

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

Indicators of Demise: The Division of Marine Fisheries' Annual Stock Status Reports

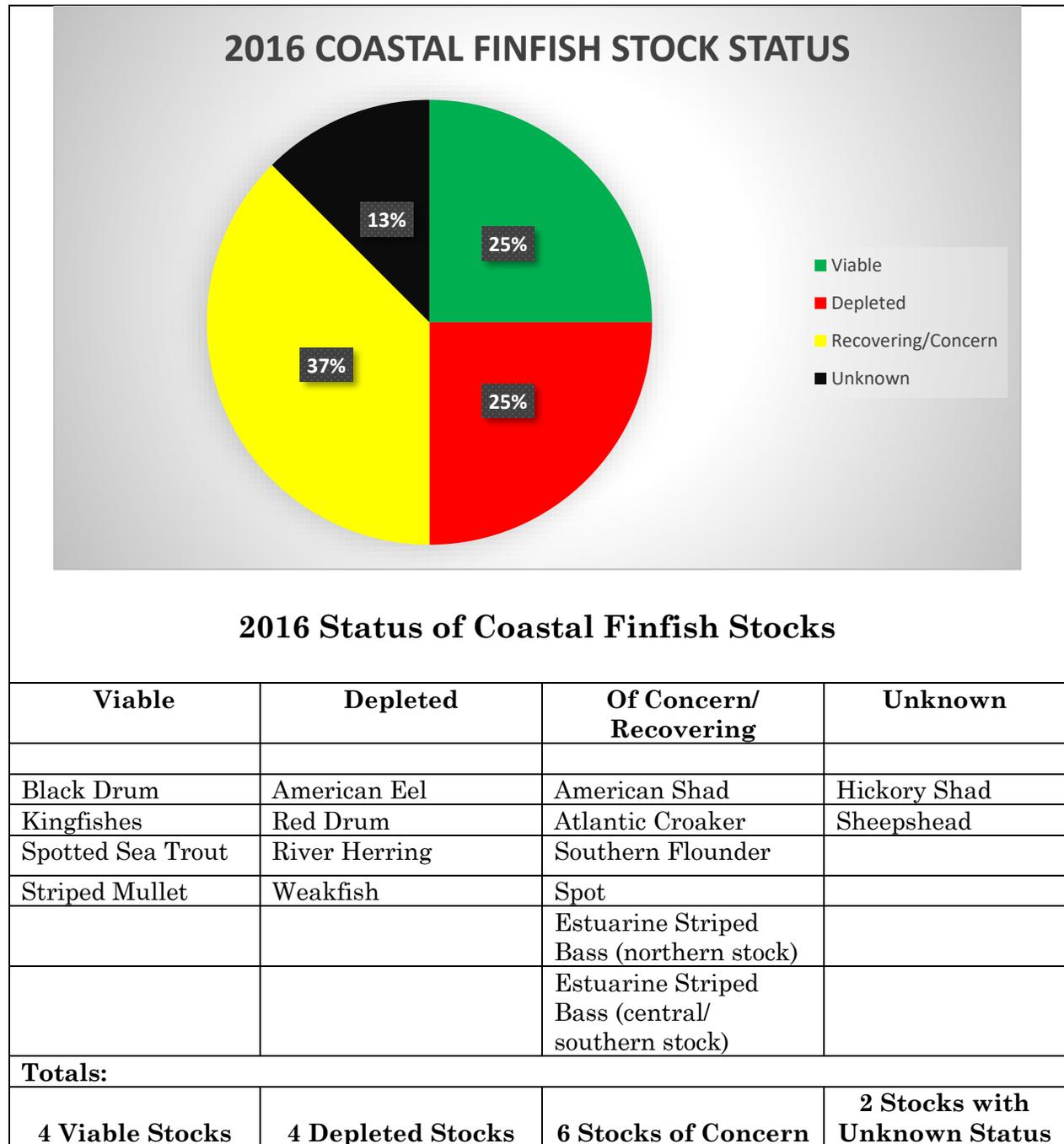
A second indicator of the overall decline in coastal fisheries resources is evidenced by an examination of the Division of Marine Fisheries' ("Division") annual stock status reports. Following legislative enactment of the Fisheries Reform Act of 1997 ("Act"), the Division traditionally issued an annual "Stock Status Report" at the beginning of each summer for most commercially and recreationally significant coastal fish species or stocks. The title of those reports is self-explanatory, as the reports were easily understandable and literally informed the public about the health and condition of most public-trust, coastal finfish stocks. Unfortunately, those informative and digestible annual stock status reports have largely disappeared, keeping most citizens in the dark about the true status of their public-trust fisheries resources.

The Act, in N.C. Gen. Stat. § 113-182.1(b), mandates that coastal fisheries be managed through fishery management plans ("FMPs"). That provision sets the bottom-line goal for public-trust fisheries resource management in North Carolina, expressly stating that "[t]he goal of the plans shall be to ensure the long-term *viability* of the State's commercially and recreationally significant species or fisheries" (emphasis added). In the biological context, "viability" is typically defined as the ability to survive and live successfully. Under that legislative standard then, the key to state coastal fisheries management is managing to ensure the long-term viability—stock health and well-being—of each managed fish species or stock.

As noted at the outset, in keeping with that legislative standard, prior to 2017 the Division issued an annual Stock Status Report that listed the current condition of most public-trust finfish species or stocks. In those reports, the Division categorized the status of managed coastal finfish species or stocks as being either "viable," "recovering," "of concern," "depleted," or "unknown." While those classifications were not specifically defined in most reports, they were easily understandable both by the public and by elected officials, and were directly reflective of both the legislative management standard for coastal fisheries, and the status of North Carolina coastal fish stocks as they relate to North Carolinian's public-trust and Constitutional rights to fish.

During the time period between 1997 (when the Act was passed by the legislature) and 2017, the health of public-trust fish stocks was such that the Division was unable to list the status of very many species or stocks as viable in its annual reports. Instead, the status of most stocks was listed as either depleted (essentially, "overfished"), recovering, of concern, or status unknown. For example, in the Division's 2016 stock status report—issued nineteen years after the Fisheries Reform Act was enacted—the Division classified only four out of the sixteen listed

coastal finfish stocks listed as being viable. The statuses of the other twelve stocks were classified as either depleted, recovering, of concern, or their status was unknown. The findings of the 2016 Stock Status Report are summarized in the chart below, which is taken from the complaint CCA NC and 86 citizen plaintiffs filed against the state in November 2020 for state in November 2020 for failing in its duty to preserve public-trust fisheries resources :



The reader will note that only one-quarter of public trust finfish stocks¹ managed by the state were in 2016 classified as having “long-term viability,” the legislative standard for stock management. Significantly, each of the twelve finfish species or stocks that the Division categorized in 2016 as being “non-viable” have historically been sought after by public anglers. While the Division’s Stock Status Reports did not paint “a pretty picture” for coastal fisheries resources, they were at least an honest and informative representation of stock status, using the management standard set out by the legislature.

Starting in 2017, under a new Fisheries Director, the Division—without explanation²—abandoned the legislative “viability” standard for coastal fish stocks in its annual stock status reports, and adopted a new report format. The new report format was called a “Stock Overview Report.” Under that new format, the only factors relevant to a stock’s reported status were: (1) whether a recent stock assessment³ had been completed, and (2) whether, according to that assessment, the stock was “overfished” or “overfishing” was occurring as defined by North Carolina law.⁴ In the Division’s own words, “Stock status in the Stock Overview is described based on overfishing and overfished/depleted status.”

¹ We remind the reader that the public’s common law (under the public trust doctrine) and constitutional right to fish does not just extend to finfish, but extends to all coastal fish stocks that North Carolinians have historically harvested for personal use. Those stocks obviously include shellfish—Eastern oysters, hard clams, and bay scallops—as well as crustaceans—blue crabs and shrimp. That means that the state’s trustee duty to ensure the long-term viability of those stocks, and to ensure a meaningful public right to harvest those stocks, applies equally to non-finish, public-trust fish stocks.

² When questioned about the changes to its annual stock status report, the Division has orally defended the changes on the grounds that the pre-2017 reports “were not based on professional standards and best fisheries management practices.” Whether the Division’s assertion is true or not is irrelevant, given that the Division’s original Stock Status Reports were based directly on the accountability requirements under state statutory law, while the Division’s Stock Overview Reports are not.

³ A “stock assessment” is the process of collecting, analyzing, and reporting demographic (stock population) information to determine changes in the abundance of fishery stocks in response to fishing and other pressures, and to the extent possible, predict future trends of stock abundance. Fisheries managers use stock assessments as a basis to evaluate and specify the present and probable future condition of a fishery. While stock assessments are a useful tool in managing a stock, the lack of a stock assessment must never be a bar to taking precautionary action to ensure the long-term viability of a public-trust stock known to be, or reasonably suspected of being, unhealthy because of overfishing or any other cause.

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

There are many problems inherent in the Division's changes to the reporting of the statuses of public-trust fisheries. For example, overharvest may lead to a species or stock being overfished at any point in time, whether or not a stock assessment is ongoing, completed or even contemplated by the Division. Nevertheless, if a recent stock assessment has not been completed for a fishery, the Division reports no further information on the stock's status in its Stock Overview Report, leaving North Carolinians uninformed—and likely unaware—of the true condition of their public resources.

But it's not just that the Division's "overfished/not overfished" standard is not the statutory standard, it's the *wrong* standard for assessing the health of public-trust fisheries resources by any reasonable measure of the state's role as trustee of those resources. As noted above, North Carolina statutes set the management standard for coastal fish stocks as a stock's "long-term viability." Moreover, those statutes also require that state FMPs contain measures that have a fifty percent probability of ending overfishing of a public-trust stock within two years, and achieving harvest sustainability⁵ for that stock within ten years at the latest. Ending overfishing is not the statutory end goal, but simply a benchmark on the road to achieving continuing harvest sustainability. Harvest sustainability is a major component—but *only* a component—of long-term stock viability.⁶

So, while the Division can declare that a stock is not overfished and that overfishing on that stock is not occurring, that does not mean that the stock is *viable*, as required both by statute and the common law and constitutional provisions guaranteeing the public's right to fish. For example, a stock may not be overfished, but nevertheless, severe age truncation in the stock (see the immediately preceding paper in this series, on "age truncation") may so reduce the stock's ability to replenish itself each year that it cannot sustain current levels of harvest even though it technically is not overfished. Similarly, a public-trust fish stock that has declined to a small fraction of its historic size (the topic of "declining commercial harvests" will be covered in a subsequent paper in this series) may also be hard-

⁵ You will recall from the last paper in the series that spawning stock biomass is defined as the total weight of the fish in a stock that are old enough to spawn. Harvest sustainability refers to maintaining the spawning stock biomass of the stock at a "replacement" level, *i.e.*, at a level large enough to ensure that, on a continuing basis, the spawning fish can produce enough offspring to replace fish that are harvested, eaten by predators, die of old age or disease, or are otherwise lost from the stock each year. Thus, in order to achieve a "sustainable harvest," only "surplus" fish can be harvested from the stock, *i.e.*, those not required to maintain the spawning stock biomass above that replacement level.

⁶ To that point, stock "harvest sustainability" is not "long-term viability" of the stock, the management goal set by the legislature for all public-trust fish stocks. That is because merely having a spawning stock capable of replacing itself does not render a stock "healthy." For example, in the last paper in the series, we looked extensively at the many adverse effects of age truncation on public-trust fish stocks. A severely age-truncated fish stock may be able to produce a sustainable harvest in the short run, but in the long term it is not a stable, viable stock.

pressed to replenish its numbers annually under continued harvest pressure, and will certainly not have the capacity to rebuild and restore itself to historic levels.

The Division has since 2017 used its new “standard” for reporting stock status in preparing its annual Stock Overview Reports. In the complaint filed by CCA NC and 86 citizen plaintiffs against the state in November, 2020, the Division’s 2020 Stock Overview Report to determine the then-current status of public-trust fish stocks was addressed. In the 2020 report, the Division found that only two stocks—blue crab and Southern flounder—were overfished with overfishing still occurring, and that while overfishing was not then occurring, the river herring stock remained overfished.⁷ However, a careful reading of the respective stock status discussions for each of the fourteen listed stocks in the source document for the 2020 Stock Overview shows that in actuality, the Division believed there was reason for concern regarding the long-term viability—the statutory goal for coastal fisheries management—of twelve of the fourteen listed stocks.

Plaintiffs also noted in the complaint that under the post-2016 report format, the Division started only to report the condition of stocks managed under a separate state FMP, and no longer reported the status of stocks managed in North Carolina under an interjurisdictional fisheries management plan.⁸ Thus, the annual stock statuses of such fishes as spot, weakfish, and Atlantic croaker—fish that are historically very important to the fishing public, and whose respective viability statuses were included in the Division’s annual Stock Status Report before 2017—are not included in the Division’s annual Stock Overviews.

Because of these changes, the Division’s Stock Overview Reports since 2017 have not only failed to reflect the legislative “viability standard” set out by statute for

⁷ The inadequacy of the Division’s new report format is further illustrated by the fact that while the 2020 Stock Overview Report format suggested there was no reason for concern about overfishing with the river herring stock, the reason that river herring were not overfished in 2020—and since—was because the river herring stock remains under a complete harvest moratorium after its collapse due to the state’s long-term mismanagement.

⁸ For example, North Carolina, along with the fifteen other Atlantic coast states (from Maine to Florida), is by statute a member of the Atlantic States Marine Fisheries Commission (“ASMFC”). The ASMFC prepares fishery management plans to regulate fish stocks that migrate between coastal states (and thus between the legal management jurisdictions of different states), and are therefore in need of interstate cooperative management—in addition to management by each state within its own boundaries—to ensure the overall interests of the species throughout its range, as well as the interests of each member state. The Division maintains that there is a difference between North Carolina coastal fish stocks that are managed under an “exclusively” state FMP and those stocks managed by the state under an interjurisdictional FMP, and treats the stocks separately in its annual FMP reviews. We fail to see the difference, and believe that state law expressly requires a separate, state-developed FMP for the North Carolina stock of every “commercially or recreationally significant species.”

coastal fisheries management, but also mislead the public and obscure the true state of health of North Carolina's coastal fish stocks.

The Division has now further refined its annual Stock Overview Reports. The “release” of the report is typically a letter listing highlights of the current year's Stock Overview, with a link to the Division's annual FMP review document for more details on the status of any specific stock. And it is true that in the annual review summary for each FMP-managed species there is a “Stock Status” section that summarizes the Division's stock status findings. However, the Division continues to miss the point of the annual stock status report, whatever it is called. As with the first (2017) Stock Overview report, current reports merely give a running tally of which stocks have a completed stock assessment, and whether, according to those stock assessments, the stock is overfished and/or overfishing is occurring. While the stock's overfished condition and status relative to continued overfishing pertain—at least indirectly—to the statutory requirements that the state end stock overfishing within two years of adopting a plan and restore harvest sustainability within ten years of plan adoption, they keep the public in the dark about the true status of its public-trust fish stocks because *they do not inform the public as to the stock's long-term viability*. Again, that is the statutory standard for stock management under an FMP, and as we pointed out previously in this paper, the facts that a stock is not overfished and that overfishing is not occurring do not mean that the stock is viable in the long-term.

Finally, the North Carolina Wildlife Federation (“NCWF”) has recently posted to its website a paper entitled “Collapsing & Collapsed: An Impact Summary of State Management under the Fisheries Reform Act of 1997.” We reference its contents here by permission. Based on historic and traditional scientific use of the term “collapsed” relative to fisheries management, the NCWF paper defines a collapsed stock as one where “for 2 years, landings for a stock fall below 10% of the average of the five highest years' landings recorded.” Using those same historic, scientific references, the paper further defines a collapsing stock as “fish stocks: (1) that have been on a general, downward trajectory for many years; (2) whose current landings are less than 25% of the average for the 5-year highest landings period; and (3) which show supporting, negative biological trends (*e.g.*, truncated population age structure).”

The conclusions of the paper are (1) that using that terminology to examine the current stock statuses of North Carolina's public-trust fisheries resources as reported in the Division's 2022 FMP Review, a majority of North Carolina public-trust fish stocks managed under state plan have either collapsed or are collapsing under the state's resource mismanagement; and (2) the most likely cause of that failed management is the allowance of overfishing.

The NCWF paper goes on to examine three stocks historically very important to the fishing public—spot, Atlantic croaker and weakfish—that are managed by the state under an ASMFC interjurisdictional FMP. The conclusion of the paper relative to

those stocks is that that the Atlantic croaker stock has collapsed both in North Carolina and coastwide; that the spot stock in North Carolina was recently collapsed and is currently collapsing, while the coastwide spot stock has collapsed; and that the weakfish stock has collapsed both in North Carolina and coastwide.

In summary, the current status of public-trust fish stocks in North Carolina under state management is neither a happy, nor a pretty, picture. Instead, it is a sad, ugly mess. By any reasonably objective measure, examination of the respective viability statuses of public-trust fisheries shows that less than a quarter of state-managed (whether managed under an exclusive state plan or under an interjurisdictional plan) public-trust fish stocks are viable, while the remaining three-quarters plus of those stocks are either depleted from overfishing, or their conditions remain a mystery to state managers. The result from those facts is a clear infringement upon the public's common law and constitutional rights to harvest fish, both of which the North Carolina Court of Appeals recently affirmed. Further, those facts are contrary to the statutory mandate that the state manage coastal fisheries resources to ensure their long-term viability, and are also contrary to the state's Court-affirmed role as trustee of those resources. Accordingly, the current, abysmal status of public-trust fish stocks should not be acceptable to *any* North Carolinian. Instead, every citizen should demand immediate changes in state action that will adequately protect public-trust fisheries resources and the collective interests of citizens in those resources. Are you that voice?