

## **THE DEMISE OF NORTH CAROLINA'S COASTAL FISHERIES RESOURCES & THE PUBLIC'S RIGHT TO FISH**

### **The History and Structure of North Carolina Coastal Fisheries Management**

North Carolinians have been richly blessed by the natural bounty of our marine and estuarine resources. North Carolina has about 322 miles of ocean shoreline and the second largest estuarine system (bays, sounds and wetlands) in the country, which amounts to over 12,000 miles of estuarine coastline. The estuarine system, rich with nutrients from the streams that travel from inland to the coast, serves as a nursery area for myriad species of edible finfishes and shellfishes. North Carolina's endowment of marine and estuarine resources has historically provided citizens with an abundance of fish to catch and consume for personal use. Early settlers to North Carolina were struck by the richness of the state's fisheries. The English explorer and naturalist, John Lawson, wrote of "great shoals of bluefish" along the Outer Banks, and described that "Oysters, great and small, are found in every Creek..." Now, as then, every North Carolina citizen owns those natural resources in common, and the government of the state serves as resource trustee to ensure that coastal fish stocks are conserved and managed to ensure their availability to current and future generations of citizens.

Historically, due to the scarcity of salt for preservation and an almost complete lack of ice or refrigeration, North Carolina's coastal fisheries resources were used almost exclusively for local, personal sustenance. While some excess personal catch was undoubtedly sold or bartered locally, there was generally no large-scale commercial fishing in North Carolina during the colonial and pre-antebellum periods. The one exception was the state's commercial "herring" fishery, which began exporting salted river herring and shad as early as the 1730s, and thrived thereafter for almost two centuries. Given the abundance of North Carolina's coastal fisheries resources, state government agencies began to promote commercial usage of those resources as a means to provide jobs and boost the economies of North Carolina's coastal counties. In 1871 the General Assembly established a "State Board of Agriculture," which included a section dedicated to fisheries management. S.G. Worth, appointed shortly thereafter, was the state's first "Fish Commissioner."

As the railroads improved transportation and salt became more readily available in the post-antebellum period, commercial exploitation of the state's coastal fisheries resources began to grow rapidly, chiefly in the harvest of oysters and finfish desired by markets in northern cities along the eastern seaboard. In 1891, jurisdiction over fisheries resources was passed by the legislature from the Board of Agriculture to the State Geologist, and in 1905 jurisdiction over fisheries was vested in the newly created "North Carolina Geologic and Economic Survey" ("Survey"). In 1907 the legislature created a separate "Fish Commission" within the Survey. However, various coastal legislators successfully exempted their counties' commercial

fishermen from the jurisdiction of the Fish Commission, including those in Beaufort, Brunswick, Camden, Carteret, Craven, Hyde, Jones, New Hanover, Onslow, Pender and Pamlico Counties. The General Assembly responded, and in 1915 created an independent “Fisheries Commission” with statewide jurisdiction. Nevertheless, since the Fisheries Commission had few employees, state regulation of coastal fisheries was minimal, with most early statutes being concerned with the management of North Carolina’s oyster industry, and enforcement was virtually nonexistent.

Given the very different natures and uses of coastal and inland fisheries, by the mid-1920s the General Assembly had created a separate “Division of Commercial Fisheries” (apparently including the Fisheries Commission) and a “Division of Inland Fisheries” within the new “North Carolina Department of Conservation and Development.” Despite the vast area comprising coastal waters, the Division of Commercial Fisheries still had very limited staff, and until 1947 its activities were restricted to law enforcement and oyster rehabilitation. The emergence of so-called “sport fishing” as an economic engine during the post-WWII period caught the attention of the legislature, and in the 1960s the Division of Commercial Fisheries’ name was changed to the “North Carolina Division of Commercial and Sports Fisheries,” with significant budget increases for management and enforcement staff positions. The final name change came during the 1970s, resulting in the management agency’s present name, the “North Carolina Division of Marine Fisheries” (“Division”).

Since the 1970s and under current law, North Carolina’s “marine and estuarine resources”—a statutory term that includes all coastal fisheries resources—are managed by the Division. The Division is administratively located within the North Carolina Department of Environmental Quality (“DEQ”).<sup>1</sup> Both the Division and DEQ are executive branch agencies, meaning that their chief operating officers—the Division’s “Fisheries Director” and the Secretary of DEQ—answer to and serve at the pleasure of the Governor. North Carolina statutes expressly declare that “[t]he marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department (and its Division of Marine Fisheries)... are charged with stewardship of these resources.” N.C. Gen. Stat. § 113-131 (a). The Division is the agency that enforces fisheries laws—both statutes and administrative rules—and implements state fisheries management policies.

In North Carolina, the North Carolina Marine Fisheries Commission (“Commission”) has historically had the statutory duty of determining state fisheries management policies. The Division’s role was to serve as Commission “staff” in implementing those policies, and to enforce Commission rules. While the Commission retains some of that

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<sup>1</sup> Predecessor Division oversight agencies include the North Carolina Departments of Conservation & Development, Natural & Economic Resources, Natural Resources and Community Development, and Environment and Natural Resources.

authority, the Division has in recent decades slowly been usurping that power of the Commission. That means that coastal fisheries management policy has increasingly been consolidated in a state bureaucracy, rather than remaining primarily vested in an appointed citizen Commission. Nevertheless, the adoption of coastal fisheries management rules lies exclusively within the statutory purview of the Commission. To that end, the Commission is charged by statute to “adopt rules to be followed in the management, protection, preservation, and enhancement of the marine and estuarine resources within its jurisdiction...” N.C. Gen. Stat. § 143B-289.52 (a). The Commission is currently a 9-member panel<sup>2</sup> of non-state employees whose members are appointed by the Governor for 3-year terms.

The Commission has statutory jurisdiction over marine and estuarine resources within North Carolina “coastal fishing waters.” Coastal fishing waters essentially include the near-shore Atlantic Ocean (the “territorial sea,” where North Carolina’s sovereign jurisdiction traditionally extends out to 3 miles from the shore), the various coastal sounds and bays, and estuarine waters up to the dividing line (literally, lines marked on the map for each water body) between coastal fishing waters and “inland fishing waters.” The North Carolina Wildlife Resources Commission has jurisdiction over all fisheries resources found in inland fishing waters. In the Atlantic Ocean, from the limits of the territorial sea<sup>3</sup> out to 200 miles (this region is called “the exclusive economic zone” or “EEZ”), the federal government has jurisdiction over oceanic fisheries resource management.

While that is the historic background and current structure for coastal fisheries management in North Carolina, the story is incomplete without a discussion of the changing landscape that has served as the backdrop for “modern” coastal fisheries resource management in the state. In the post-WWII 20<sup>th</sup> century, the state’s population grew rapidly, increasing from 4 million in 1950 to 8 million by 2000—and is currently estimated to be 10.7 million. As transportation routes to the coast increased in number and improved in condition, millions of state inland residents began to vacation at the coast. In addition, many inland residents purchased “second” homes at the coast. That growth came at the cost of significant environmental degradation and estuarine habitat destruction. In the 1940s, the legislature boosted that population influx by deeding large tracts of coastal marshland—largely regarded at the time as mosquito-infested “wastelands”—to local school boards to sell in order to raise funds for local schools. Much of that marshland was sold and then filled in to

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<sup>2</sup> That number has greatly varied over time, and in the recent past (the mid-1990s), the Commission has had as many as 17 members.

<sup>3</sup> Though the traditional limit for the territorial sea is 3 miles offshore, that limit has by international treaty been extended to 12 miles, and the states and federal government technically share fisheries management jurisdiction within the 3 to 12 mile offshore zone.

create private building lots. In addition to the toll taken on coastal fisheries resources by environmental degradation and loss of habitat resulting from population growth, remarkably improved gear and harvest technologies in the commercial fishing industry revolutionized commercial harvest and substantially increased commercial harvest of public fish stocks.

Coastal fish stock populations have always varied in size as a result both of environmental conditions and stock mortality, especially fishing mortality. Despite that variability, for the better part of a century following the creation of State fisheries management agencies in the late nineteenth century, North Carolina's coastal fisheries resources were in general so abundant that overharvest and allocation were seldom at issue. During those times of abundance, the State's primary objective remained promoting development of an important state economic resource in a relatively isolated, impoverished area of the State. However, by the late 20<sup>th</sup> century, the "new" pressures outlined had caused traditional stock abundances to decline precipitously almost across the board. Despite this seismic shift in management context, the state—and especially the Division—remained fixated on promoting the state's commercial fishing industry at the expense of other North Carolinians, who were left with ever-dwindling fish stocks.

With decades of stock declines, concerns over the state's coastal fisheries resources mounted, and the General Assembly responded in 1996 by creating the Fisheries Moratorium Steering Committee ("Committee"). The Committee was tasked with examining coastal fisheries management issues over the course of a year, identifying management problems and making recommendations to the General Assembly about the changes to state law needed to remedy those problems. The Committee was promoted as a "stakeholders" committee, equitably comprised of representatives for all citizen groups having an interest in coastal fisheries resources. Unfortunately, in light of the fact that coastal fisheries resources are held in trust for *every* North Carolina citizen as well as for future generations of citizens, the makeup of the Committee was substantially biased in favor of the commercial fishing industry, ostensibly tainting the Committee's recommendations.

Nevertheless, positive steps in coastal fisheries management did follow as a result of the Committee's report. Most notably, the General Assembly revamped then-current law by enacting the Fisheries Reform Act of 1997 ("Act") to govern coastal fisheries resource management, and the Act was subsequently revised to strengthen it even further.<sup>4</sup> Significantly, the Act sets an express goal for North Carolina coastal fisheries management "to ensure the long-term viability of the State's commercially and recreationally significant species or fisheries." N.C. Gen. Stat. § 113-182.1(b).

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<sup>4</sup> The North Carolina statutes governing coastal fisheries management, like all statutes, must comport with the public-trust doctrine and the North Carolina Constitution. Those subjects will be treated in papers yet to be deposited on this site.

To achieve that goal of species, or “stock” viability, the Act requires agency use of fisheries management plans (“FMPs”), and state FMPs must be developed and implemented for each recreationally or commercially significant species. Under direction by the Commission, the Division is charged with developing and recommending FMPs for Commission adoption. The Commission in turn uses its rulemaking authority to implement those FMPs. When fisheries data show that a species is overfished, the FMP must specify a time period of 2 years or less from plan adoption to end overfishing, a period of 10 years or less from plan adoption to achieve a sustainable harvest, and the FMP must be designed to have at least a 50% probability of achieving sustainable harvest within the 10-year period.<sup>5</sup> Accordingly, the FMPs must contain management measures to achieve each of those legislative goals.

Although the Act was laudable in its aim to standardize coastal fisheries management and address overfishing concerns, the Act lacks legislative direction for how administrative agencies should make fisheries management decisions. The Act also lacks adequate enforcement provisions to ensure that overfishing ends and sustainable harvests are realized. Moreover, the cumbersome process for review of FMPs under the Act serves as a significant impediment to timely, efficient, and objective management decisions. The end result is that the Act, as implemented by North Carolina’s administrative agencies, has been an ineffectual statutory framework for ensuring that the state—as resource trustee—meets its long-standing public-trust obligations and constitutional obligations to properly manage coastal fisheries resources. After twenty-five years of management under the Act, many fish stocks have continued to decline due to chronic overfishing or bycatch wastage.

But, the problems with state fisheries management agencies run deeper. As noted previously, the Division is the successor to the 20<sup>th</sup> century North Carolina Division of Commercial Fisheries, an agency originally charged with promoting and developing commercial fisheries in North Carolina. Time and circumstances have changed the landscape, as previously detailed. Yet the Division has failed to adapt to the increased pressures put on coastal fish stocks from a variety of sources.

At the management level, the Division is a classic example of “regulatory capture” in its historical relationship with the commercial fishing sector that it once was charged with promoting, but now is charged with regulating. As a result of administrative

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<sup>5</sup> N.C. Gen. Stat. § 113-182.1(b) contains a narrow exception that allows the Fisheries Director to exempt a fishery from one or both of those statutory timelines, and from the 50% probability standard, where the Director “determines that the biology of the fish, environmental conditions, or lack of sufficient data make implementing the requirements of this subdivision incompatible with professional standards for fisheries management.”

agency bias, Division-recommended FMPs are often skewed in favor of species exploitation, rather than true stock viability, containing no protective buffers for imperfect or incomplete stock data, modeling error, or for unforeseen environmental disruptions like disease or weather extremes. Once implemented, FMPs are by statute virtually locked into place for at least 5 years—and sometimes much longer<sup>6</sup>—matter what happens to the stock in the meantime.

As is typical in instances of regulatory capture, the Division adamantly denies its bias in favor of the regulated community and commercial exploitation of coastal fisheries resources. And yet, there is no other possible explanation for the fact that the State’s fisheries management policies have for over a century allowed commercial overharvest of fisheries resources owned by all North Carolinians. Regulatory capture is exacerbated by North Carolina’s “fox guarding the henhouse” system for the management of coastal fisheries resources. The Commission is by statute an “interested” commission, where a full one-third of its members represent the commercial fishing industry, despite the fact that the commercial fishing industry—commercial fishing, seafood preparation and processing, fish markets and retailers, and seafood restaurants—is estimated to annually employ less than 6,000 persons, just over one twentieth of one percent of the State’s citizens/resource owners. For decades, moreover, there has been intense political pressure exerted by members of both the legislative and executive branches of State government on the Fisheries Director to manage coastal fish stocks for maximal exploitation, with little regard to conservation measures prudent and necessary to protect a public-trust resource.

As a result of these factors, North Carolina’s coastal fisheries resources have suffered. The Division and Commission have seldom been synchronized regarding adequate resource protection. When the Division has made reasonably protective management recommendations for a species, the Commission has often refused to adopt them. When the Commission has adopted policies aimed at conserving coastal fisheries resources, the Division’s response has often been to either implement the policy only in the short-term or to minimize it in the longer term. And the hard-fought gains that have been made in the conservation of coastal fisheries resources have typically been short-lived, as Governors have come and gone, and new Commissioners and Fisheries Directors have been appointed.

In the exceptionally rare instances where the Commission has gone further to protect a stock than has been recommended by the Division, the political response has been telling. In such cases, the Commission has been harshly criticized by legislators or members of the Governor’s own administration, and the Division has been resistant to implementing Commission management decisions long-term.

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<sup>6</sup> North Carolina statutes require that FMPs be updated every 5 years, but due to various circumstances, state fisheries management agencies are often unable to develop and implement plan amendments within the prescribed time.

Sadly, there is no indication that either the General Assembly or the State's administrative agencies will voluntarily institute the changes needed to reverse the decades-long decline of our coastal fish stocks or protect the rights of citizens to harvest those fish. After decades of trying to "work within the system" to effectuate coastal fisheries management policy changes that would force the state to embrace its role as resource trustee and comply with its own laws, thereby fairly representing the overall public interest, CCA NC leaders finally recognized that the system was so broken that it could likely only be remedied by extra-agency, judicial intervention. Consequently, on November 20, 2020, CCA NC and 86 individual North Carolinians filed suit against the State of North Carolina to hold the state accountable for decades of mismanagement of North Carolina's coastal fisheries resources, violating the public-trust and constitutional rights of both current citizens and future generations. We expect more citizens will join as plaintiffs when allowed to do so. Over the coming weeks, CCA NC will be unfolding and elaborating the bases of that lawsuit in a series of papers deposited at this location. We look forward to your making that journey with us.