks. Overfishing is a universally recognized threat to fish stocks, just as overuse of any natural resource threatens the resource's long-term health and well-being.

185. Under the public-trust doctrine as codified in the North Carolina Constitution, the State has a legal duty to enact and implement laws that adequately conserve and protect coastal fisheries resources, thereby ensuring the general public's right to fish and preserving coastal fisheries resources for future generations.

186. The State has repeatedly breached that duty for multiple species of fish that are popular to the fishing public.

187. While there are varying definitions of the term "overfished" in the field of fisheries management, under North Carolina statutory law, a coastal fish stock is "overfished" when "the spawning stock biomass²⁰ of the fishery (stock) is below the level that is adequate for the recruitment class of a fishery (stock) to replace the spawning class of the fishery (stock)." N.C. Gen. Stat. § 113-129(12c). In other words, as a fish stock becomes depleted by overfishing, there comes a point when there

²⁰ "Spawning stock biomass," typically abbreviated "SSB," is simply the combined weight of all individuals in a fish stock that are capable of reproducing. In essence, it is the "reproductive capacity" of the stock. The reproductive capacity of overfished stocks quickly diminishes, both as the overall stock size shrinks and as the number of older fish declines, because older females proportionately produce greatly enhanced numbers of eggs that are genetically better suited for survival, as opposed to younger, sexually mature females.

simply are not enough adult fish reproducing to produce offspring in sufficient numbers to replace stock members that die (from any cause).

188. North Carolina statutes also provide facially, as discussed below, that the Division and the Commission must timely end overfishing on North Carolina coastal fish stocks and achieve sustainability within time periods specified by the General Assembly. However, both the statutory definition of overfishing and implementation of the legislative time frames for ending overfishing and achieving sustainability have proved inadequate to meet the State's public-trust and constitutional obligations to protect coastal fish stocks.

189. Under the Fisheries Reform Act of 1997, the Division was required to develop a management plan (FMP) for each significant fish species and update that plan at least every five years. The Commission was then required to review, adopt, and implement that plan. *See* N.C. Gen. Stat. §§ 113-182.1(a), (d).

190. That Act expressly provides that the primary purpose for every FMP "shall be 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).

191. To achieve stock viability, the FMP must set forth the measures to be taken, where necessary, to end overfishing of a stock and achieve sustainability by the deadlines set for each goal in the Act:

(a) N.C. Gen. Stat. § 113-182.1(b)(5) requires that each FMP specify a time period of two years or less from plan adoption to end overfishing on a stock;

(b) N.C. Gen. Stat. § 113-182.1(b)(6) requires that each FMP specify a time period of ten years or less from plan adoption to achieve a sustainable harvest in terms of stock biomass; and

(c) N.C. Gen. Stat. § 113-182.1(b)(7) requires that the statistical probability of achieving a sustainable harvest under FMP management recommendations must be fifty percent or higher.

192. The Act contains no enforcement provisions if the legislative requirements of ending overfishing and achieving sustainability are not timely realized. That absence of any enforcement provisions has allowed the Division and the Commission to simply ignore the statutory requirements where convenient, without imposing immediate harvest restrictions to implement those requirements.

193. An additional recurring problem under the Act is that the Division has maintained that at the time an FMP is being considered, if there is no formal, peer-reviewed stock assessment for the species to determine whether it is overfished and whether overfishing is occurring (as those terms are defined by the Act), the overfishing-prevention provisions of the Act are inapplicable and stock management recommendations are left to the Division's complete discretion.

194. That policy is entirely inconsistent with the State's public-trust duties for managing coastal fish stocks. Yet it has been applied indiscriminately in managing coastal fisheries resources, regardless of warning signs like decreased landings or other measures of stock abundance, and has led to the demise of numerous coastal fish stocks, as the examples below fully illustrate.

195. That allowance of unabated overfishing of multiple coastal fish stocks has rendered the legislative timelines found in the Act insufficient to protect and ensure the viability of such stocks.

196. The Act gives the Fisheries Director authority to issue a declaration that the two-year deadline to end overfishing and the ten-year deadline to reach a sustainable harvest are temporarily inapplicable, but only under the very limited circumstances and upon a determination that the biology of the fish, environmental conditions, or lack of sufficient data makes implementing (i.e., reaching) those two deadlines “incompatible with professional standards for fisheries management.” *See* N.C. Gen. Stat. §§ 113-182.1(5), (6).

197. However, there is no provision in the Act that allows the Fisheries Director, the Division, the Commission or anyone else to simply “reset” those two-year (to end overfishing) and ten-year (to reach a sustainable harvest) deadlines after the first FMP of a stock under the Act is adopted.

198. Now, twenty-three years after the enactment of the Fisheries Reform Act of 1997, it is readily apparent that the State’s statutory laws, and implementation of those laws by state agencies, are ineffective to achieve these objectives of ending overfishing in two years and reaching sustainable harvests within ten years. This is true even though both of those goals are facially required by statute in the Act, and further, are fundamentally required by the State’s public-trust and constitutional obligations to North Carolinians.

199. Three finfish stocks offer alarming examples of the State's failure to control overfishing to the detriment of the public's right to fish for those species: River Herring, Southern Flounder, and Striped Bass. Each of these examples is addressed below.

A. The State allowed a 99-percent decline in the River Herring Stock from overfishing.

200. The management history of North Carolina's River Herring stock provides the initial, disturbing example of how the State has tolerated and failed to address overfishing of a stock popular to the fishing public for decades, all despite longstanding, clear evidence that the health of the stock deteriorated over a period in excess of three decades due to overfishing.

201. River Herring (a term that includes Blueback Herring and Alewife), are small, "anadromous" fish, meaning they migrate from the Atlantic Ocean through the State's ocean inlets into coastal bays and sounds, and ascend into freshwater rivers and streams to spawn.

202. The River Herring fishery is likely North Carolina's oldest fishery. When European colonists arrived in the New World, they found that Native Americans had long been harvesting River Herring that migrated upstream every year to spawn in every North American river system draining to the Atlantic Ocean. Ten years before the American Revolution, there was a thriving Herring fishery that operated on North Carolina's Chowan River.

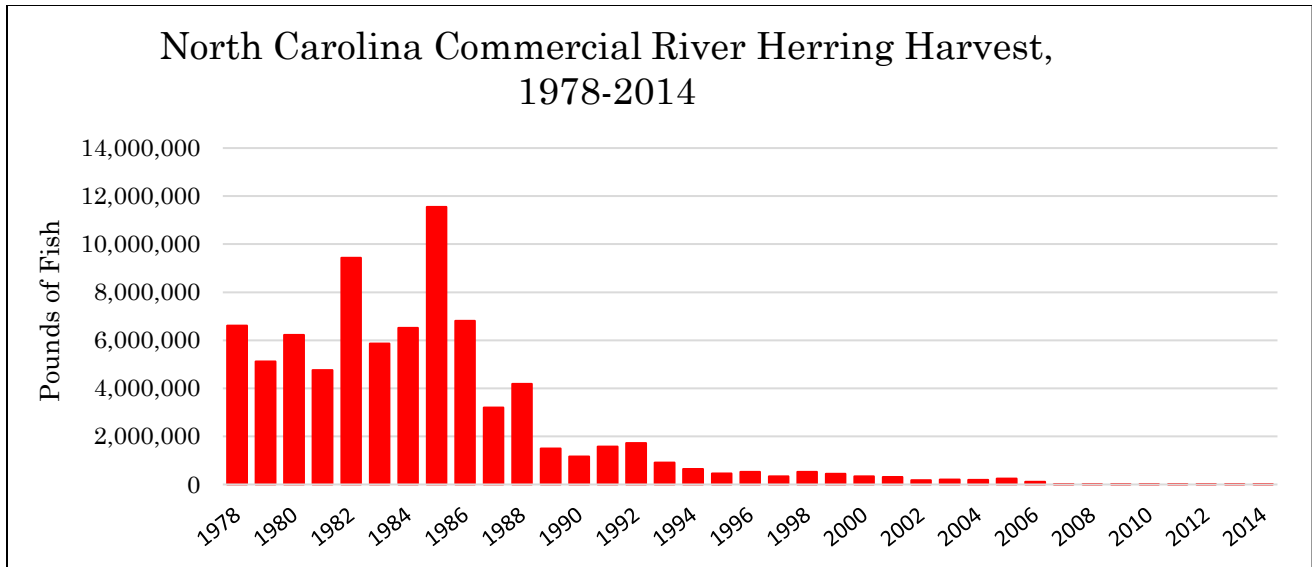
203. The Division states in its River Herring FMP that currently the extent of River Herring harvest for personal consumption and bait is unknown. However,

historical data confirms that River Herring have provided both sustenance and income for inhabitants of one of the state's poorer regions since the Colonial Era.

204. In addition to its public-subsistence role, River Herring also serve as an important prey species for Striped Bass and other fish stocks that are significant to the fishing public.

205. River Herring historically swam in North Carolina estuaries and rivers numbering in the hundreds of millions. It was estimated in 1917 that landings of River Herring in the Chowan River and Albemarle Sound areas of the State alone totaled 20 million pounds in most years. For four decades thereafter, annual River Herring landings averaged between 11 and 12 million pounds. By the 1970s, however, landings had declined to an annual average of 8 million pounds.

206. The fact that the North Carolina River Herring stock has long been in trouble was also readily apparent from the harvest data. The Division's commercial landings data for River Herring date to 1972. For the period from 1972 to 1985, annual landings averaged 7.3 million pounds, peaking at 11.5 million pounds in 1985, declining steadily for a period of years, then declining precipitously thereafter. Annual commercial landings of River Herring for the decade following the 1985 "modern" peak landings year averaged 2.2 million pounds. Annual commercial landings in the period from 1995 until 2006, when a harvest moratorium was imposed because of stock collapse, averaged just 308,000 pounds. The 2006 harvest of less than 110,000 pounds was the lowest on record:



207. Using the historical figure of average annual landings in excess of 20 million pounds in the early 20th century, it is clear that North Carolina River Herring landings decreased by over 99 percent before the State took any substantial action to end overfishing of the stock.

208. Despite the known, marked decline in River Herring abundance, the State failed to act to stem that disastrous decline until it was too late, and North Carolina’s stock of River Herring collapsed from overfishing.

209. Indeed, the State had no River Herring management plan of any kind prior to the Fisheries Reform Act—a shocking failure given that River Herring was a stock that comprised North Carolina’s oldest fishery and once supported landings of 20 million pounds. Instead, the Commission adopted its first River Herring FMP in 2000, only after the Act required it.

210. Despite the precipitous, 99-percent decline in annual River Herring landings that had already occurred in North Carolina by that time, the Division did not recommend a harvest moratorium for River Herring in the initial FMP. Instead,

it gave in to pressure from the commercial fishing industry and recommended only an annual catch quota for the fishery—a vastly insufficient management measure for a stock near collapse. The Commission rejected a proposal to impose a harvest moratorium on River Herring and adopted the Division’s management stock recommendations.

211. Following adoption of the FMP, the Division completed a River Herring stock assessment in 2005. That stock assessment determined that both species of River Herring (Blueback Herring and Alewife) were overfished, and that overfishing was occurring on both species. That stock assessment also determined that there was minimal recruitment with continued declines in abundance for both species, and that both species displayed high fishing-mortality rates. Based on the 2005 stock assessment, the Division recommended a public and commercial harvest moratorium, and that moratorium was adopted by the Commission in 2007.²¹

212. The estimated spawning stock biomass for the River Herring stock in 2009 was approximately 210,000 pounds, a mere 5.2 percent of the spawning stock

²¹ Despite the harvest “moratorium,” the new plan—again bowing to pressure from the commercial fishing industry and its supporters—ignored the plight of the stock and the overall public interest, and included a “set-aside harvest” of 7,500 pounds to be used for data collection and to provide product to local herring festivals. Astoundingly, despite the collapsed stock, the latter provision gave the Fisheries Director authority to allocate up to 4,000 pounds of that total set-aside poundage as a discretionary harvest season by those with permits. It was not until 2015, when the next plan amendment was adopted, that the annual, discretionary harvest season was rescinded by the State, imposing a true harvest moratorium on the collapsed stock. By then, it was far too late. The River Herring stock was depleted, depriving North Carolinians of fishing for River Herring, and taking a toll on other public-trust resources, like Striped Bass, for which River Herring serve as a primary food source.

biomass that would be required to support a sustainable harvest as required by North Carolina law. Despite the harvest “moratorium,” the Blueback Herring spawning stock biomass had by 2017 only reached 12 percent of what is required for a sustainable fishery, even in the complete absence of fishing mortality. For these reasons, it is unlikely that the North Carolina River Herring stock will ever be biologically capable of supporting significant public or commercial harvest.

213. The General Assembly has remained seemingly unconcerned about the total collapse of the State’s oldest fishery, neither taking or recommending action to prevent stock collapse as it was occurring, or to remedy the situation following the historic tragedy.

214. The State’s refusal to take decisive (or even somewhat reasonable) management action in the three decades over which North Carolina’s River Herring stock declined precipitously leading to the stock’s imminent collapse, has completely deprived the public of its public-trust rights to harvest River Herring.

B. The State has allowed chronic overfishing to threaten the collapse of its Southern Flounder stock, just as the State did for River Herring.

215. The plight of North Carolina’s Southern Flounder stock provides a second, striking example of how the State has allowed overfishing of a fish popular to the fishing public for decades, notwithstanding both the statutory prohibition against continued overfishing and longstanding, clear evidence that the stock was depleted from more than three decades of overfishing.

216. Indeed, by the time the State took action in 2019 to (at least ostensibly) end overfishing as required by law, the draconian measures required at that point in

time substantially deprived the fishing public of access to the fish. That deprivation would not have been necessary if the State had acted to address overfishing sooner, in the timeframe contemplated by the Fisheries Reform Act. Moreover, recent data confirms that even more stringent measures than those adopted in 2019 may be required to end overfishing of Southern Flounder in the foreseeable future.

217. Flounder, which includes three separate species in North Carolina's coastal waters (Southern Flounder, Summer Flounder (*Paralichthys dentatus*), and Gulf Flounder (*Paralichthys albiguttata*)), have historically been one of the most sought-after species by the fishing public in North Carolina. In terms of public harvest, Southern Flounder is the most important of those species.

218. As far back as 1989, Division data indicated Southern Flounder were overfished, and that overfishing was actively occurring.

219. After the Fisheries Reform Act was passed in 1997, an initial FMP for Southern Flounder was developed by the Division and adopted by the Commission in 2005. As a part of the plan development process, a peer-reviewed 2005 stock assessment for Southern Flounder was produced. That stock assessment showed that the Southern Flounder stock was overfished, and that overfishing was occurring. Yet the State took no decisive action, as required by the Act, to implement rules to end overfishing and achieve a sustainable harvest of the stock.

220. The Act requires that each FMP be updated at least every five years. There followed a series of supplements and amendments to the original Southern Flounder FMP, and an associated series of peer-reviewed stock assessments, in 2009,

2014, and 2017 (the latter published upon completion of peer review in January 2019).

221. The 2009 stock assessment confirmed that the Southern Flounder stock was overfished, and that overfishing was still actively occurring.

222. Despite the 2009 finding that overfishing of the Southern Flounder stock had now been ongoing for almost twenty years, the Commission's implementation of "2011 Supplement A" and "2013 Amendment 1" to the 2005 FMP were also ineffective in ending overfishing and rebuilding the spawning stock biomass for Southern Flounder. Any regulatory options proposed that would impose additional restrictions on commercial harvest were first discounted by advisory committees controlled by commercial fishing interests, and then rejected by the Commission. All proposals—both from the public and from within the Commission—to address the root cause of the problem (i.e., commercial-fishing pressure on the stock) were outvoted and rejected. The State allowed "status quo" commercial harvest to continue unabated.

223. The 2014 Southern Flounder stock assessment was meant to determine if the legislative goals for ending overfishing and reaching a sustainable harvest had been achieved under the 2005 FMP, following decades of overharvest. The assessment showed that the legislative goals had not been met, and that the Southern Flounder stock remained overfished, and that overfishing was still occurring. The stock assessment was peer-reviewed and approved for the Division's and the Commission's management use by a majority of the peer reviewers.

224. The Division was fully aware of the dire condition of the Southern Flounder stock at the time of the 2014 Southern Flounder stock assessment. In the Division's annual stock status report published on its website, the Southern Flounder stock was classified as overfished in each year from 2002 to 2005, and similarly as "depleted" in each year from 2006 to 2013.

225. Despite the Southern Flounder stock's long history of overfishing in North Carolina, its poor condition and peer approval of the 2014 stock assessment for management use, the Division rejected the stock assessment for management purposes. It instead took the extraordinary measure of suspending the statutory deadlines for ending overfishing and for reaching a sustainable harvest as they pertain to Southern Flounder. The Division cited a need for additional, coastwide data to ensure that Southern Flounder were not simply migrating to adjacent states rather than being removed from the North Carolina stock by harvest.

226. Given that in 2014 the Division was long out of compliance with the legislative directive to end overfishing on North Carolina's Southern Flounder stock within a time period not to exceed two years, the Division lacked the authority to validly invoke the statutory rules-suspension provision. Instead, the Division was statutorily required to take immediate regulatory action to end overfishing of that

stock through use of the Fisheries Director’s existing proclamation authority.²² It did not do so.

227. The State’s decision not to implement any new measures to protect the Southern Flounder stock in 2014 was widely seen as a ploy to keep commercial gillnetters fishing despite the data, just as the State did in 2010 by obtaining an incidental take permit to allow the commercial fishing industry to harm endangered and threatened sea turtles statewide by continuing to fish gillnets. In each case, both of which show the extent of the regulatory capture by the commercial fishing industry, the State chose resource exploitation over its duty to preserve and protect coastal fisheries resources.

228. Unfortunately, even after taking into account the Division’s “concern” about potential out-of-state stock migration by analyzing relevant Southern Flounder data from South Carolina, Georgia, and Florida, the 2017 Southern Flounder stock assessment confirmed the findings of all previous stock assessments. It showed that the North Carolina Southern Flounder stock was still overfished, and that overfishing was still actively occurring.

²² Under N.C. Gen. Stat. § 113-221.1(b), the Commission is authorized to “delegate to the Fisheries Director the authority to issue proclamations suspending or implementing, in whole or in part, particular rules of the Commission that may be affected by variable conditions.” The Commission has done so in the rule found at 15A NCAC 03I .0102. Unfortunately, the Fisheries Director, as described elsewhere herein, has a long and consistent record of using that authority primarily to promote exploitation of public-trust coastal fisheries resources, and not to conserve and protect those resources.

229. More specifically, the 2017 stock assessment data analysis contained the following dire news on the condition of North Carolina's Southern Flounder stock:

- (a) The probability that the stock was overfished was 100 percent;
- (b) The probability that the 2017 North Carolina Southern Flounder stock was experiencing overfishing was 96.4 percent;
- (c) The estimated spawning stock biomass for Southern Flounder has been below targets for a sustainable harvest since as far back as 1989;
- (d) Juvenile Southern Flounder that have yet to reach spawning age are increasingly being harvested, with a concomitant decrease in the number of older fish in the stock, thereby further reducing the biomass of the spawning stock;
- (e) If the 2017 coastwide fishing mortality rate continued unabated, the North Carolina spawning stock biomass would continue to decline; and
- (f) The predominant source of overfishing of Southern Flounder in North Carolina was not from the fishing public, but from private, for-profit commercial fishing activities, including the Southern Flounder large mesh gillnet fishery. In 2017, commercial landings (including dead discards) accounted for 72 percent of North Carolina's total removals of Southern Flounder by fishing.

230. In presenting the 2017 stock assessment results to the Commission in September 2019, the Division stated that it:

recognizes the need for quick implementation of management strategies to reduce total removals stemming from the continued overfished and overfishing status of southern flounder that have remain unchanged since 1989 relative to the 2017 thresholds.

The lack of rebuilding success related to the management implemented from the original FMP (2005) [and subsequent amendments] . . . has not resulted in the necessary increase in [the spawning stock biomass] to end the stock's overfished status, thus further reductions are necessary (emphasis added).

231. Despite calls for immediate action, the Fisheries Director, while expressing concern about the state of the Southern Flounder stock, resisted requests from the public that he exercise his proclamation management authority to impose immediate, emergency conservation measures to stop overfishing and curb the decline of the Southern Flounder stock. In refusing to use his existing authority to protect the stock, the Director insisted that additional time was needed to review the data and that the appropriate remedy was to go through the process of amending the Southern Flounder FMP yet again.

232. That additional time to “process the data” turned out to be two years, now bringing the longstanding Southern Flounder management crisis into 2019, some *thirty years* after overfishing of the stock was first realized. Meanwhile, during those two additional years, overfishing of North Carolina's Southern Flounder stock continued unabated.

233. Nor did the General Assembly act to enforce its own deadlines for ending overfishing and achieving a sustainable harvest for the Southern Flounder stock as this agency mismanagement played out.

234. Ultimately, draconian reductions in the harvest of Southern Flounder were found to be necessary in 2019 to end overfishing and recover the spawning stock biomass to a sustainable harvest level. This was entirely foreseeable and avoidable,

given the decades of management inaction and the long-documented confirmation of stock overfishing that culminated in the dire predictions of the 2017 stock assessment.

235. Even then, the Division acted with no sense of urgency to achieve those legislative goals. Having missed the original deadlines to end overfishing and achieve harvest sustainability for Southern Flounder, the current FMP amendment for Southern Flounder being prepared by the Division purports to “reset” those deadlines to 2021 and 2028, respectively. Here, too, that decision has no known precedent and was made without discussion or explanation.

236. The Division’s attempt to “reset” both timelines with a clean slate is made at the expense of the public-trust fishing rights of North Carolina citizens, and is in direct contravention of state statutory law in at least two ways:

(a) First, because the Division was long out of compliance with the legislative timelines for ending overfishing and achieving harvest sustainability at the time it purported to suspend those timelines in 2014, the Division lacked authority to do so. It instead should have immediately taken or recommended actions to close the Southern Flounder fishery to harvest until both legislative directives were achieved; and

(b) Second, the statutory authority given to the Fisheries Director to suspend the legislative timelines for ending overfishing or achieving a sustainable harvest authorizes only a temporary “hold” on those timelines. Once the condition

that caused that authority to be invoked is resolved, the timeline immediately restarts, tolling consecutively, from the point at which it was suspended.

237. In implementing drastic, necessary harvest reductions in light of the 2019 presentation of the latest Southern Flounder stock assessment, the Division recommended harvest cuts intended to bring about an overall 52 percent reduction in stock fishing mortality. Those measures, projected to reduce harvests by 62 percent in 2019 and by 72 percent in 2020, took the form of season closures for Southern Flounder for both the fishing public and the commercial fishing industry, and were adopted by the Commission in September 2019.

238. Those draconian harvest measures have resulted in substantial collateral consequences for the fishing public that do not apply to the commercial fishing industry:

(a) First, even though the 2017 stock assessment showed that Southern Flounder commercial landings (including dead discards) account for 72 percent of North Carolina's total removals of the species by fishing, the resulting season closures were purposefully designed by the Division so that the needed reductions would affect commercial-license holders (less than one-tenth of 1 percent of North Carolina citizens) and the fishing public (the remaining 99.9 percent of citizens) *equally*. That "equal" treatment could only be justifiable, rather than arbitrary, if the treatment of those two groups was roughly equal before the new cuts were implemented. State policies and plans that historically have allowed the fishing public to harvest a mere 28 percent of a fish stock hardly amount to "equal" treatment.

(b) Second, because the three species of flounder occurring in State coastal waters are so similar in appearance and not readily distinguishable to many in the fishing public, the resulting public season closures apply not only to Southern Flounder, but to all species of flounder caught in North Carolina. That is the case even though there is no stock abundance issue for Summer and Gulf Flounders. That creates a *de facto* public harvest closure in North Carolina for those latter two stocks whenever the season is closed for Southern flounder. For 2019, the public was prohibited from possessing any flounder after September 4. For 2020, the public was prohibited from possessing any flounder in North Carolina except for a very limited season window extending from August 15 through September 30. That means that even if public fishers catch Summer or Gulf Flounders lawfully in Virginia or South Carolina, or in federal waters offshore North Carolina, those fish could not lawfully be brought into the State. That prohibition does not apply to the commercial industry, which regularly lands Summer Flounder in North Carolina.

239. Unfortunately, very recent data indicate that the stringent, additional harvest measures for Southern Flounder enacted by the Commission in September 2019 are insufficient to recover the stock. As a result, the State fell far below its goal of a 62 percent reduction in fishing mortality for Southern Flounder for 2019. Consequently, it is virtually certain that even more draconian measures will have to be taken to achieve the objectives of ending overfishing and restoring the stock to harvest sustainability in the foreseeable future. Meanwhile, North Carolina remains

the only southeastern state trying to keep its estuarine waters open for commercial gillnet fishing for Southern Flounder.

240. The current result of the ongoing Southern Flounder management crisis is that, despite the original Southern Flounder FMP being adopted some fifteen years ago, and the statutory directives requiring the timely ending of overfishing and attainment of harvest sustainability, the Southern Flounder stock today remains severely overfished due to the inadequacy of State fisheries management statutes and mismanagement by State fisheries management agencies.

241. This mismanagement has resulted in significant curtailment of Plaintiffs' and the public's right to use state waters to fish for Flounder. That significant impairment of public-trust rights could have been avoided by competent, responsible public resource management by the State. In any case, it demanded much earlier regulatory action to end overfishing of Southern Flounder, and to rebuild the spawning stock biomass to support a sustainable harvest in compliance with a legislative mandate.

242. As is well-illustrated by the history of State management of Southern Flounder, the laws and implementation of those laws necessary for the State to meet its public-trust obligations in managing coastal fish stocks are flawed when action is not taken to end overfishing and begin to restore a stock until fourteen years after the original FMP was adopted, and after four successive stocks assessments indicated that the stock continued to decline.

243. Now, the State's gross inaction has put North Carolina in a position where there is no "quick fix" for three or more decades of stock mismanagement. It remains a long, painful road to restoring North Carolina Southern Flounder to the point that the stock is truly viable, all to the great detriment of North Carolinians' public-trust rights.

C. A comparison of the State's two Striped Bass stocks provides a third example of the State's continued tolerance of and failure to end overfishing.

244. North Carolina Striped Bass management provides a third glaring illustration of the State's failure to address overfishing of coastal fisheries resources and the loss of public-trust rights resulting from that mismanagement.

245. Striped Bass have historically been one of the coastal fish stocks most sought after by the North Carolina fishing public. They are also a significant target of the commercial fishing industry, typically being a gillnet bycatch fishery. Their harvest with gillnets involves substantial wastage, as described herein.

246. Like River Herring, Striped Bass are an anadromous species, meaning they live in the ocean as adults but return to the headwaters of their native rivers to spawn each spring as water temperatures warm. The resultant juvenile fish from successful spawning reside in the state's rivers, estuaries, and other coastal waters until they reach maturity.

247. Historically, all of North Carolina's major rivers and their tributaries²³ supported native, spawning populations of Striped Bass. However, a host of historical, human-induced changes to those river systems adversely affected natural Striped Bass populations over time. Nevertheless, Striped Bass populations adapted to those strictures, and by the mid-20th Century, all North Carolina river systems supported relatively stable Striped Bass populations and spring spawning runs of adult fish.

248. After adapting to those environmental changes, however, over the past half century a new and even more ominous threat to the continued viability of North Carolina Striped Bass stocks emerged: overfishing. Indeed, the primary source of Striped Bass stock mortality since at least the mid-20th Century has been fishing (harvest) mortality. And unlike natural sources of mortality (for example, predation or disease), fishing mortality is, and has always been, within the direct control of State fisheries management agencies.

249. For management purposes, North Carolina's Striped Bass populations are essentially divided into two stocks based on the following geographic areas: (a) the Albemarle Sound/Roanoke River management area (the "ASMA") in the north, comprising the Albemarle Sound estuary and its tributary streams; and (b) the Central and Southern management area (the "CSMA"), primarily made up of the

²³ These waters include the Roanoke River and other rivers emptying into Albemarle Sound; the Tar, Neuse and Pamlico Rivers and their tributaries emptying into Pamlico Sound; the Cape Fear River and its tributary streams emptying directly into the Atlantic Ocean; and other smaller river systems in the southern portion of the state, like the New and White Oak Rivers.

Tar/Pamlico and Neuse River systems, including the Pamlico Sound estuary, in the central coastal area, and the Cape Fear River system and associated estuaries in the southern coastal area.

250. The ASMA has historically supported, by far, the largest state Striped Bass spawning population, though the comparatively smaller river systems to the south have historically also supported significant North Carolina Striped Bass spawning stocks.

251. However, all North Carolina estuarine Striped Bass stocks neared apparent collapse in the late 20th Century, due to a combination of fishing overharvest and human interference adversely affecting natural spawning runs.

252. The United States Congress displayed a strong interest in the demise of North Carolina ASMA Striped Bass populations in the late 1980s and early 1990s. As a result, Congress funded studies intended to determine the causes of ASMA Striped Bass population declines, with the goal of restoring that stock. Those studies confirmed overfishing as the primary source of ASMA Striped Bass stock decline.

253. In response to those studies, the State adopted an Estuarine Striped Bass FMP Plan in 1990 containing fishing restrictions that drastically reduced—by a projected 80 percent—Striped Bass harvest in the ASMA.²⁴

254. Under the 1990 FMP’s severe harvest restrictions, ASMA Striped Bass populations rebounded. By 2001, the stock was declared recovered, and the severe harvest restrictions were relaxed. In other words, the FMP’s drastic harvest reduction measures worked.²⁵

255. Nevertheless, despite the management success of drastic harvest restrictions in the ASMA, harvest reduction management measures in the CSMA were largely an afterthought in the 1990 FMP and its successors, including the initial, 2004 Estuarine Striped Bass.

²⁴ Due to their migratory nature, Striped Bass are found both in inland waters under the management jurisdiction of the North Carolina Wildlife Resources Commission and coastal waters under the jurisdiction of the Marine Fisheries Commission. Thus, those management jurisdictions overlap in state “joint waters”, which are primarily estuarine areas where state freshwater rivers flow into the coastal water bodies influenced by ocean tides and salinities. As a result, the 1990 FMP was a joint effort between the Marine Fisheries Commission and the Wildlife Resources Commission. It is significant that this plan pre-dated the Fisheries Reform Act of 1997, and was really the first “modern” management plan of its kind for a North Carolina coastal fish stock.

²⁵ Unfortunately, the stock protections and management gains made under any FMP are ephemeral unless the management strategies that yielded those gains are adhered to in future plans. In the case of ASMA Striped Bass, the State in subsequent FMPs continually ratcheted the allowed fishing mortality on the stock upward, and the most recent stock assessment for ASMA Striped Bass in 2020 shows that, once again, the stock is both overfished and that overfishing is occurring.

256. The State initially acknowledged that the CSMA stock was overfished, despite the relative lack of data on that stock, and facially endorsed allowing the new ASMA stock data to serve as a proxy for CSMA Striped Bass management.

257. But despite the previous success of the ASMA management model, the State (through the Division) ultimately abandoned that approach. Instead, the Division bowed to commercial fishing industry pressure and allowed nearly double the commercial harvest from the CSMA than would have been allowed using ASMA management targets.

258. Had the Division adhered to its original intention—and sound fisheries management practices—total annual commercial harvest of CSMA Striped Bass would have been limited to 13,600 pounds. Instead, the Fisheries Director, arbitrarily, nearly doubled the projected “sustainable” commercial harvest limit to a clearly unsustainable 25,000 pounds per year.

259. The State’s neglect of the CSMA Striped Bass stock by failure to impose restrictions similar to those that restored the ASMA stock soon became evident in the smaller Cape Fear River system, where overfishing caused that population to completely collapse by the late 1990s. As a result—but far too late to protect either the population, or state citizens’ public-trust rights to harvest it for personal use—a

complete harvest moratorium for the Cape Fear Striped Bass population was imposed by the Commission in 2008.²⁶

260. Now, because of the State’s mismanagement, the entire CSMA Striped Bass stock has either completely, or very nearly completely, collapsed. And the State’s most recent management actions for CSMA Striped Bass continue to illustrate the Division’s bias in favor of for-profit resource exploitation over the public-trust rights of citizens to catch fish for personal use.

261. In light of the stock’s continued decline, the Commission in 2016 asked the Fisheries Director to use his delegated proclamation authority to reduce the annual commercial harvest quota for Striped Bass in the CSMA from 25,000 pounds to 5,000 pounds. The Director refused. The Director indicated that he would instead defer to the current status quo management.

262. In response, the Commission asked the Secretary of the North Carolina Department of Environmental Quality to authorize a supplement to the then-current

²⁶ Nevertheless, the marked, and unacceptable, failure of the State’s “too little, too late” management approach to its public-trust fisheries resources is evidenced by the 2020 CSMA Striped Bass stock analysis, which shows that for the Cape Fear Striped Bass population, despite the possession moratorium—which stops directed fishing but does not halt bycatch wastage in a fishery—that population “showed a consistent decline in abundance estimates . . . from 2012-2018. Abundance in 2018 was reduced to less than 20% of the abundance in 2012, even with a total no possession provision for striped bass in place in the Cape Fear River since 2008.” Mathes, T., Y. Li, T. Tears, and L.M. Lee (eds.) (2020). “Central Southern Management Area striped bass stocks in North Carolina, 2020.” N.C. Div. of Marine Fisheries, NCDMF SAP-SAR-2020-02; p. v.

management plan that would implement additional conservation measures to protect the CSMA Striped Bass stock.²⁷ That request was denied by the Secretary.

263. Meanwhile, a published 2018 Wildlife Resources Commission study of the Neuse River Striped Bass population found that the stock was chronically overfished, was experiencing excessive mortality, and that mortality was most closely correlated statistically with commercial gillnet harvest. Based on that analysis, the researchers concluded that reducing harvest exploitation to target levels would require substantial reductions in gill-net effort in the Neuse River.

264. In responding to the study, the Commission voted again in 2018 to ask the Secretary to authorize a supplement to the state Striped Bass fishery management plan for the CSMA stock. Finally acknowledging the dire condition of that stock, the Division agreed to support that request. In December of 2018 the Secretary approved a supplement.

265. Nevertheless, in developing those supplemental plan management recommendations, the Division refused to acknowledge the bycatch mortality from commercial gillnets as the principal cause of stock demise. Instead, the Division proposed a *complete* Striped Bass harvest moratorium—that is, for both commercial operations and the fishing public—for joint and internal coastal waters within the CSMA. In doing so, the Division penalized the fishing public for the actions of

²⁷ N.C. General Statute § 113-182.1(e1) enables the Secretary, if the Secretary “determines that it is in the interest of the long-term viability of a fishery,” to authorize the Commission to develop temporary management measures to supplement an existing FMP.

commercial gillnetters that the Division had not just tolerated but protected for decades.

266. In 2019, the Commission adopted the management supplement. However, because the CSMA gillnet fisheries are mixed-species fisheries, the management supplement's Striped Bass possession moratorium did little or nothing to address the real problem: Striped Bass gillnet bycatch mortality when gillnets are directed at other species, such as Southern Flounder.

267. Realizing this shortcoming, the Commission in approving the supplement also passed a motion asking the Fisheries Director to issue a proclamation, effective in conjunction with the supplement's Striped Bass possession moratorium. That proclamation would have prohibited gillnet use in the upper tidal reaches of the Tar-Pamlico and Neuse Rivers to eliminate this documented source of continuing stock mortality. Public comment overwhelmingly supported this action.

268. The Fisheries Director refused to issue the proclamation. The Commission therefore convened an emergency meeting and voted to compel the Director to issue the requested proclamation removing gillnets from certain CSMA waters to protect the CSMA Striped Bass stock from bycatch discard mortality in the gillnet fishery during the pendency of the no-harvest moratorium.

269. In response, the Secretary of the North Carolina Department of Environmental Quality took the extraordinary, unprecedented step of condemning the Commission's efforts to conserve the Striped Bass resource:

“I am disappointed by the Marine Fisheries Commission calling an emergency meeting with only 48 hours notice for a non-emergency. The Commission used bad judgment in directing the Division of Marine Fisheries Director to take actions that contradict science and the recommendations of the division’s scientists. I certainly hope this is not a precedent we will see again from this Commission.

The statute empowering the Marine Fisheries Commission to direct issuance of gill net bans in certain areas does not authorize the Secretary or the Department discretion to overturn such a directive.”

270. Inexplicably, the Secretary’s comments ignore the conclusions of the Wildlife Resources Commission’s scientific studies concerning CSMA Striped Bass mortality and its causes—the *only* “science” that the Division had available to it at the time it made its management recommendations to the Commission. The Secretary also ignored the fact that Division “recommendations” are just that—recommendations—and that the Commission is the only body under State law with the authority to set the policies for coastal fisheries management and to implement those policies through rulemaking.

271. This litany of continued mismanagement of CSMA Striped Bass stocks by the Division and its parent agency is at least in part attributable to their flawed understanding of—or at least management response to—the actual utility of annual fish stocking programs in restoring anadromous fish stock viability.

272. The State’s primary response to the overfishing of Striped Bass has been to restock public waters with young hatchery-raised fish. In each of the three major CSMA stock river systems (the Tar-Pamlico River, the Neuse River, and the Cape Fear River), a stocking program of “fingerling” hatchery-raised Striped Bass has been

underway for decades. Each year, the State releases approximately 100,000 fish in the lower reaches of each of those three river systems.²⁸

273. While annual stocking of Striped Bass fingerlings in the CSMA has temporarily “put fish in the system” to grow and be harvested, that strategy has done little or nothing to restore the overfished CSMA Striped Bass stock.

274. Moreover, the State’s mismanagement of the CSMA stock has rendered that system little more than a “put-and-take” Striped Bass fishery—that is, a fishery where the source of harvestable fish is almost entirely those stocked from hatcheries. If the Fish and Wildlife Service was to stop stocking Striped Bass in the CSMA, there would in very short order be no fish to catch, either for the fishing public or for commercial gillnetters.

275. The result of that extirpation of native Striped Bass in the stock is that the public harvest Striped Bass fisheries that historically existed in North Carolina’s inland navigable waters have essentially collapsed, depriving North Carolinians of their public-trust rights to fish for Striped Bass. Currently only about 2 percent of Striped Bass harvested in the CSMA are caught in inland waters, punctuating the staggering, historic decline of Striped Bass spawning in CSMA rivers, most of which has resulted from the State’s mismanagement of that stock.

276. As set out previously herein, the 1997 Fisheries Reform Act established “viability” and “sustainability” as the twin goalposts for coastal fish stock

²⁸ The cost of that stocking program exceeds \$750,000 annually, and that entire cost is borne by the U.S. Fish and Wildlife Service using federal tax dollars.

management. Regarding those goals, the State has long known that the CSMA Striped Bass stock decline is related to excessive stock mortality. Although mortality occurs in all fish stocks, no stock can withstand long-term, excessive mortality and remain viable or sustainable.

277. Another Wildlife Resources Commission study of CSMA Striped Bass indicated that “cryptic mortality”—that is, unexplained stock mortality—in the CSMA stock was much greater than the totals of mortality from all known sources, including reported recreational and commercial harvests. The study concluded that the most likely explanation for the excessive CSMA Striped Bass mortality is illegal and underreported commercial harvest—namely, dead discards from gillnet harvest during the Striped Bass closed season; latent, unreported commercial harvest; and harvest by abandoned, commercial fishing gears.

278. Nevertheless, the Division was not deterred—and indeed, because of regulatory capture, *could not* be deterred—from its typical, status quo management strategy for CSMA Striped Bass by those sister agency findings. The Division acknowledged excessive mortality in the CSMA stock, but rationalized the problem as being insoluble through management action because the lack of sufficient numbers of fish to yield data to support a stock assessment meant that sustainable harvest could not be determined. In other words, the Division’s circular logic was that it could not do anything about CSMA Striped Bass dying at an excessive rate until they stop dying at an excessive rate.

279. The Division’s circular logic runs headlong into the Fisheries Reform Act’s directives that the State end overfishing and achieve stock viability. Under the Division’s view, for a stock like CSMA Striped Bass that has largely been extirpated by overharvest, the absence of fish on which to base an acceptable stock assessment will always preclude new management measures. By that logic, stock viability can never be achieved. That result and its underlying logic both directly undermine the directives of North Carolina statutes and violate North Carolinians’ constitutionally protected public-trust rights to fish for coastal fish stocks.

280. In considering viable management strategies for Striped Bass in developing the FMP for that stock, the Division rejected the management alternative of “legislative designation of Striped Bass as a game fish”—that is, as a stock subject only to public harvest. The Division did so even though that strategy would have achieved stock sustainability by preventing commercial overfishing of the stock, thereby ensuring long-term stock viability. Ironically, the Division expressly determined that this designation would be “contrary to the North Carolina public-trust doctrine.”

281. Ultimately, the results of the Division’s decades-long championing of policies that allow continued for-profit exploitation of an overfished CSMA Striped Bass, while concurrently minimizing the public’s public-trust rights to harvest those same stocks, have been:

(a) the collapse of the public Striped Bass fishery in CSMA inland, navigable waters;²⁹

(b) the perpetuation of a put-and-take fishery within the CSMA that is dependent on the continued, annual infusion of substantial public funds to stock hatchery-raised fish;

(c) harvest of CSMA Striped Bass primarily by a tiny segment of the State's citizens for personal profit, rather than by the general fishing public for personal use and/or enjoyment; and

(d) substantial impairment of the public's constitutionally protected public-trust rights to fish for Striped Bass within CSMA navigable waters.

282. In sum, the State's mismanagement of North Carolina's River Herring, Southern Flounder, and CSMA Striped Bass reflects the State's failure to meet its own minimal, statutory standards for adopting and implementing FMPs that ensure stock viability by ending overfishing and restoring the spawning biomass of overfished stocks to sustainable levels. More significantly, it reflects the State's failure to protect and preserve these species from overexploitation or waste.

²⁹ The State's August 2020, CSMA stock analysis concludes that "[r]esults from the matrix model indicated that striped bass populations in the CSMA are depressed to an extent that *sustainability is unlikely at any level of fishing mortality*." Mathes, T., Y. Li, T. Tears, and L.M. Lee (eds.) (2020) (emphasis added). "Central Southern Management Area striped bass stocks in North Carolina, 2020."

IV. The State continues to tolerate a lack of reporting of harvest by more than half of commercial fishing license holders.

283. Every person who fishes commercially for profit in North Carolina must obtain an annual commercial fishing license. *See Under N.C. Gen. Stat. § 113-168.1.*

284. When the Fisheries Reform Act was enacted in 1997, the General Assembly directed that the Marine Fisheries Commission determine an appropriate cap number for commercial licenses to control commercial harvest effort until all FMPs were completed as required by the Act.³⁰ Moreover, the Commission was directed, within the license cap number, to annually make a pool of commercial fishing licenses available for persons who may wish to obtain a future North Carolina commercial fishing license.³¹

285. Under those authorities, the Commission capped the total number of available commercial fishing licenses that could be issued annually by the Division at 8,896.³² According to Division data, 5,916 North Carolina commercial fishing licenses were issued in 2019.³³

³⁰ N.C. Gen. Stat. § 113-168.2(a).

³¹ N.C. Gen. Stat. § 113-168.2(b).

³² NCDMF. (Nov. 2006). "North Carolina License & Statistics Section Summary Statistics," 2006 Big Book of Data (2d ed., Final Version, Nov. 30, 2006). N.C. Division of Marine Fisheries, Morehead City, NC; p. I-4.

³³ NCDMF. (Nov. 2019). "North Carolina License & Statistics Section Summary Statistics," 2019 Big Book of Data. N.C. Division of Marine Fisheries, Morehead City, NC; p. I-14.

286. Those who hold commercial fishing licenses must only sell landed fish to a licensed fish dealer, or, in the alternative, must also hold a fish dealer's license in addition to their commercial fishing license to sell directly to the public. *See* N.C. Gen. Stat. § 113-168.4.

287. Under N.C. Gen. Stat. § 113-168.2(i), every landing of fish for sale in North Carolina must be recorded by the fish dealer on a form provided by the Division known as a "trip ticket." A trip ticket identifies the fisher and dealer, as well as the quantity and species of fish landed. It also contains any other information deemed relevant for state coastal fisheries management by the Division or the Commission. Therefore, to sell harvested fish to a fish dealer, a commercial-license holder must comply with the trip-ticket provision by providing the dealer with all required information about that harvest. The recording fish dealer must provide a copy of all trip tickets to the Division.

288. The State's trip-ticket program is crucial to fisheries management in North Carolina. It provides fisheries managers with critical information about fishing mortality and commercial harvesting rates, as well as stock abundances and stock distributions within coastal waters. Without this data, the Division would in most cases be unable to develop the stock assessments on which it so heavily relies in making its fisheries-management recommendations.

289. However, trip ticket data shows that a substantial percentage of North Carolina's commercial fishing licensees do not report any landings, for any trip, while

their annual license is in effect. Their names do not appear in any trip ticket data.

This is reflected in the following table illustrating “latent” commercial licenses:

PERCENT OF “LATENT” NORTH CAROLINA COMMERCIAL FISHING LICENSES 2000-2019				
License Year	Total Number of Commercial Fishing Licenses Issued	Total Number of Commercial Fishing Licenses Reporting Harvest	Percent of Commercial Fishing Licenses Reporting Any Harvest Annually	Percent of Commercial Fishing Licenses NOT Reporting Harvest Annually
2019	5,916	2,355	39.8	60.2
2018	6,164	2,571	41.7	58.3
2017	6,296	2,541	40.4	59.6
2016	6,465	2,635	40.8	59.2
2015	6,635	2,773	41.8	58.2
2014	6,685	2,803	41.9	58.1
2013	6,699	2,701	40.3	59.7
2012	6,764	2,716	40.2	59.8
2011	6,819	2,993	43.9	56.1
2010	6,815	3,136	46.0	54.0
Average Annual Percent of Latent Licenses Over Last 10 Years:				58.3 %
2009	6,827	3,125	45.8	54.2
2008	6,861	3,207	46.7	53.3
2007	6,906	3,302	46.7	53.3
2006	6,959	3,306	47.5	52.2
2005	7,055	3,682	52.2	47.8
2004	7,175	3,886	54.2	45.8
2003	7,232	4,054	56.1	43.9
2002	7,308	4,266	58.4	41.6
2001	7,413	4,588	61.9	38.1
2000	7,504	4,367	58.2	41.8
Average Annual³⁴ Percent of Latent Licenses Since FRA Enacted:				52.8 %

³⁴ 1997-1999, non-digitized license data are not readily available to the public.

As this table indicates, since the Division began digital license recordkeeping in 2000, almost 53 percent of commercial-license holders in North Carolina reported no harvest. Further, for the last ten years (from 2010 to 2019), on an annual average, over 58 percent of commercial fishing license holders did not report any landings of fish for the year.³⁵

290. Those data make it clear that substantially more than half of North Carolina’s commercial fishing licenses are “latent licenses” for management purposes. They are either not used to fish at all, or—substantially more likely—are used without their landings being recorded and reported to the Division via the trip ticket program, in violation of State law and to the substantial detriment of State citizens’ public-trust rights in coastal fisheries resources. Also, the number of latent commercial fishing licenses is increasing over time.

291. The entirely foreseeable effect of these latent commercial licenses on even healthy, viable coastal fish stocks is potentially devastating for two reasons: (a) underestimation of stock fishing mortality, and (b) unrealized, potential commercial harvest effort.

292. If any significant fraction of the huge pool of latent licenses is currently being used to harvest fish without having those landings reported, the unrecorded fishing mortality would mean the Division’s stock assessments are based on

³⁵ NCDMF. (Nov. 2019). “North Carolina License & Statistics Section Summary Statistics,” 2019 Big Book of Data. N.C. Division of Marine Fisheries, Morehead City, NC; p. I-14.

incomplete, incorrect data, and therefore, could be drastically misleading. If fishing mortality is actually higher than reported, and thereby underestimated in Division modeling of stock conditions, stocks would appear more robust than they actually exist, and stock viability would be overestimated.

293. To that point, a 2015 Division study found that 28 percent of commercial-license holders maintain a license for personal consumption or donation of harvest. Since those harvesters do not sell their catch, it is neither reported nor recorded.

294. It is impossible to know exactly which fish stocks are being harvested or the actual amount of harvest effort occurring under those non-reporting commercial licenses. The overall implications are clear, however. In the Division's stock assessments, commercial harvest mortality is substantially underestimated for some, if not most, stocks. That mortality underestimation could be a decisive, critical factor in the case of chronically overfished fish stocks. Yet, despite this knowledge from its own study, the Division has done nothing to remedy this lack of reporting by licensees or account for it within Division stock assessments.³⁶ Nor has the General Assembly acted to address the problem.

295. Moreover, regardless of whether latent license holders currently harvest any fish in North Carolina waters, those non-reporting licenses—more than 58

³⁶ The Division has repeatedly tried to discredit the findings of this Report, which, if accepted, would have a significant effect on Division management of coastal fish stocks by reducing allowable harvest levels. The Division tried to discredit the report on the basis that the study was methodologically flawed.

percent of all North Carolina commercial licenses—represent an enormous pool of potential fishing pressure that could be used to harvest public fish stocks at any moment in time. This makes overfishing much more likely to occur—even on currently viable stocks—before the State can react with additional regulatory controls of commercial harvest effort.³⁷ In this context, the Fisheries Director’s long and consistent history of refusing to use delegated proclamation authority to timely protect fish stocks from overharvest as management crises arise makes the existence of this enormous pool of latent commercial fishing effort even more alarming.

296. That devastation to coastal fish stocks and public-trust rights—whether actual from underreporting, or potential from latent commercial harvest effort—is far more likely given the concern over the respective viability statuses of so many coastal fish stocks. Indeed, the ongoing effects of unreported commercial harvest may well be responsible for the current overfished condition or otherwise poor state of so many coastal fish stocks.

297. For these reasons, the State’s continuing allowance of latent commercial fishing licenses represents a substantial threat to coastal fish stocks in terms of

³⁷ In the recent history of State management of fish stocks, this has been a recurring theme for stocks managed under a commercial quota (total allowable harvest poundage) system. The Division underestimates projected commercial harvest effort, and opens the commercial season for stock harvest by proclamation. It then finds out after-the-fact from trip ticket information that the quota was quickly exceeded. It then closes the commercial harvest season by proclamation, and laments the fact that, although commercial harvest had far exceeded allowable limits, there was little or nothing that could be done about it.

commercial harvest effort, and stands in direct conflict with the State's duty to protect those stocks and public-trust rights.

298. Equally important, the State's failure to effectively monitor potential use of latent commercial fishing licenses indicates that the actual decline in coastal fish stocks is even greater than the State has publicly revealed. It confirms what the Plaintiffs have known for some time: The State's *acknowledged* decline in coastal fish stocks may only be the tip of the iceberg. To be sure, the State's abject failure to protect these critical public-trust resources is even worse than the public is aware from the State's data or rhetoric.

CLAIM FOR RELIEF

Breach of Trust under the Public-Trust Doctrine, N.C. Const. art. I, § 38, and N.C. Const. art. XIV, § 5

299. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

300. The public-trust doctrine imposes on the State a legal duty to hold and manage in trust, for the benefit of its citizens, all of the public-trust resources of this state. Those public-trust resources include all navigable waters, including those in coastal regions. Those 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 their personal use, as well as the fish that swim in those public waters.

301. The people of North Carolina in their Constitution have mandated that the State uphold its obligations under the public-trust doctrine. 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.

302. The public-trust doctrine operates according to basic trust principles that govern the trust relationship. 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 overexploitation or waste.

303. The public-trust doctrine imposes a fiduciary duty on the State to manage and regulate the harvest of these fish 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 the harvest of finfish or shellfish in public waters in quantities or by methods that cause unnecessary waste or impair the sustainability

of fish stocks, which in turn threaten the right of current and future generations of the public to use such public waters to fish.

304. As described in detail above, the State has breached those duties under the public-trust doctrine, resulting in a decades-long, uninterrupted, dramatic decline in these stocks overall, as well as a decline in the health of multiple species of these fish. As described in detail above, the State has failed to preserve North Carolina's coastal fish stocks as public-trust resources by failing to manage and regulate the harvest of such finfish and shellfish in a manner that preserves the right of current and future generations of the public to use public waters to fish. And as described in detail above, the State has failed to protect North Carolina's coastal fish stocks from over-exploitation and wastage caused by finfish and shellfish harvest methods, including those described above.

305. Instead, the State has allowed finfish and shellfish harvest gears or methods in public waters that generate undue wastage and impair the sustainability of public-resource fish stocks, thereby impairing the right of the current and future generations of the public to use such public waters to fish. Moreover, the State has tolerated and failed to remedy chronic overfishing of multiple species of coastal fish and has tolerated latent commercial fishing licenses for which no harvests are reported as required by law.

306. The State's breach of its public-trust obligations has violated the Plaintiffs' public-trust rights (and for CCA NC, the rights of its members) by substantially impairing their ability to use State waters to fish. This violation of the

Plaintiffs' public-trust rights includes the violation of their public-trust rights under Article I, Section 38 and Article XIV, Section 5 of the North Carolina Constitution. The State's failure to preserve and protect North Carolina's coastal fish stocks and violation of the Plaintiffs' public-trust rights continues unabated today and, in the absence of prospective injunctive relief, will continue unabated in the future.

307. At all relevant times, the State's breach of its public-trust obligations lacked any legitimate justification. The State's breach of trust was not committed in a legitimate effort to "promote wildlife conservation and management" or "preserve the future of . . . fishing." N.C. Const. art. I, § 38. To the contrary, as described above, the State's breach of trust *prevented* "wildlife conservation and management" and *threatened* "the future of . . . fishing" in North Carolina. Nor was the State's breach of trust committed in a legitimate effort to "conserve and protect its lands and waters for the benefit of all its citizenry" or "preserve as a part of the common heritage of this State its . . . estuaries [and] beaches." N.C. Const. art. XIV, § 5. Instead, as described in detail above, the State has disregarded that State-constitutional mandate.

308. Under the public-trust doctrine, Article I, Section 38 of the North Carolina Constitution, and Article XIV, Section 5 of the North Carolina Constitution, Plaintiffs are entitled to declaratory and injunctive relief, as described below, to remedy the State's breach of trust and violation of their public-trust rights.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

- (1) declare that the State has breached its obligations under the public-trust doctrine, Article I, Section 38 of the North Carolina Constitution, and Article XIV, Section 5 of the North Carolina Constitution, as described above;
- (2) enjoin the State from committing further breaches of its obligations under the public-trust doctrine, Article I, Section 38 of the North Carolina Constitution, and Article XIV, Section 5 of the North Carolina Constitution, as described above, and retain jurisdiction to enforce the State's compliance with that injunctive relief;
- (3) tax the costs of this action to the State, as well as any attorneys' fees allowed by law;
- (4) assign a Resident Superior Court Judge pursuant to Rule 2.2 of the Local Rules for Civil Superior Court of the Tenth Judicial District to preside over this action; and
- (5) grant such further relief as the Court deems equitable and just.

Respectfully submitted the 10th day of November, 2020.

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