

NORTH CAROLINA
CARTERET COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2016 SEP 23 FILE NO.: 16-CVSC 45

CARTERET COUNTY FISHERMAN'S
ASSOCIATION, INC.; NORTH
CAROLINA FISHERIES ASSOCIATION,
INC.; COUNTY OF CARTERET;
COUNTY OF DARE; COUNTY OF HYDE,

Plaintiffs

vs.

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL QUALITY; DONALD
R. VAN DER VAART, Secretary, N.C.
Dept. of Environmental Quality; NORTH
CAROLINA DIVISION OF MARINE
FISHERIES; BRAXTON DAVIS, Director,
Division of Marine Fisheries; SAMMY
CORBETT, Chairman, North Carolina
Marine Fisheries Commission; MARK
GORGES, North Carolina Marine Fisheries
Commission; CHUCK LAUGHRIDGE,
North Carolina Marine Fisheries
Commission; JANET ROSE, North Carolina
Marine Fisheries Commission; JOE SHUTE,
North Carolina Marine Fisheries
Commission; RICK SMITH, North Carolina
Marine Fisheries Commission; MIKE
WICKER, North Carolina Marine Fisheries
Commission; ALISON WILLIS, North
Carolina Marine Fisheries Commission.

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. Southern flounder is one of the most economically important fish species for commercial and recreational fisheries in our State.

2. The commercial southern flounder fishery is heavily regulated to ensure a sustainable fishery. Stock assessments and other population and catch indices show that existing

conservation measures adopted prior to 2015 were helping the southern flounder fishery. For example, stock assessments show that the southern flounder is improving with decreases in fishing mortality, increases in spawning stock biomass, and expansion of age classes.

3. Despite the stringent regulations already in place and a recovering southern flounder stock, between early 2015 and 2016, Defendants took unprecedented action to arbitrarily impose additional and unnecessary management measures on the commercial southern flounder fishery that will devastate this industry. Defendants adopted and implemented these management measures based on inconclusive and conflicting data, an invalid stock assessment, no recommendations from the Division of Marine Fisheries or other fishery experts, and serious questions and concerns raised by the Secretary of the Department of Environmental Quality, independent fishery experts, and members of the General Assembly. The temporary management measures adopted and implemented by Defendants are not only based on inadequate scientific data, but were also adopted in violation of North Carolina Open Meetings law and pursuant to an “efficient” and “fast” method (*i.e.*, a regulatory short cut) to quickly adopt these management measures. The temporary management measures adopted and implemented by Defendants are arbitrary and based on inadequate scientific data, were improperly adopted through an abbreviated regulatory process and in violation of North Carolina Open Meetings law, are not necessary to ensure the long-term viability of the southern flounder and will devastate commercial fishermen.

PARTIES

4. Plaintiff, North Carolina Fisheries Association, Inc. (“NCFA”) is a non-profit corporation organized and existing under North Carolina law, with its principle office in New Bern, Craven County, North Carolina. NCFA’s mission objectives include the study, promotion,

and development of growth and conservation and use of fish, seafood, and other marine resources; to assemble and disseminate information with respect to conservation, preservation and use of products of the sea; to gather and disseminate information which will be beneficial to those engaged in catching, taking, preparing, preserving, distributing, or using any form of marine life; and, to cooperate with other organizations and state and federal agencies created for any of the foregoing purposes. Its members include, but are not limited to, commercial fishermen from all coastal counties in North Carolina, seafood dealers, processors, distributors and other persons and businesses which are directly affected by Marine Fisheries rules, regulations and proclamations.

5. Plaintiff, Carteret County Fisherman's Association, Inc. ("CCFA") is a non-profit corporation organized and existing under North Carolina law, with an office in Carteret County, North Carolina. CCFA's mission objectives include the study, promotion, and development of growth and conservation and use of fish, seafood, and other marine resources; to assemble and disseminate information with respect to conservation, preservation and use of products of the sea; to gather and disseminate information which will be beneficial to those engaged in catching, taking, preparing, preserving, distributing, or using any form of marine life; and, to cooperate with other organizations and state and federal agencies created for any of the foregoing purposes. Its members include commercial fishermen in the Carteret and Onslow counties of North Carolina which are directly affected by Marine Fisheries rules, regulations and proclamations.

6. Carteret County is a body politic and corporate created pursuant to the laws of the State of North Carolina, with the powers to sue and be sued, and may exercise in conformity with the laws of the State of North Carolina county powers, rights, duties, functions, privileges and immunities of every name and nature.

7. Dare County is a body politic and corporate created pursuant to the laws of the State of North Carolina, with the powers to sue and be sued, and may exercise in conformity with the laws of the State of North Carolina county powers, rights, duties, functions, privileges and immunities of every name and nature.

8. Hyde County is a body politic and corporate created pursuant to the laws of the State of North Carolina, with the powers to sue and be sued, and may exercise in conformity with the laws of the State of North Carolina county powers, rights, duties, functions, privileges and immunities of every name and nature.

9. Defendant, Donald R. van der Vaart, in his official capacity as Director, North Carolina Department of Environmental Quality (“DEQ”), is the chief officer and bears ultimate responsibility for the preservation and protection of North Carolina’s natural resources.

10. Defendant, North Carolina Department of Environmental Quality (“DEQ”) is the lead stewardship agency for the promotion of the conservation and developmental of the natural resources of this state, in promoting more profitable uses of the resources and in coordinating existing scientific investigations and other related agencies in formulating and promoting sound policies of conservation and development including administration and direction of its division, the North Carolina Division of Marine Fisheries.

11. Defendant, Braxton Davis, in his official capacity as Executive Director, North Carolina Division of Marine Fisheries, has responsibility for ensuring sustainable marine and estuarine fisheries and habitats in North Carolina including ensuring compliance with conservation regulations and protection of the state’s fisheries resources. Defendant Davis holds proclamation authority giving him the ability to open or close fisheries, restrict gear types, and

make other decisions regarding North Carolina marine resources management, including decisions regarding the use of fishing gear.

12. Defendant, North Carolina Division of Marine Fisheries (“DMF”) is responsible for the stewardship of the state’s marine and estuarine resources and has jurisdiction over all activities connected with the conservation and regulation of marine and estuarine resources pursuant to N.C. Gen. Stat. §§ 113-131 and 113-132.

13. Defendant, North Carolina Marine Fisheries Commission (“MFC”), is a commission created in DEQ, which functions, purposes and duties include:

a. Manage, restore, develop, cultivate, conserve, protect, and regulate the marine and estuarine resources within its jurisdiction, as described in N.C. Gen. Stat. §113-132 pursuant to N.C. Gen. Stat. § 143B-289.51(b)(1).

b. Implement the laws relating to coastal fisheries, coastal fishing, shellfish, crustaceans, and other marine and estuarine resources enacted by the General Assembly by the adoption of rules and policies, to provide a sound, constructive, comprehensive, continuing, and economical coastal fisheries program directed by citizens who are knowledgeable in the protection, restoration, proper use, and management of marine and estuarine resources pursuant to N.C. Gen. Stat. § 143B-289.51(b)(2).

c. To provide fair regulation of commercial and recreational fishing groups in the interest of the public pursuant to N.C. Gen. Stat. § 143B-289.52(a)(2).

14. The following members of the Marine Fisheries Commission, which consists of nine members appointed by the Governor pursuant to N.C. Gen. Stat. § 143B-289.54, in their official capacity:

- a. Defendant Sammy Corbett is a citizen and resident of Pender County, North Carolina and is the chairman of the North Carolina Marine Fisheries Commission;
- b. Defendant Mark Gorges is a citizen and resident of New Hanover County, North Carolina;
- c. Defendant Chuck Laughridge is a citizen and resident of Carteret County, North Carolina;
- d. Defendant Janet Rose, is a citizen and resident of Currituck County, North Carolina;
- e. Defendant Joe Shute is a citizen and resident of Carteret County, North Carolina;
- f. Defendant Rick Smith is a citizen and resident of Wilson County, North Carolina;
- g. Defendant Mike Wicker is a citizen and resident of Wake County, North Carolina;
- h. Defendant Alison Willis is a citizen and resident of Carteret County, North Carolina.

JURISDICTION AND VENUE

15. The Superior Court of Carteret County has personal jurisdiction over the parties to this action, as well as the subject matter at issue.

16. Carteret County, North Carolina is the proper venue for this action.

REGULATORY FRAMEWORK

17. Pursuant to N.C. Gen. Stat. ch. 113, subch. IV, N.C. Gen. Stat. §§ 113-127 to 113-377, the General Assembly provides authority to the North Carolina Division of Marine

Fisheries (“DMF”) and the North Carolina Marine Fisheries Commission (the “Commission”) to regulate marine fisheries and to adopt regulations to implement the statutory directives.

18. In addition to general rulemaking authority, the Commission is granted limited authority to promulgate “proclamations.” N.C. Gen. Stat. § 113-221.1. Specifically, “[t]he Marine Fisheries Commission may 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.” N.C. Gen. Stat. § 113-221.1(b).

19. In 1997, the General Assembly enacted the North Carolina Fisheries Reform Act, S.L. 1997-400. The purpose of the Fisheries Reform Act is to protect, enhance and better manage coastal fisheries in North Carolina.

20. The Fisheries Reform Act recognized: (a) North Carolina has one of the most diverse fisheries in the United States; (b) commercial fishermen are essential to providing wholesome food for the citizens of the State; (c) the economic contribution and important heritage of traditional full-time and part-time commercial fishing; (d) for many citizens fishing is an important recreational activity and a source of great personal enjoyment; (e) the importance of providing plentiful fishery resources to maintain and enhance tourism as a major contributor to the economy of the State; and (f) the need to protect our coastal fishery resources and to balance the commercial and recreational interests through better management of these resources. S.L. 1997-400.

21. Among other things, the Fisheries Reform Act restructured the Commission and mandated that DMF develop proposed fishery management plans (“FMPs”) for adoption by the Commission for all commercially and recreationally significant marine fishery species found in

state coastal waters (defined as coastal waters out to three nautical miles). N.C. Gen. Stat. §§ 113.182.1(a) and 143B-289.51.

22. Each FMP “shall [i]nclude conservation and management measures that will provide the greatest overall benefit to the State, particularly with respect to food production, recreational opportunities, and the protection of marine ecosystems, and that will produce a sustainable harvest.” N.C. Gen. Stat. § 113-182(b)(3).

23. FMPs include mandatory actions to ensure specific levels of fish for future harvests. N.C. Gen. Stat. § 113-182.1(b). These actions are implemented by regulations that limit the number of participants in a fishery, limit or control the amounts or size of certain fish species, the types of allowable fishing gear, and the times during the year or areas in which these fish species may be caught. *See* N.C. Gen. Stat. § 113-182.1(f); *see also* 15A NCAC 3M .0503.

24. The Fisheries Reform Act also requires that adequate biological (including stock assessments), social and economic data are used to develop FMPs. N.C. Gen. Stat. § 113-182.1(b)(1).

25. Each FMP is required to be reviewed at least once every five (5) years, and the Commission may not revise the schedule for the development of an FMP, once adopted, without the approval of the DEQ Secretary. N.C. Gen. Stat. § 113-182.1(d). As part of this review process, the Commission may amend an FMP if it determines that an amendment will “facilitate or improve the developments of Fishery Management Plans or is necessary to restore, conserve, or protect the marine and estuarine resources of the State.” *Id.*

26. Outside the formal amendment process, the Commission may change management measures in an existing FMP under certain limited circumstances and where certain steps are followed. Specifically, “[i]f the Secretary determines that it is in the interest of the

long-term viability of a fishery, the Secretary may authorize the Commission to develop temporary management measures to supplement an existing Fishery Management Plan” and “the urgency of the issue makes it impossible to address it through the FMP amendment process.” N.C. Gen. Stat. § 113-182.1(e1); FMP Guideline V.C.1 (11/4/10).

27. After the Secretary determines that it is in the interest of the long-term viability of a fishery and it is impossible to address through the FMP amendment process, DMF is required to develop a draft supplement and provide a position on the supplement to the Commission, including an analysis of the proposed management change, relevant data and projected outcomes, and proposed rules or proclamation measures necessary to implement the proposed management change. FMP Guideline V.C.2 (11/4/10).

28. The Commission is required to review the draft supplement and reject, approve or modify and approve it for public comment. The Commission is authorized to only consider a single management issue for each draft supplement. FMP Guideline V.C.3 (11/4/10).

29. Unlike the formal amendment process, N.C. Gen. Stat. § 113-182.1(e1) specifically exempts a supplement from review of a FMP advisory committee, regional advisory committees and legislative review. Thus, this exemption removes the formal stakeholder input opportunities that are significant parts of the amendment process and result in a deliberative and open process.

30. The Commission is given the authority to either incorporate the temporary management measures into the amended FMP or to let the temporary management measures expire on the date the amended FMP is adopted.

FACTUAL ALLEGATIONS

Southern Flounder Background

31. Southern flounder is one of the most economically important fish species for commercial and recreational fisheries in our State.

32. Most of the North Carolina recreational harvest of southern flounder occurs inshore in North Carolina's estuaries and coastal rivers. Ocean harvest near reefs is also an important part of the North Carolina recreational hook and line fishery. Based on 2011-2013 data, recreational fisheries account for approximately 21.4% of the total southern flounder harvest in North Carolina waters.

33. Southern flounder are commercially harvested in North Carolina waters by pound nets, gill nets, gigs, and various other commercial gear, such as shrimp trawls, crab trawls, seines, and crab pots. The majority of the commercial harvest occurs by gill nets and flounder pound nets from the Albemarle and Pamlico sounds. Based on 2011-2013 data, commercial fisheries account for approximately 78.6% of the total southern flounder harvest in North Carolina waters.

34. Commercial and recreational fishing are an integral part of the economy of several coastal counties, especially Dare, Carteret and Hyde, which accounted for over 60% of the State's total landings. The average annual landings of southern flounder in Dare County from 1994-2012 was 769,075 pounds. The average annual landings of southern flounder in Carteret County from 1994-2012 was 687,464 pounds, and the average annual landings of southern flounder in Hyde County from 1994-2012 was 321,569 pounds.

Pre-2015 Southern Flounder Regulation

35. In 2001, DMF began the process of developing an FMP for the southern flounder.

36. Four years later, in 2005, the Commission adopted the original Southern Flounder FMP, which was the result of extensive scientific data and discussions, estimates of stock status, and social and economic impacts. The Southern Flounder FMP set overfishing and overfished thresholds and targets using a spawning potential ratio and implemented management measures intended to end overfishing and rebuild the stock.

37. The stock assessment used to develop the Southern Flounder FMP assumed that there was one unit stock in the southeastern United States. At this time, DMF had data from their own tagging studies conducted in the 1980s and 1990s that southern flounder migrated from North Carolina to South Carolina and along the coast to Florida.

38. Recognizing that migration was a potential major factor in southern flounder conservation, the Commission endorsed funding to investigate the potential that a portion of the adult southern flounder population remained offshore following spawning, which may play a factor in sustaining the southern flounder fishery.

39. In or around 2008, DMF conducted a new southern flounder stock assessment and released the stock assessment in 2009 (the “2009 Southern Flounder Stock Assessment”). This stock assessment again assumed that there was one unit stock. Additional migration data were referenced in the stock assessment noting that there was a southward migration of southern flounder out of the North Carolina estuaries during the fall. However, DMF was unable to define the southern flounder migration patterns with any certainty.

40. The 2009 Southern Flounder Stock Assessment indicated that conservation measures implemented pursuant to the Southern Flounder FMP were helping the flounder resource. For example, the stock assessment indicated the stock status was improving with decreases in fishing mortality, increases in spawning stock biomass, and expansion of age

classes. Many southern flounder population or catch indices also showed promise of stock recovery, including commercial landings were decreasing (about 1 million pounds). Further, the number of active flounder pound nets, which had been the dominant commercial gear harvesting flounder, had dropped from 394 sets in 1995 to 145 in 2007 (63% reduction) and from 279 in 2005 when the last population assessment was performed (48% reduction).

41. Despite these improvements, DMF determined that a reduction in overall harvest was still needed to achieve sustainable harvest.

42. In response to the stock assessment, DMF began developing the Southern Flounder FMP Amendment 1 in 2010 and proposed increasing the threshold and target spawning potential ratios to reduce the risk of recruitment overfishing.

43. During the development of Amendment 1, DMF reached a settlement with the Karen Beasley Sea Turtle Rescue & Rehabilitation Center concerning sea turtle interactions with the commercial gill net industry. In response to this settlement, effective May 15, 2010, DMF adopted Proclamation M-8-2010, which included management measures intended to reduce these interactions.

44. These management measures were substantial and significantly impacted gill net fishermen's efforts to harvest southern flounder. With the exception of western Albemarle and Pamlico sounds, this proclamation limited the use of large-mesh gill nets (4-6½-inch stretched mesh) to four nights a week, Monday through Thursday. It also limited the height of those gill nets to 15 meshes, required leaded bottom lines, and prohibited floats (except those used for identification) north of the Highway 58 Bridge. It also reduced the amount of gill net yardage allowed to 2,000 yards north of the Highway 58 Bridge and 1,000 yards south of it, and required 25-yard spaces between no more than 100-yard sections of the gill net.

45. In February 2011, the Commission adopted Supplement A to the Southern Flounder FMP to implement recreational harvest restrictions.

46. Consistent with recommendations made by the Southern Flounder FMP Advisory Committee and DMF, Supplement A did not include any additional restrictions on the southern flounder commercial fishery because the recently implemented gill net management measures to protect sea turtles were projected to result in an overall commercial southern flounder harvest reduction of approximately 22%.

47. Between about January 20, 2011 and May 20, 2012, additional proclamations were adopted to address gill net restrictions. These proclamations exempted additional areas from the gill net management measures, added an extra fishing day south of Beaufort Inlet, and closed southern Core Sound to large mesh gill nets and reduced the maximum length of gill nets from 2,000 feet to 1,000 feet in this area.

48. In or about April 2011, DMF reported to the Commission that the additional restrictions imposed on the southern flounder fishery were having positive impacts. Southern flounder landings had been reduced by an estimate of 25.6%, which was above the 20.5% mandate in Supplement A to the Southern Flounder FMP. DMF stated that a higher proportion of larger fish (indicator of a healthier resource), relatively low landings in Albemarle Sound (a major harvest area), and fishermen leaving the flounder gill net fishery due to the sea turtle-associated restrictions.

49. In February 2012, DMF reported to the Commission that commercial southern flounder landings had been reduced by 41% from 2010 to 2011.

50. On or about September 6, 2012 (and updated January 18, 2013), DMF submitted an application to the National Marine Fisheries Service ("NMFS") for a permit to incidentally

take sea turtles listed as threatened or endangered under the Endangered Species Act associated with large- and small-mesh gillnet fisheries operating in inshore waters.

51. In February 2013, the Commission adopted Amendment 1 to the Southern Flounder FMP, which increased the threshold and target spawning ratios and implemented management measures for commercial and recreational fisheries. With respect to the recreational fishery, the management measures established in Supplement A were incorporated into Amendment 1 (*i.e.*, a coast-wide 15-inch minimum size limit and a six-fish recreational bag limit). With respect to the commercial fishery, management measures intended to reduce sea turtle interactions were adopted, including limiting the number of fishing days each week and establishing maximum yardage limits for gill nets with a mesh size of 4.0 to 6.5-inches stretch mesh. These commercial fishery restrictions also included adding another day of allowed fishing south of Morehead City, the closure of Core Sound to flounder gill nets, and a 1,000 yard maximum length restriction in Bogue Sound

52. Amendment 1 to the Southern Flounder FMP presented effort calculations in the southern flounder gill net fishery from 2007 to 2011 and the effort reductions that were likely a result of gill net restrictions. According to Amendment 1, gill net effort declined 55% (yardage set) in the commercial southern flounder fishery since 2007 (the last year of the 2009 stock assessment). Trips using gill nets reduced by 50% since 2007. Southern flounder commercial harvest decreased 40% from 2007 to 2011.

53. In May 2013, DMF provided the Commission updated southern flounder landings data for the recreational and commercial fisheries from 2007 to 2012. Calculated reductions in southern flounder landings since Proclamation M-8-2010 became effective on May 15, 2010 were substantial when compared to harvest from 2007 (the last year of the prior stock

assessment). DMF calculated the harvest (by number) was reduced in southern flounder commercial fisheries by 25.6% in 2010, 44.9% in 2011, and 27.8% in 2012, well above the 20.5% threshold that DMF had calculated for sustainability when DMF recommended and the Commission approved, Supplement A to the Southern Flounder FMP.

54. On or about September 10, 2013, NMFS issued Permit No. 16230 authorizing the take of listed sea turtles incidental to large- and small-mesh gillnet fishing in specified inshore estuarine areas. The incidental take permit is effective through August 31, 2023 and includes a number of conditions to monitor, minimize and mitigate impacts to listed sea turtles, including new restrictions on large mesh gillnets, closure or prohibition of certain areas to large-mesh gillnets, monitoring requirements, adaptive fishery management measures, and a continuation of North Carolina's regulations for small-mesh gillnet requirements. If the estimated or observed sea turtle interactions or mortalities exceed the incidental take limits, DMF must immediately close the appropriate area to fishing with gillnets.

55. Since the implementation of the incidental take permit, DMF has issued and continues to issue a series of proclamations to implement the conditions set forth in Permit No. 16230. Temporary management measures specified in these proclamations have resulted in a substantial reduction in southern flounder harvest.

56. In May 2014, NCFA proposed that DMF prohibit the use of flounder gill nets during spring and summer due to commercial fishermen exceeding the commercial landings cap of red drum in the fall of 2013. Sometimes red drum occur as bycatch in the flounder gill net fishery, and the NCFA suggested the measures to avoid unwanted regulatory discards of red drum.

57. In early May 2014, the Director closed the flounder gill net fishery upon receipt of the request and requested advice from the Commission at its May 22, 2014 meeting. The Commission supported a closure of set flounder gill nets in North Carolina through September 2014. DMF did not provide any estimates of what the closure would do for southern flounder sustainability. As a result of the situation with red drum, the set southern flounder gill net fishery did not operate in North Carolina during May to September 2014.

58. In November 2014, DMF provided the Commission updated southern flounder landings data for commercial harvests from 2012 to November 2014. Calculations showed that there was a 25.6% reduction in the number of flounder trips and a 23.3% reduction in flounder harvest during May through August 2014 when compared to the prior year. Thus, the measures proposed by NCFA resulted in a substantial reduction in southern flounder harvest.

Post-2015 Southern Flounder Regulation

59. In or around December 2014, DMF completed a new southern flounder stock assessment (the "2014 Southern Flounder Stock Assessment").

60. The 2014 Southern Flounder Stock Assessment included new genetic and tagging data that purported to show that southern flounder migrate long distances and appear to be one genetic stock. Despite the additional data, DMF had known for a number of years that southern flounder migrate long distances in a southerly direction during spawning periods based on its own studies.

61. In February 2015, DMF advised the Commission that the 2014 Southern Flounder Stock Assessment was rejected by three independent peer reviewers and should not be used either for management purposes or to determine population levels of southern flounder for overfishing benchmarks. DMF and the peer reviewers were concerned that recent studies

showed that the North Carolina stock of southern flounder mixed with stocks in other South Atlantic states. According to DMF, these concerns could only be addressed with a regional stock assessment that included data from other states and also presented sampling survey data from South Carolina (electroshocking and trammel net surveys) and Georgia (trawl survey) showing declines in catch per unit effort values from the 1990s or early 2000s. No data were shown from Florida.

62. Although the stock assessment could not be used for management purposes and DMF acknowledged that southern flounder movement into and out of North Carolina waters and the number of southern flounder migrating to southeastern states are unknown, DMF advised the Commission that the regional southern flounder stock was experiencing a decadal long decline in recruitment, which is the number of young fish entering into the stock.

63. DMF provided this information and position to the Commission despite: (i) the independent stock assessment reviewers stated that they saw no trends in recruitment, except exceptional year classes – in fact, these expert reviewers expressed the opinion that it made no biological sense that the southern flounder stock had been experiencing overfishing for 23 years and at two to three times the accepted level based on prior assessments with no observed response to halving the catch through management measures or that the stock had not experienced a precipitous decline; and (ii) DMF’s presentation to the Commission omitted data from Florida, which has the second highest harvest of southern flounder. In 2012, Florida state resource biologists assessed the southern flounder stock and determined that the stock was “either stable or improving” and that current management measures appeared to be “successfully maintaining a sustainable flounder industry.”

64. Despite concerns raised by its own stock assessment biologist and independent peer reviewers, who are either experts in fish population assessments or southern flounder, inconclusive and conflicting data, existing management measures that resulted in a substantial reduction in southern flounder harvest, and a southern flounder population that had been sustaining itself for over twenty years, DMF recommended to the Commission that it adopt a supplement to Amendment 1 to the Southern Flounder FMP.

65. In making its recommendation, neither the DEQ Secretary nor DMF determined that the supplement was “in the interest of the long-term viability of [the] fishery” or “the urgency of the issue makes it impossible to address it through the FMP amendment process.” *See* N.C. Gen. Stat. § 113-182.1(e1); *see also* FMP Guideline V.C.1 (11/4/10).

66. In response to DMF’s recommendation, the Commission voted to pursue a supplement to Amendment 1 to the Southern Flounder FMP to reduce the catch of southern flounder between 25% and 60%.

67. Although a supplement is only authorized to address the long-term viability of a fishery and where it cannot be addressed through the amendment process, no data were presented to convey what reductions were needed, what harvest reductions had been achieved since the last population assessment or any information on the current status of southern flounder fisheries (effort reduction through gill net measures).

68. The Commission members, only one of which is a scientist, arbitrarily and irresponsibly selected the proposed reduction amounts based on their personal opinions and without advice from fisheries experts.

69. In or about May 2015, DMF presented five options to the Commission for the supplement to Amendment 1 of the Southern Flounder FMP. The options included: increasing

the current season closure; increasing the minimum commercial size limit; decreasing the recreational bag limit, and implementing a combination of a season closure and minimum size limit, and implementing a season closure, increasing the commercial size limit and decreasing the recreational bag limit.

70. For the first time, DMF estimated potential reductions not based on harvest, but on catch, which includes discard estimates. DMF noted that for some gears there were no data on discards and that the calculations to estimate catch amounts were very complex and included many assumptions.

71. No other FMP process had used such calculations to determine or assess conservation measures. DMF stated that “regardless of the reduction level and management measures chosen, it will be difficult to determine if the estimated catch reductions are actually achieved due to current data limitations (*i.e.*, uncertainty about discards).” Thus, DMF recommended measures for a supplement that could not be quantified to determine if they were ensuring the long term viability of the fisheries, as required by N.C. Gen. Stat. § 113-182.1(e1).

72. At the time of proposing the supplement, DMF did not have a valid southern flounder stock assessment, did not know the population status of southern flounder, had not conveyed to the Commission harvest reductions that had been required by prior FMPs and amendments (how the fishery had been modified to help flounder populations) and presented proposed measures to the Commission that could not be determined whether or not they were successful.

73. In or about May 2015, the Commission rejected the management measures proposed by DMF for the supplement. Instead, the Commission voted to publish six proposals

for public comment. The Commission Chair allowed commissioners to offer their personal proposals if they chose to do so.

74. The six measures proposed by the Commission were:

a. Proposal 1: Increase the commercial size limit to 15 inches; increase the sizes of pound net escape panels to either 5.75 or 6 inches; create a quota on the pound net catch (at levels that were equal to a 25% reduction from 2013 levels); no new pound net permits; no pound net permit transfers until the next amendment(or death); commercial gigging allowed four days/week with a 36 flounder trip limit (multiple limits possible); a ban on flounder gill nets in 2016; and no changes on recreational fisheries.

b. Proposal 2: Increase the commercial size limit to 15 inches; flounder gill nets north of Hatteras would not be allowed from September 16 to January 16, and south of Hatteras from October 16 to January 1; increase the sizes of pound net escape panels to either 5.75 or 6 inches; commercial gig fishermen would have a 35 fish trip limit; recreational fishermen will not have any reductions unless reductions are needed; a November to December closure will be required; and no new pound net permits.

c. Proposal 3: Increase the commercial size limit to 15 inches; increase size of pound net panels to 6 inches; increase gill net mesh size to 6 inches; close both recreational and commercial fisheries from November 16 to December 31; and no changes in recreational fisheries.

d. Proposal 4: Maintain status quo for commercial; decrease recreational size limit to 14 inches; observe 60-day comment period, with stakeholder input.

e. Proposal 5: Increase the commercial size limit to 15 inches; increase the minimum mesh size in gill nets to 5.75 inches; increase the size of escape panels in pound nets to

5.75 increases; close commercial and recreational fisheries from December 1 to 31; and no change in recreational limits.

f. Proposal 6: Increase the minimum mesh size limit mesh gill nets to 5.75 inches; increase escape panel sizes in pound nets to 5.75 inches; close commercial and recreational fisheries from December 1 to 31.

75. On or about June 17, 2015, the Commission held a public meeting on these proposals. The meeting was attended by 150 concerned stakeholders. No Commission advisory committee meetings were held to solicit input. The Commission received over 1,200 comments that expressed either support or opposition to the Supplement to Amendment 1 of the Southern Flounder FMP. Nineteen local government groups sent resolutions of support or opposition to the draft supplement. Numerous petitions were received by the Commission. The management process had been transformed from a deliberative and systematic one to one that was crises-driven.

76. The management measures proposed by the Commission addressed multiple management issues, including gear requirements in the pound net fishery, gear requirements in the gill net fishery, achieving a sustainable harvest, and ocean harvest of southern flounder, and were therefore inconsistent with FMP guidelines. *See* FMP Guideline V.C.3 (11/4/10) (“The MFC will only consider a single management issue for each draft supplement.”). In preparing and adopting FMPs, the Commission and DMF are required to, among other things, comply with guidance criteria. N.C. Gen. Stat. § 113-182.1(a).

77. In or about August 2015, General Assembly members and the DEQ Secretary expressed concerns regarding the supplement process.

78. Thirteen General Assembly members presented a letter dated August 20, 2015 to the Commission requesting that the DEQ Secretary “rescind immediately” his authorization for the supplement. The legislators also noted that the process was meant to “supplement an existing FMP” and that the Commission appeared to be “moving forward with a rewrite of the FMP.”

They further stated:

Neither the underlying statute nor your March 2015 grant of authority [for the supplement] could have intended the MFC to prohibit particular commercial fishing gear when the existing FMP imposes no such prohibition. Such a significant policy choice must be made by the General Assembly or the MFC using the fair and open process specified by G.S. 113-182.1.

Members of the General Assembly again reaffirmed the intent of the Fishery Reform Act, which was designed to provide a fair, balanced, open, responsible, and deliberative, process to manage the fisheries resources through FMPs.

79. In a letter dated August 20, 2015 to the Commission, the Secretary of DEQ shared the legislators’ concerns. In the letter, the Secretary stated:

In the letter, the [legislators] referenced the existing Fishery Management Plan (FMP) and the effect of some of these options would have in changing the fundamental nature of the Southern Flounder FMP. They further noted that such significant alterations, if believed to be in the best interest of [the] fishery, should be adopted through the process described in G.S. § 113-182.1, or the amendment process. I agree with this interpretation of the law.

80. After receiving comments from the General Assembly members and the Secretary, the Commission chose not to vote on the draft supplement at their August 2015 meeting.

81. In or about November 2015, despite the lack of a valid stock assessment, inconclusive and conflicting data, existing management measures that resulted in a substantial reduction in southern flounder harvest, and a recovering southern flounder population, the Commission voted to approve Supplement A to Amendment 1 of the Southern Flounder FMP.

82. Supplement A to Amendment 1 of the Southern Flounder FMP included the following management measures: the commercial size limit for southern flounder was increased from 14 to 15 inches; the minimum mesh size for gill nets was increased from 5.5 to 6 inches; the escape panel mesh size in pound nets was increased from 5.5 to 5.75 inches; southern flounder gill nets were prohibited from October 16 to December 31 (previously December 1 to 31); the recreational southern flounder fishery was closed from October 16 to December 31 (no prior closure period); a quota corresponding to a 38% reduction in landings was established for the southern flounder pound net fishery (prior closure period was from December 1 to 31); and closure of the commercial southern flounder gig fishery when the pound net quota was reached (prior closure period was from December 1 to 31).

83. Recent southern flounder migration studies raise further questions about the validity of strategies DMF and the Commission recommended and adopted to conserve southern flounder. DMF failed to seriously consider migration data from historical studies in prior conservation efforts. Recent studies show that southern flounder that migrate from North Carolina during spawning may return to other southeastern Atlantic coast states and bias spawning stock biomass estimates, which raises serious questions about the validity of biomass estimates that were provided in earlier population assessments. Independent experts also suspect the ocean waters are serving as a protected area for spawning females, which is allowing the fishery and population to sustain itself with relatively high fishing rates in North Carolina's estuarine waters.

84. With increased size limits for commercial fisheries, significant gear modifications for the pound net and gill net fisheries, a significant reduction of the legal fishing season for gill nets, pound nets, and gigs, establishment of a quota for the first time for the pound net fishery

and gig fishery, and implementation of a recreational fishing season closure in the sounds and the ocean, the Commission passed a supplement that is in fact a significant amendment to Amendment 1 of the Southern Flounder FMP and addressed multiple management issues contained in Amendment 1.

85. Upon information and belief, in the course of adopting Supplement A to Amendment 1 of the Southern Flounder FMP, several members of the Commission violated North Carolina Open Meetings law, N.C. Gen. Stat. §§ 143-318.9, *et seq.* In a letter dated February 16, 2016, the Office State Auditor presented the results of its audit of DMF. Finding 21 states:

There have been open meeting laws violated by several members of the commission. The director of DMF will only send emails to certain members, and not the whole commission.

We did not review the director's emails to determine that Director Daniel sent emails to only certain members of the Commission. However, there does appear to be emails between commission members that violate open meeting laws.

Four separate email chains dated January 14, 2015, September 8, 2015, July 20, 2015, and February 10, 2015, occurred between Commission Members. In each instance, the Commission's legal counsel, Phillip Reynolds, stopped the email communication and reminded the commission members about open meeting laws.

Although Director Daniel was copied on some of these emails, we did not observe any emails which were sent by the Director.

86. The Commission adopted Supplement A of Amendment 1 of the Southern Flounder FMP without a recommendation from DMF, even though N.C. Gen. Stat. § 113-182.1(b) and FMP Guidelines V.C.6-7 require such a recommendation.

87. In adopting Supplement A to Amendment 1 of the Southern Flounder FMP, the Commission did not adhere to its statutory duty to provide "fair regulation of commercial and recreational fishing groups in the interests of the public" as required by N.C. Gen. Stat. § 143B-289.52.

88. Neither the six options that the Commission voted to issue for public comment nor the management measures adopted by the Commission as Supplement A are fair or equitable. These proposed management options and the adopted management measures focus primarily on restrictions of the southern flounder commercial fisheries with essentially no restrictions on the recreational southern flounder fishery.

89. Since the adoption of Amendment 1 to the Southern Flounder FMP and prior to adoption of Supplement A, management measures adopted by the Commission to address the commercial and recreational southern flounder fisheries were fair and equitable. Based on DMF calculations, restrictions adopted by the Commission during this time period resulted in a 23% reduction in harvest for recreational fishermen and a 26% reduction in harvest for commercial fishermen. From 2011 to 2014, southern flounder harvest reductions had been equitable (39% reduction) for both recreational and commercial fishermen.

90. To implement Supplement A to Amendment 1 of the Southern Flounder FMP, DMF has issued several Proclamations, including FF-3-2016, FF-4-2016, M-34-2015, FF-68-2015, FF-69-2015 and will issue other Proclamations in the future.

91. Defendant Laughridge has acknowledged that the southern flounder restrictions will likely put an end to the commercial southern flounder industry, posting on a recreational fishing forum on July 7, 2016:

A moratorium on pound nets??? Pretty sure the reduction in landings with a quota on pound nets (which most consider a clean gear) and then a closure will do more than turtles have ever done. A moratorium on new permits was tried at a Wilmington MFC meeting and the legal minds said that could not be done.

As to gillnets, the setting of the seasons for the turtle [incidental take permit] were somewhat suspect, but the majority of So Flounder are caught by all gears between Sept 1 and the end of Oct/middle of Nov, based on NCDMF data. Turtles have impacted the timing and closure of gillnets in Sept and Oct, but they are now subject to an Oct 15 closure statewide and they risk complete closure due to turtles if they start much before late Sept/1st of Oct.

Good fishing!!!

92. DMF is required by N.C. Gen. Stat. §113-182.1(b)(1) to perform a fiscal analysis of a supplement to determine the social and economic impact of the fishery to the State. DMF has not performed a fiscal analysis of the impact of the supplement to determine its social and economic impact to the State.

93. Upon information and belief, the supplement as adopted by the MFC will result in a loss of income to commercial flounder harvesters in excess of \$1,500,000 and a resulting loss to seafood processors, dealers, wholesale distributors, retailers and restaurants in approximately five to seven times this amount. In addition the supplement will affect recreational fishermen and for hire vessels, causing a loss of sales of consumable and durable goods, all severely effecting the economies of coastal counties, including Carteret, Hyde and Dare counties.

FIRST CLAIM FOR RELIEF
(Supplement A of Amendment 1 of the
Southern Flounder FMP Violates Applicable Law)
(Against All Defendants)

94. Plaintiffs repeat and allege the allegations contained in the preceding paragraphs in the Complaint as is set forth fully herein.

95. N.C. Gen. Stat. § 113-182.1(e1) authorizes the Commission to develop temporary management measures to supplement an existing FMP if the Secretary of DEQ determines it is in the interest of the long-term viability of a fishery.

96. The Commission may only develop temporary management measures to supplement an existing FMP where “the urgency of the issue makes it impossible to address it through the FMP amendment process.” FMP Guideline V.C.1 (11/4/10); N.C. Gen. Stat. § 113-182.1(a).

97. N.C. Gen. Stat. 113-182.1(b) and FMP Guidelines V.C.2,6-7 require, among other things, DMF to recommend and take positions on management measures proposed in a supplement and to consider social and economic impacts of the fishery to the State.

98. The Commission Guidelines for FMPs further provide that the Commission will only consider a single management issue for each draft supplement. FMP Guideline V.C.3 (11/4/10).

99. In developing and adopting Supplement A to Amendment 1 of the Southern Flounder FMP and in violation of applicable laws and guidelines: (i) Defendants failed to determine that the temporary management measures were in the interest of the long-term viability of the southern flounder fishery and that it was impossible to address the issue through the FMP amendment process; (ii) Defendants arbitrarily and capriciously selected the proposed reduction amounts based on inconsistent and conflicting data and without advice from fisheries experts; (iii) DMF failed to recommend or take a position on proposed management measures; (iv) Defendants failed to consider the social and economic impacts of the fishery to the State; and (v) the Commission considered more than one management issue.

100. Therefore, Supplement A to Amendment 1 of the Southern Flounder FMP is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law.

SECOND CLAIM FOR RELIEF
**(Proclamations Implementing Supplement A to Amendment 1
of the Southern Flounder FMP are Arbitrary and Capricious)**
(Against All Defendants)

101. Plaintiffs repeat and allege the allegations contained in the preceding paragraphs in the Complaint as is set forth fully herein.

102. To implement the temporary management measures in Supplement A to Amendment 1 of the Southern Flounder FMP, DMF has issued several Proclamations including

Proclamations FF-3-2016, FF-4-2016, M-34-2015, FF-68-2015, FF-69-2015 and will issue other Proclamations in the future to implement this supplement.

103. The temporary management measures in Proclamations FF-3-2016, FF-4-2016, M-34-2015, FF-68-2015, FF-69-2015 are not supported by a valid stock assessment or adequate scientific data and are not necessary to ensure the long-term viability of the southern flounder.

104. Therefore, Proclamations FF-3-2016, FF-4-2016, M-34-2015, FF-68-2015, FF-69-2015 are arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law.

THIRD CLAIM FOR RELIEF
(Violation of N.C. Gen. Stat. § 143B-289.52)
(Against Commission and Commissioners)

105. Plaintiffs repeat and allege the allegations contained in the preceding paragraphs in the Complaint as is set forth fully herein.

106. N.C. Gen. Stat. § 143B-289.52(a)(2) provides that the Commission has the duty “[t]o provide fair regulation of commercial and recreational fishing groups in the interest of the public.”

107. In developing and adopting Supplement A to Amendment 1 of the Southern Flounder FMP, the Commission failed to adhere to its statutory duty to provide “fair regulation of commercial and recreational fishing groups in the interests of the public” in violation of N.C. Gen. Stat. § 143B-289.52(a)(2).

108. Therefore, Supplement A to Amendment 1 of the Southern Flounder FMP is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law.

FOURTH CLAIM FOR RELIEF
(Violation of Open Meetings Law, N.C. Gen. Stat. §§ 143-318.9, *et seq.*)
(Against Commission and Commissioners)

109. Plaintiffs repeat and allege the allegations contained in the preceding paragraphs in the Complaint as is set forth fully herein.

110. Public bodies are prohibited from conducting official meetings unless the meetings are properly noticed and open to the public. *See* N.C. Gen. Stat. §§ 143-318.9, 318.10(a) and 318.12.

111. “Public bodies” include any elected or appointed government authority, board, commission, committee, council, or other body. N.C. Gen. Stat. § 143-318.10(b).

112. An “official meeting” includes “the simultaneous communication by . . . electronic means of a majority of the members of a public body for the purpose of . . . participating in deliberations . . . or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.” N.C. Gen. Stat. § 143-318.10(d).

113. In four separate email chains dated January 14, 2015, February 10, 2015, July 20, 2015 and September 8, 2015, several of the Defendant Commissioners violated North Carolina Open Meetings law. Upon information and belief, on other occasions several of the Defendant Commissioners violated the North Carolina open meetings law regarding Supplement A to Amendment 1 of the Southern Flounder FMP.

WHEREFORE, Plaintiffs respectfully pray the court as follows:

1. For a declaration that Supplement A to Amendment 1 of the Southern Flounder FMP and the proclamations implementing this supplement are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law;


2. For temporary, preliminary and permanent injunctive relief prohibiting Defendants and any persons acting on their behalf from implementing any temporary


management measures adopted pursuant to Supplement A to Amendment 1 of the Southern Flounder FMP and implemented pursuant the proclamations;

3. For a declaration that Commissioners violated North Carolina Open Meetings law and that Supplement A to Amendment 1 of the Southern Flounder FMP is null and void, and temporary, preliminary and permanent injunctive relief prohibiting Defendants from violating the Open Meetings law in the future; and

4. For such and other further relief as to the court seems just and proper.

This the 23rd day of September, 2016.



Stevenson L. Weeks (NC Bar #9515)
WHEATLY, WHEATLY, WEEKS,
LUPTON & MASSIE, P.A.
710 Cedar Street
Beaufort, NC 28516
Phone: (252) 728-3158
Fax: (252) 728-5282
slw@wwnwpa.com


Todd S. Roessler (NC Bar #28046)
KILPATRICK TOWNSEND &
STOCKTON LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Phone: (919) 420-1700
Fax: (919) 420-1800
TRoessler@KilpatrickTownsend.com

*Attorneys for North Carolina Fisheries
Association, Inc. and Carteret County
Fisherman's Association, Inc., County of
Carteret, County of Dare, and County of
Hyde*

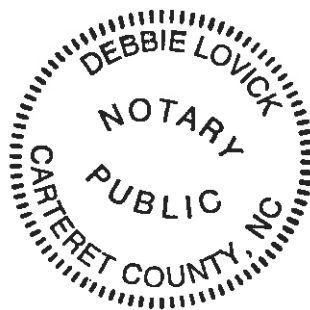
VERIFICATION

Jerry Schill, President of North Carolina Fisheries Association, Inc., being duly sworn, does depose and say: That he has read the foregoing Complaint for Declaratory and Injunctive Relief and that the same is true to his own knowledge with the exception of those matters and things herein alleged on information and belief and, as to those matters and things he believes them to be true.


Jerry Schill

Sworn to and subscribed before me
this 23rd day of September, 2016.

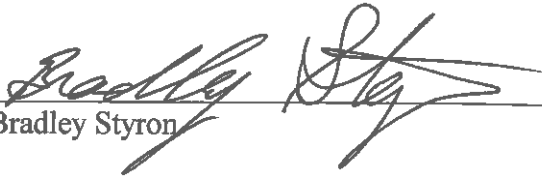

Debbie Lovick - NOTARY PUBLIC



My Commission expires: June 15, 2018

VERIFICATION

Bradley Styron, President of Carteret County Fisherman's Association, Inc., being duly sworn, does depose and say: That he has read the foregoing Complaint for Declaratory and Injunctive Relief and that the same is true to his own knowledge with the exception of those matters and things herein alleged on information and belief and, as to those matters and things he believes them to be true.


Bradley Styron

Sworn to and subscribed before me
this 26th day of September, 2016.


Debbie Lovick - NOTARY PUBLIC

My Commission expires: June 15, 2018

