



AFTER MAJOR VICTORY FOR COASTAL FISHERIES, LEGAL FIGHT CONTINUES IN APPELLATE COURT

State of North Carolina Asks for “Immunity” from Lawsuit

RALEIGH, N.C. (February 24, 2022) – The fight to save North Carolina’s coastal fisheries took a major step forward in court last week. On February 10, the most recent legal briefs were filed in a lawsuit seeking to hold the state accountable for failing to meet its legal duty to protect North Carolina’s once-abundant inshore coastal fisheries from overharvest and undue waste.

The lawsuit details how North Carolina’s coastal fisheries have suffered chronic decline under the state’s decades-old management approach of allowing maximum, unsustainable exploitation of this public resource, primarily by the commercial fishing industry, including the continued authorization of estuarine shrimp trawling in waters heavily populated by juvenile fish, unattended gillnets, and chronic overfishing of flounder and other popular species.

The legal action, brought in 2020 by the Coastal Conservation Association of North Carolina and a group of 86 citizen plaintiffs, including five former members of the N.C. Marine Fisheries Commission (MFC), is proceeding after the trial court rejected the state’s request to dismiss the case last summer. The state is appealing that decision and asking the appellate court to do something that no court in the history of our nation has done before: give the state “sovereign immunity” from the public trust doctrine, a foundational tenet of public governance that predates the birth of our nation. Sovereign—or “State”—immunity is the old, but dying, legal doctrine that the state can do no wrong, and thus cannot be sued by its citizens.

The public trust doctrine, a set of principles derived from Roman and English law, establishes that the citizens of the state have the right to use public waters, including to fish for personal use, and that the state holds fish and wildlife in trust for the use and benefit of its current and future citizens. As the resource trustee the state must protect fish and wildlife from overharvest or undue waste. The public trust doctrine’s protection of the right to fish is reinforced in the North Carolina Constitution, which states that “the right to fish shall be forever preserved for the public good.”

The state’s request for immunity, if granted, would render that constitutional protection meaningless, and it would effectively mean that North Carolinians could not enforce the public trust doctrine against their government, the resource trustee. Only once, in two centuries of public trust doctrine cases in the U.S., has a state (Alaska) been brazen enough to request immunity from the public trust doctrine. A court swiftly rejected that request.

In their February 10 brief to the Court of Appeals, the plaintiffs pointed to that precedent, as well as the lack of any legal precedent for the State of North Carolina’s request for immunity. “The state’s attempt to assert sovereign immunity overreaches in ways that the state has never attempted before, and it asks this Court to go where no court in our nation’s history has ever gone before,” their brief explained. “The Superior Court recognized this government overreach for what it was, and it was right to reject it. This Court should do the same.” Amicus briefs in support of the plaintiffs’ position were also filed by the North Carolina Wildlife Federation, Sound Rivers, and Professor Joseph Kalo, Graham Kenan Professor of Law Emeritus at UNC Law School, a leading scholar on ocean and coastal law.

Briefing in the appeal is expected to be completed by late March, after which the Court of Appeals will decide whether to schedule a hearing on the state's argument.

"North Carolina's public trust fish stocks are as a whole depleted and unhealthy, and the state has no plan nor political will to turn that around," said Dr. Tim Nifong, CCA NC General Counsel. "The few state citizens who are privileged to harvest public trust resources for personal profit are allowed to take the vast majority of those resources under state management policies, leaving only the 'crumbs' to the other 11 million citizens."

CCA NC Executive Director David Sneed added, "This lawsuit is aimed at changing state policies that rob the public of its rights by ignoring stock conservation in favor of unsustainable exploitation of the resource."

Other southeastern states have done a better job than North Carolina at protecting their coastal fisheries resources and, consequently, public trust fishing rights. In North Carolina's sounds, large shrimp trawlers are allowed to drag heavily weighted nets that damage habitat and kill close to a billion juvenile finfish each year. For every pound of shrimp harvested, more than three pounds of fish are killed as by-catch, thus wasted. Once abundant stocks of gray trout, spot and croaker have been decimated. North Carolina also remains the last bastion for large-scale gill netting, a harvest method banned in most states due to the by-catch and impacts to sea turtles and other marine life. Use of gill nets continues in North Carolina waters because the state holds two permits on behalf of commercial fishermen that allow them to circumvent Endangered Species Act protections and kill or harm endangered sea turtles and sturgeon.

These practices have resulted in the depletion of many commercially and ecologically important fish species. In the 25 years since the Fisheries Reform Act of 1997 was enacted to, supposedly, restore North Carolina's already depleted fish populations, the long-term decline across multiple species has only accelerated.

Meanwhile, the actual harvest pressure on the state's inshore fisheries is unknown, but it is clearly substantially underestimated by the state. Commercial gears were never intended to be used large-scale to harvest public resources for personal use. On average, over 50 percent of commercial license holders do not report sale of any fish.

Among fish species traditionally targeted by the public, chronic overexploitation has led to precipitous declines in annual harvest. Since 1997, harvest of southern flounder, a North Carolina seafood staple, is down by 81%, spot by 85%, croaker by 88% and weakfish (grey trout) by a shocking 97%. Striped bass (77%) and bluefish (63%) are also in decline. Recent efforts by the state to drastically limit the total harvest of southern flounder—caused by state managers allowing 33 years of commercial overharvest—have resulted in severe restrictions on public access to that stock. "North Carolina's fishing heritage is at stake, and without meaningful reform, these trends may be irreversible," said CCA Chairman Bert Owens.

With the legal action moving forward, CCA NC is preparing to launch a public awareness campaign to educate North Carolinians about the issues and generate broad-based support for true coastal fisheries management reform. Utilizing public relations, social media and event activations, the campaign will detail how fair, intelligent, science-based management policies can preserve both recreational and commercial fishing for future generations without diminishing access to fresh North Carolina seafood.

CCA NC believes that the state must begin immediately to make the long-term viability of North Carolina's coastal fisheries a top priority, and that all interested parties should have meaningful opportunity to work with the state and its agencies in achieving that goal.

About CCA NC:

CCA NC is a community of conservationists and recreational anglers working to promote sound management of public trust marine and estuarine resources and protect them for the enjoyment of current and future generations. CCA NC is affiliated with the Coastal Conservation Association, a national non-profit organization comprised of 17 coastal state chapters spanning the Gulf of Mexico, Pacific and Atlantic seabords. CCA's strength is drawn from the tens of thousands of recreational saltwater anglers who make up its membership and whose grassroots influence is felt through state capitals, U.S. Congress and, most importantly, in the conservation and restoration of our coastal marine resources.

Media contact:

Charles Upchurch
(919) 395-1588
cupchurch@fwv-us.com

###