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WAKE COUNTY

SUPERIOR COURT JUDGES OFFICE

BY: S. Smallwood

NORTH CAROLINA

GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

20-CVS-12925

COASTAL CONSERVATION
ASSOCIATION, et al.,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

CASE MANAGEMENT ORDER

This matter came before the Court on October 2, 2023 on the parties' joint motion for a Rule 26(f)(4) discovery conference. After considering the arguments of counsel and other appropriate matters of record, the Court, in its discretion, sets the following deadlines and schedule:

I. Agreed-Upon Discovery Plan and Schedule

Pursuant to the parties' agreement, the Court orders the following:

A. Expert Disclosures and Discovery. Any experts retained or specifically employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony shall be required to prepare a report pursuant to Rule 26(b)(4)a.2. For all other experts, the information set forth in Rule 26(b)(4)a.3 shall be disclosed at the time of the expert disclosures.

The parties shall, in good faith, make their disclosed experts reasonably available to be deposed throughout the expert discovery period.

B. Contents of Privilege Logs. The content of privilege logs shall conform with the content set forth in Appendix A to this Order.

C. Service and Filing Deadlines. Service shall be by email in accordance with Rule 5(b)(1).

D. Response Deadlines. Notwithstanding any provision of Rule 6 or Rules 26 through 37, the parties may, by written stipulation, extend the time allowed to respond to any discovery, and that, notwithstanding Rule 6, such extensions may exceed thirty days. No party shall be deemed to have failed to respond to discovery if the party responds within the time allowed by a written stipulation. Specifically, no fact that is the subject of a request for admission shall be deemed admitted if the responding party has served a written answer or objection within the time specified in a written stipulation.

E. Number of Written Interrogatories. The parties acknowledge that the nature of the case may warrant allowing the serving of interrogatories in excess of the fifty permitted by Rule 33(a). Unless a party objects to the number of interrogatories served by any other party, the party shall be presumed to have agreed to allow an exceedance of the numeric limits on interrogatories. In determining whether any party has unreasonably exceeded the limit, the court will consider, among other things, the needs of the case and whether the party has been judicious, efficient, and reasonable in their use of interrogatories.

F. Fact Witness Depositions. Each side is permitted to take up to the following number of fact witness depositions without leave of court: the greater of:

(a) 30 or (b) the number of witnesses identified by the opposing party under the Federal Rule 26(a)(1)(A)(i) process plus five. Depositions of fact witnesses shall be limited to seven hours of testimony, absent agreement or leave of court, except that each party may take four depositions of fact witnesses of up to fourteen hours of testimony, not to exceed seven hours of testimony on any single day. (As of the date of this Order, the Plaintiffs have used one of their allotment of four fourteen-hour fact witness depositions.)

G. Expert Witness Depositions. Depositions of expert witnesses shall be limited to a maximum of fourteen hours of testimony, and, unless otherwise agreed by the parties, no deposition of expert witnesses shall last for more than seven hours of testimony on the record in a single day.

H. Electronically Stored Information. The parties have agreed to an ESI Protocol governing the production of ESI. The parties have also agreed to a Consent Protective Order on Inadvertent Disclosure of Documents, which was entered on August 9, 2023.

II. Discovery Plan and Schedule

After considering the parties' competing proposals for the remainder of the discovery schedule and plan, the Court orders the following:

- A. End of Fact Discovery. Fact discovery shall conclude on May 31, 2024.
- B. Deadlines for Expert Discovery.

- 1) Cross-service of non-binding expert topics shall be February 16, 2024.
- 2) The Plaintiffs' expert disclosures and/or reports, if any, are due March 15, 2024.
- 3) The State's expert disclosures and/or reports, if any, are due May 1, 2024.
- 4) Plaintiffs' rebuttal expert disclosures and/or reports, if any, are due June 14, 2024.
- 5) Expert discovery shall conclude on July 19, 2024.

C. Amendment of Case Management Order. On or before May 31, 2024, the parties shall consult with the trial court administrator for the entry of a case management order that includes a mediation deadline and a trial date.

III. Expert Deposition Fees

The Court finds no manifest injustice in requiring each party seeking discovery to pay the expenses associated therewith pursuant to Rule 26(b)(4)(c) and does so require.

IV. The Plaintiffs' Summary of Issues

At the Court's direction to Plaintiffs to prepare a summary of the issues that the Plaintiffs contend exist at the present time, the Plaintiffs have submitted the following summary. In submitting this summary, the Plaintiffs represent that because discovery is not complete, the Plaintiffs intend to supplement or revise the following issue summary as appropriate.

A. General issues relating to the State's duties as resource trustee

The Court of Appeals' unanimous decision in this case was unequivocal: "The right to fish and harvest fish would be rendered meaningless without access to fish. Therefore, the State's duty necessarily includes some concomitant duty to keep fisheries safe from injury, harm or destruction for all time." *CCA v. State*, 285 N.C. App. 267, 275 (2022). Moreover, "the alleged facts here support Plaintiffs' contention the State did not protect the harvestable fish population 'for the benefit of all its citizenry.'" *Id.* at 280. Those key holdings present the following factual issues:

- Have coastal-fisheries resources significantly declined in abundance and/or health (i.e., suffered harm) under the State's management?
- Does the State's duty to protect and preserve "coastal-fisheries resources" include a duty with respect to both finfish and shellfish? The State has objected on relevancy grounds to the Plaintiffs' discovery seeking information on shellfish. The Plaintiffs' view is that the State's objection lacks merit.
- Given its duty to preserve and protect coastal-fisheries resources, has the State devoted adequate resources to enforcement of coastal fisheries harvest restrictions, and by what metrics does the State evidence that adequacy?
- Has the State devoted adequate resources to remedying factors other than fishing mortality (e.g., habitat loss or degradation, pollution, environmental perturbations) that could contribute to the decline of coastal-fisheries resources, and by what metrics does the State evidence that adequacy?
- Has the State failed to satisfy its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

B. Issues related to the status of N.C. coastal-fisheries resources

1. North Carolina's standard for fisheries management

"Long-term viability" is a recognized, benchmark standard for fisheries management in North Carolina, as acknowledged by the current Fisheries Director Kathy Rawls in her deposition in this case, and by her predecessor Dr. Louis Daniel. That management standard was codified in the Fisheries Reform Act of 1997 ("FRA"), comprehensive coastal fisheries management reform legislation intended to address the pre-existing decline in our coastal-fisheries resources. Under the FRA, coastal-fisheries resources are managed under Fishery Management Plans ("FMPs"), which are typically species or stock specific. Each FMP seeks to ensure the "long-term viability" of the species covered.

In its discovery responses, the State made an important admission: that “[l]ong term viability, or lack thereof, is not a measurable metric used by [the State’s Division of Marine Fisheries] (“DMF”).” The conflict between the statutory standard and the State’s admission present the following factual issues:

- What is “long-term viability” and what are the metrics by which that standard should be applied, measured, and evaluated?
- What is the current “long-term viability” status of the fish stocks managed by the State, and how has the State communicated that status to the public?
- What are the most significant factors that are contributing, or have contributed, to the decline of North Carolina’s coastal-fisheries resources and their resultant lack of “long-term viability?”
- What is a “collapsed” or “collapsing” fish stock (common terminology in fisheries science), and which fish species populations in North Carolina are “collapsed” or “collapsing?”
- Are the State’s methodologies and protocols adequate to prevent overfishing and achieve “long-term viability?”
- Why have our coastal-fisheries resources, as a whole, continued to decline under State management since the FRA was enacted and implemented?
- Is the State’s failure to adhere to the statutory “long-term viability” standard inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals’ decision in this case?

2. Overfishing in public trust fisheries

The current FMP statute requires each plan to specify a deadline, not to exceed two years from the date of the plan, to end overfishing. *See* N.C. Gen. Stat. § 113-182.1(b)(5). In her deposition, the current Fisheries Director Kathy Rawls testified that this two-year maximum deadline for ending overfishing was reasonable. Using the State’s data, the complaint documents how the State for decades has allowed for-profit overfishing of fish species or stocks that are historically important to citizen harvesters for personal, not-for-profit use. The complaint further describes how the State has allowed overfishing to occur even though it is universally recognized that overfishing is a threat to long-term stock viability, and that any stock subject to continued overfishing cannot remain sustainable, or if overfished, rebuilt to levels permitting a sustainable harvest. That background presents the following factual issues:

- Which North Carolina species or stocks are or have been overfished, how long or often has overfishing been allowed to occur, and what is the primary source of overfishing for each relevant species or stock?
- What are the long-term, adverse resource effects of continued overfishing?
- What effect has overfishing had on the public trust and constitutional rights of citizens to fish for personal, not-for-profit use?
- To what extent and for what managed species have politics, rather than fisheries science and widely accepted best management practices, dictated North Carolina coastal fisheries resource management?
- Is the State's tolerance and enabling of overfishing inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

3. The State's failure to capture necessary harvest data

Under North Carolina law, for-profit ("commercial") harvest data is captured by requiring fish dealers (the buyers) to generate "trip tickets" with information required by the State for every purchase they make from for-profit fishermen. DMF then uses that harvest data to assist in managing coastal-fisheries resources.

As the complaint documents, however, on an annual average over the last ten years, approximately 60% of for-profit license holders generated zero trip tickets. Compl. ¶ 289. These licenses for which no harvest data is captured have been referred to as "latent licenses" or "dark licenses." The quantity of fish harvested under these "dark licenses" is, at best, unknown. The only available, relevant data is from a DMF survey, which concluded from survey responses that 30% of for-profit fishermen who reported no landings harvest fish only for personal use or donation.

The Plaintiffs contend that it is inconsistent with the State's public trust and constitutional obligations to presume, without any supporting data, that there is no significant harvest of fisheries resources under these dark licenses that comprise 60% of for-profit licenses. In its discovery responses, the State contends that if these 60% of for-profit licenses were harvesting enough to impact fish stocks, then DMF "would have observed or heard of much more unreported activity than it has." This background presents the following factual issues:

- How significant is the uncaptured, for-profit harvest in North Carolina, and what efforts, if any, has the State made to determine the actual pressure being exerted on our fisheries resources in order to properly manage them?
- In assessing the status of managed fish stocks and setting for-profit harvest limits, how does the State account for the harvest for personal use (according to DMF's survey results) that uses commercial gears?
- Is the State's failure to capture necessary and critical harvest data inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

4. Industrial shrimp trawl operations in estuarine waters

Juvenile finfish bycatch wastage in North Carolina's estuarine shrimp trawl fishery has been recognized as a significant resource management problem by the State since at least the 1950s. Over the last several decades, the State has allowed the industrialization of shrimp trawling in the Pamlico Sound and many of our other estuarine waters. Ocean-class trawlers are allowed to operate in much of our estuarine waters virtually around the clock, for five days a week, seven months a year. The result has been that the same areas of Pamlico Sound and many other estuarine waters are trawled over and over, virtually continuously, with no chance for the bottoms to recover. This ensures that there is no respite for fish stocks (e.g., spot and Atlantic croaker) that reside in those waters on a widespread basis, which are harvested in shrimp trawls as bycatch, discarded as dead, and wasted.

As to shrimp trawl impacts, particularly in the Pamlico Sound, the complaint cites several "characterization" studies conducted by DMF, the last of which were in 2014 and 2015. Those studies report the results of observing trawl trips and document the percentages of the overall catch of various bycatch species—that is, species other than shrimp. DMF's "characterization" studies document the quantity of bycatch of Atlantic croaker, weakfish, and spot from shrimp trawls in Pamlico Sound, which are the primary bycatch species in terms of number and weight. The complaint chronicles the fact that Pamlico Sound once was also a renowned location for public angling for those species and for Southern flounder, and that both non-profit and for-profit fishing for spot, Atlantic croaker, and weakfish has declined precipitously since shrimp trawling in the Pamlico Sound and other estuarine waters was industrialized. *See* Compl. ¶ 111, et seq.

In its discovery responses, the State contends that estuarine shrimp trawl bycatch is not a significant problem in North Carolina, asserting that the State has successfully addressed the issue by reducing juvenile finfish bycatch by 60-70%

since 1991 by requiring bycatch reduction devices in estuarine shrimp trawls. These circumstances raise the following factual issues:

- What is the State's history and track record on estuarine shrimp trawling and on regulating shrimp trawls in our coastal waters?
- What are the data on estuarine shrimp trawl juvenile finfish bycatch mortality and for what fisheries or species is this bycatch a resource problem?
- What are the long-term consequences to fish-habitat bottoms (public trust lands) from repetitive trawling?
- Is the State's regulation of the estuarine shrimp trawl fishery inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

5. Gillnets and the burden of remaining the last southeastern state attempting to manage fisheries that are subject to significant gillnetting

The complaint chronicles the bycatch and resource wastage caused by the widespread use of gillnets in North Carolina. Gillnets are columns of mesh that hang in the water and capture fish by the gills, causing the fish to drown unless they are relatively quickly released. Gillnets also kill or injure threatened and endangered species protected by federal law, such as sea turtles and sturgeon. The complaint documents when each southeastern state besides North Carolina took action to either ban the use of gillnets outright or substantially limit their use. Compl. ¶ 161, et seq.

The regulatory and legal burden for the State in allowing gillnet usage to continue in North Carolina coastal waters has in the last thirty years included obtaining and complying with several "incidental take permits" ("ITPs"). ITPs allow for the "taking"—including killing—of certain federally-listed endangered species and threatened species, up to permitted limits. The permits held by the State, which allow for-profit fishermen to take sea turtles and Atlantic sturgeon, are not held by any for-profit commercial fishing interest; rather, they are held by the State's DMF on behalf of North Carolina's for-profit fishermen. Compl. ¶ 168, et seq. The nature of gillnets, history of their regulation by the State, and widespread use by those who fish for profit in North Carolina raise the following factual issues:

- What is the State's history and track record on gillnet usage and regulating gillnets in North Carolina's coastal waters?

- What are the data on gillnet bycatch mortality, and in what fisheries or for what species or stocks is gillnet bycatch a resource problem?
- What is the State's history in acquiring and administering a statewide gillnet ITP, including compliance with the ITP by those who fish for profit?
- Is the State's regulation of for-profit gillnetting practices, including obtaining and administering a statewide gillnet ITP, inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

6. Species/stock-specific resource management issues

a. Southern flounder

The complaint chronicles the State's management failures with respect to Southern flounder, a prime example of the State's prolonged tolerance of overfishing of a stock that has been among the most popular species sought by not-for-profit citizen harvesters. Compl. ¶ 215, et seq. For decades, the State has known that the vast majority of the harvest pressure on Southern flounder is from for-profit fishing. Yet for most of the last twenty years, the burden of increased restrictions on Southern flounder harvest were disproportionately placed on public, not-for-profit harvesters. These circumstances raise the factual issues below. *See infra* p. 12.

b. Striped bass

The State's management of striped bass has for decades been especially problematic given the anadromous spawning nature of the species in different North Carolina coastal river systems, split regulatory jurisdiction over that species, and the fact that striped bass are highly prized by both for-profit and not-for-profit fishermen. There are two management units for striped bass in North Carolina, the Albemarle Sound Management Area ("ASMA"), which includes the Albemarle Sound and its tributaries, including the Roanoke River, and the Central and Southern Management Area ("CSMA"), which includes everything south of the ASMA, including the Neuse River system, the Tar and Pamlico River system, and the Cape Fear River system. The MFC has regulatory jurisdiction over striped bass harvest in North Carolina coastal waters, the North Carolina Wildlife Resources Commission ("WRC") has regulatory jurisdiction over striped bass harvest in inland state waters, and the two agencies share regulatory jurisdiction over striped bass in joint fishing waters (essentially, that area where coastal and inland waters overlap). These circumstances raise the factual issues below. *See infra* p. 12.

c. River herring

River herring is a notable stock because it holds the unique positions of being both the State's oldest fishery and the first fish stock in recent history to suffer population collapse¹ under the State's management. Like striped bass, river herring (which actually consists of two species) are an anadromous stock. River herring have been under a complete harvest moratorium in North Carolina since the early 2000s, yet despite having no directed fishing pressure, because their collapse is so complete, have shown no real signs of recovery. These circumstances raise the factual issues below. *See infra* p. 12.

d. Spot, Atlantic croaker and weakfish (gray trout)

Although consolidated for purposes of this summary, management of spot, Atlantic croaker, and weakfish merits independent consideration because each species has been historically so significant to citizens for subsistence, sustenance, sport, and other not-for-profit, personal uses. However, the management issues for each species are very similar in North Carolina for at least two reasons.

First, as noted above (*supra* p. 8), spot, Atlantic croaker and weakfish are the primary stocks that have been decimated from having juveniles of each species killed, and wasted, in massive quantities, year after year for decades, in the for-profit estuarine shrimp trawl fishery. Second, unlike other species historically important to citizens for personal use, the State has chosen to manage spot, Atlantic croaker and weakfish not under an independent, unique state FMP, but to manage these species only under a coastwide management plan promulgated by the Atlantic States Marine Fisheries Commission ("ASMFC"), of which North Carolina is a member. These circumstances raise the factual issues below. *See infra* p. 12.

e. Blue crab

Blue crab are the most economically valuable North Carolina public trust species harvested by for-profit fishermen. As such, the blue crab fishery was the primary impetus for the legislature imposing in the FRA limited entry into for-profit fishing in the State, as commercial crab potters were concerned with a large influx of out-of-state fishermen moving to North Carolina from other jurisdictions. Concomitantly, blue crab has been one of the most frequently harvested species by

¹ In its pleadings and discovery responses, the State contends both that the North Carolina river herring stock has not collapsed, and that the State does not recognize the term "collapsed" in managing its fisheries. In her deposition in this case, however, current Fisheries Director Kathy Rawls admitted that the North Carolina river herring stock has collapsed. Rawls Dep. 113, et seq.

the general citizenry for not-for-profit, personal use. These circumstances raise the factual issues below. *See infra* p. 12.

f. Eastern Oyster

Like river herring, the use of oysters for personal subsistence long preceded the advent of colonization of North Carolina lands and waters by Europeans. Historically, for-profit harvest of oysters was vastly greater than for-profit harvest seen today, with booming commercial oyster processing centers formerly located at Vandemere in Pamlico County, and to a lesser extent, Varnumtown and Shallotte in Brunswick County. Similar to public use of blue crab, citizen, not-for-profit harvest of Eastern oyster for personal use was historically substantial, though that use has declined with the demise of Eastern oyster under State management. These circumstances raise the factual issues below. *See infra* p. 12.

* * *

For each species or stock listed above in Issue 6 (*supra* pp. 10-12), the circumstances above raise the following factual issues:

- What factors determine the abundance and health of these species or stocks in North Carolina, and how is fishing mortality considered?
- What is the State's history and track record in managing these species or stocks?
- Is the State's failure to protect and preserve these species or stocks inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

7. The decline of citizen, not-for-profit harvest limits

The complaint chronicles the decline over time in public angler "bag limits," the type and quantity of fish that not-for-profit, public harvesters are allowed to keep for personal use. Compl. ¶ 78, et seq. The State's answer to the complaint denies that the State's management failures have had any bearing on the decline in not-for-profit bag limits. These circumstances raise the following factual issues:

- What has been the State's history and track record with respect to declining not-for-profit bag limits, and what are the reasons underlying those declines?
- Is the State's imposition of severely restricted not-for-profit bag limits as a result of its coastal fisheries management failures inconsistent with its public

trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

C. Additional economic issues

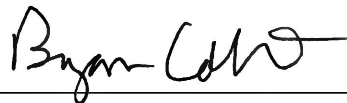
- How much wild-caught seafood harvested from North Carolina's coastal waters remains in the state, available for consumption by North Carolinians (those to whom these resources belong), versus how much is exported?
- What would be the change in the economic value of North Carolina's coastal-fisheries resources if the State managed all—or even some—of those resources to maximize the public benefit?
- As to the economic benefit to North Carolina, is the State's management of coastal-fisheries resources inconsistent with its public trust and constitutional obligations as set forth in the Court of Appeals' decision in this case?

V. Further Supplementation of Issues

The Plaintiffs shall timely supplement their contentions of what issues exist as that evolves during the course of discovery so as to give the parties and the Court a contextual framework to guide the discovery process.

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The Honorable G. Bryan Collins, Jr.

Appendix A – Contents of Privilege Logs

To the extent the parties withhold discoverable information on the basis of privilege, the withholding party shall produce a privilege log that contains the following information (1) Document identifier (bates stamp); (2) Date; (3) Sender or author; (4) Recipient (if applicable); (5) Privilege claimed (attorney client or work product); and (5) brief description. In lieu of providing the privilege log above, the party has the option to produce an automated privilege log.

In particular, the parties may create such automated logs by exporting from their respective databases the following fields for all documents withheld, in whole or in part (through proper redactions), as privileged; provided, however, that if Email Subjects or File Names contain information that the producing party reasonably believes may risk waiver of the privilege, then the parties may revise those Email Subjects and/or File Names so long as the receiving party is advised of the change. The privilege log fields shall contain the following information, to the extent available:

- Privilege Identifier (numerical identifier for documents that were entirely withheld)
- Bates Range (for partially withheld documents)
- File Extension
- Date Sent
- Date Created
- Author
- Email From
- Email To
- Email CC
- Email BCC
- Email Subject
- File Name
- Privilege Type (Attorney-client privilege, Trial Preparation/Work Product, or both)

For good cause, either party may request in writing that the other party provide a more detailed description for a reasonable number of entries, specified by Privilege Identifier or Bates Range if the basis of the privilege is not clear from the automated log. Communications between counsel of record and their client after the commencement of this litigation regarding legal advice on the subject matter of this lawsuit and related attorney work product will not be produced in discovery and need not be included in any privilege logs.

Appendix B – Excerpts² of DMF’s 2022 Fishery Management Plan Review (issued August 2023)

Southern flounder - (T)he current status of the southern flounder stock is overfished, and overfishing is occurring.

Estuarine Striped bass – (i) results from the 2022 Albemarle-Roanoke region stock assessment indicate the stock is overfished and overfishing is occurring, (ii) results from the matrix model indicate that striped bass populations in the Central Management Area (Pamlico and Neuse Rivers) are depressed to an extent that sustainability is unlikely at any level of fishing mortality, and it also provides evidence that natural recruitment is the primary limiting factor influencing Tar-Pamlico and Neuse River stocks and if stocking was stopped the populations would decline, (iii) a no possession provision for striped bass for the Cape Fear River instituted in 2008 remains in place.

Spotted Seatrout (aka speckled trout) - The 2022 North Carolina spotted seatrout stock assessment indicated the spotted seatrout stock in North Carolina and Virginia is not overfished but overfishing is occurring.

Weakfish (aka gray trout) – An update to the peer-reviewed 2016 regional stock assessment was completed in 2019, showing the stock is depleted and has been since 2003.

Atlantic croaker – Stock status relative to overfishing or overfished status is unknown. Commercial landings in the past six years have been the lowest in the relevant time series.

Spot – Stock status relative to overfishing or overfished status is unknown.

River herring - An Atlantic coastwide river herring stock assessment update was completed in August 2017, with data through 2015. Results indicate that river herring remain depleted and at near historic lows on a coastwide basis. A no-harvest provision applicable in North Carolina since 2007 remains in effect.

Striped mullet – The 2022 North Carolina striped mullet stock assessment indicated the North Carolina striped mullet stock is overfished and overfishing is occurring in the terminal year of 2019.

² These excerpts are not intended as an exhaustive summary of the information reported in the Plan Review.

Blue crab – Results of the 2018 benchmark Blue crab stock assessment (2016 terminal year) indicate the stock is overfished and overfishing is occurring.

Eastern oyster – North Carolina commercial oyster landing have been in decline for most of the past century, likely due to overharvest and compounded by environmental factors.